Missouri Attorney General's Opinions - 1933

Opinion	Date	Topic	Summary
1-33	Feb 16	ESCHEAT FUND.	Duty of State Auditor to make payment to representative of an estate. Sections 623 and 624 R. S. Mo. 1929.
1-33	Mar 23	CIRCUIT CLERK'S SALARY.	Section 11786 R. S. Mo. 1929.
1-33	Apr 27	BUILDING AND LOAN.	A – Power of Directors to amend by-laws. B – Power of Directors to amend by-laws when present by-laws specifically give Board such power.
1-33	Apr 29	BUILDING AND LOAN ASSOCIATIONS.	No power to give notes to retire stock.
1-33	May 27	INFORMATION.	Section 5429, subdivision 1, Section 4119–Approved.
1-33	Aug 18	SCHOOL AND SCHOOL DISTRICTS.	Tuition and school warrants.
1-33	Aug 25	Hon. Orin J. Adams	WITHDRAWN
1-33	Oct 24	PROSECUTING ATTORNEY.	Allowance of expenses in the county; allowance of expenses in change of venue cases in the county.
1-33	Oct 27	TAXATION.	The County Board of Equalization has authority to assess property omitted from assessor's books for current year only; and any attempted assessment for previous years is void.
1-33	Dec 22	PUBLIC AUCTIONEERS.	Non-resident may not obtain license.
2-33	Jan 27	COUNTY WARRANTS.	Received by Circuit Clerk and Ex-officio Recorder for his salary, though unpaid and protested, cannot be offset by him against Recorder's fees collected by him and to be paid monthly to county treasurer.
2-33	Apr 15	LIQUOR.	Corporation permittee for sale for consumption on premises having an affiliate corporation used as adjunct to first named corporation and controlled by same interests as control first named corporation, cannot under wholesaler's permit sell to the affiliate corporation 3.2 per cent beer in original package for resale by latter corporation under permit as merchant to sell in original package.
2-33	June 15	Hon. W. B. Allison	WITHDRAWN
2-33	June	COUNTY COLLECTOR.	Consolidation of offices of county collector and county treasurer in

	19		certain counties – Senate Bill No. 76.
2-33	June 23	STATE PURCHASING AGENT LAW.	Appellate courts do not come within the provisions of the state Purchasing Law.
2-33	Aug 29	TAXATION.	No authority in Senate Bill 80 for refund of penalties, interest or costs paid prior to April 13, 1933.
2-33	Oct 31	BANKS & BANKING.	Taxes payable by liquidator of failed bank for taxes assessed before failure.
3-33	Jan 19	JUDGES.	Salaries begin on qualifying by taking oath of office for all judges. Retiring Circuit Judges have one day in January this year. Number of days in calendar month makes division to calculate divisions of monthly salary.
3-33	Jan 25	COUNTY HIGHWAY ENGINEER.	Authority under Sec. 8011 Revised Statutes of Missouri, 1929 to appoint assistants – definition of assistant.
3-33	Jan 26	COUNTY FUNDS. COUNTY TREASURER.	Minimum rate of interest. Cannot be invested in bonds. Term of Office—Old Treasurer holds over until new treasurer has qualified—amount of bond.
3-33	Jan 28	SALARIES. JUDGES.	Dividing January warrants as to terms, Court of Appeals' judges begin 1st Monday like circuit judges. (Opinion modifying January 19th opinion).
3-33	Feb 2	COUNTY COURT. PENALTIES.	County Court has no authority to waive penalties on delinquent taxes or change time when such penalties go into effect.
3-33	Feb 3	TAX ATTORNEY. COLLECTOR.	Allowance of fees allowed under Sec. 12944. Employment of tax attorney; fees allowed.
3-33	Feb 27	TREASURER.	Transfer of funds by treasurer from state interest fund to general revenue fund.
3-33	Feb 28	CIRCUIT CLERK'S CHANGE OF VENUE FEES.	Sections 11786 and 11815 R. S. Mo. 1929.
3-33	Feb 28	CRIMINAL COST. MEDICAL ATTENTION.	Sections 8534, 8554, 3825 and 3840, R. S. Mo. 1929.
3-33	Mar 1	SCRIPT. CURRENCY.	Violation of Section 4097 R. S. Mo. 1929 by circulating script designed as use for currency.
3-33	Mar 3	SCHOOLS.	State funds transferred by deficiency bill, State Auditor not required to set apart any part to the school fund.
3-33	Mar 22	INCOME TAX.	Incomes received from royalties on patents and copyrights.
3-33	Apr 11	TAXATION.	Salaries, interests, costs and charges relating to collection of delinquent

			taxes—Effect of Senate Bill No. 80 with relationship thereto.
3-33	Apr 17	INCOME TAX.	Taxpayer voluntarily filing joint individual income tax return for the whole year 1931 for himself and wife and paying the tax thereon in absence of a statute or regulation of State Auditor's office allowing him so to do, has not the right in 1933 to file an amended return for the year 1931 of himself and wife covering income from January 1, 1931 to September 13, 1931, and from September 14, 1931 to December 31, 1931, and by the amended return become entitled to a credit of $68.80 on future income taxes.
3-33	Apr 27	APPROPRIATIONS.	General appropriation bills need no emergency clause to become operative immediately when signed by the Governor. Section 659, R.S. Mo. 1929.
3-33	May 8	STATE AUDITOR. COUNTY COLLECTOR.	Method to be followed by State Auditor to determine the rate of percentage of commission on taxes collected to be allowed County Collectors in Annual Settlement with Auditor.
3-33	May 22	APPROPRIATIONS. BLIND COMMISSION.	House Bill No. 659, 57th General Assembly, affecting the Commission for the Blind discussed.
3-33	May 22	COLLECTORS FEES.	Formula for paying into the city, county and state treasuries excess fees collected.
3-33	May 26	BLIND PENSIONS.	Is claimant entitled to payment of blind pension as of date of court decision, or as of date of his application to Probate Judge or Blind Pension Commission? Is State Auditor authorized to pay claimant out of the 1933-34 appropriation for that part of pension due during 1932-33?
3-33	May 27	RAILROAD TAXES.	Remission of penalties, etc. applies to railroad taxes.
3-33	June 15	CONVICTS TO PENITENTIARY.	Interpretation of section 11791 R. S. Mo. 1929.
3-33	June 17	SEARCHES AND SEIZURES. STATE AUDITOR.	Section 10132 R. S. 1929, does not give right to the State Auditor to inspect books of corporations or companies in which one may be a stockholder for purpose of ascertaining what has been paid in dividends.
3-33	June 23	CIRCUIT CLERKS.	Fees in criminal cases for making transcript.
3-33	June 26	JUSTICE OF PEACE. FEES. CRIMINAL COSTS.	Justice of the peace is entitled to fee of fifty cents for entering his decision on record in a preliminary hearing.
3-33	June 30	ELECTION.	Amount of $500.00 counsel for services of Attorney in primary contest for nomination for Missouri House of Representatives on Resolution of

			House directing its Committee on Accounts to pay said sum held no authority thereof.
3-33	July 1	COUNTY HIGHWAY COMMISSION.	Power and duties under Article 2, Chapter 42, R. S. Mo. 1929.
3-33	July 5	SHERIFF FEES.	Fees of sheriff in transporting convicts to Penitentiary.
3-33	July 7	TAXATION. CONSTITUTION.	Section 13870 violates Sections 6 and 7 of Article X of the Constitution of Missouri and is void.
3-33	July 27	CRIMINAL PROCEDURE.	Continuances of indictments and information.
3-33	July 27	STATE AUDITOR. COUNTY COURTS.	State Auditor may use some discretion in period covered by audit and examination of county records under Section 11478.
3-33	July 27	COUNTY CLERKS. STATE AUDITOR. TAXATION.	Senate Bill Number 50, Laws 1933, page 421, applicable to counties having township organization.
3-33	Aug 7	FOURTH CLASS CITY.	City of the fourth class cannot provide by ordinance for appointment of city police judge.
3-33	Aug 11	STATE FAIR. APPROPRIATIONS.	Premiums paid in prizes for horse-racing at State Fair paid out of appropriations under heading, “Premium for livestock shows”.
3-33	Aug 15	TAXATION AND REVENUE.	Constitutionality of Section 10070.
3-33	Aug 15	STATE FAIR.	Entertainment may be paid for under Sec. 1, sub-section C-D, Laws of Mo. 1933, p. 63. (HB 649).
3-33	Aug 15	STATE OFFICERS.	State Officer cannot receive salary from State Department and also from State Fair Board.
3-33	Aug 23	CRIMINAL COSTS.	Liability of county or state for costs.
3-33	Aug 30	COUNTY CLERKS.	Entitled to count printed words in calculating fees due under Section 10007 R. S. Mo. 1929.
3-33	Aug 31	ANTI-TRUST.	Open Steel Flooring Industry codes relative to Missouri anti-trust statutes.
3-33	Sept 6	STATE BARBERS BOARD.	Salary of retiring Board ends July 7, 1933.
3-33	Sept 11	BUS & TRUCK LAW.	Constitutionality of paragraph (e) of Sec. 5270, Laws of Mo., p. 304.
3-33	Sept 11	MISSOURI COMMISSION OF THE BLIND.	No authority to pay Board of Health from funds appropriated to Commission for specific purposes.

3-33	Sept 11	INCOME TAX.	Income tax by foreign state may be deducted.
3-33	Sept 12	COUNTY BUDGET LAW.	When effective.
3-33	Sept 14	STATE PURCHASING AGENT ACT.	Effective July 24, 1933 and the exclusive authority for purchase of supplies therein contemplated.
3-33	Sept 19	SENATE BILL.	Section 9963e unconstitutional as delegating legislative power to county courts.
3-33	Sept 21	TAXATION.	Correction of Assessment Error.
3-33	Sept 23	CHANGE OF VENUE.	In criminal cases before a Justice of the Peace.
3-33	Sept 26	NEPOTISM.	Official appointing step-father of his wife does not violate Section 13, Article 14 of the Constitution because they are not related either by consanguinity or affinity.
3-33	Sept 27	EMPLOYEES. BUDGET LAW.	The power to administer budget law and hire employees and fix salaries vests in the Governor.
3-33	Oct 2	APPROPRIATIONS. MISSOURI COMMISSION FOR THE BLIND.	Section A1, page 138, Missouri Laws 1933, discussed.
3-33	Oct 5	STATE AUDITOR.	Proper to issue warrant for stationery purchased prior to June 12, 1933.
3-33	Oct 21	CONSTITUTIONAL LAW.	Effect of overruling prior decision dealing with statutory construction on intermediate transactions.
3-33	Oct 30	COUNTY HIGHWAY ENGINEER.	Custodian of road tools, machinery, etc. Supervisor of construction and maintenance of highways. Authority to appoint “assistants”. County Court to hire workmen. County courts cannot issue road warrants without approval of highway engineer.
3-33	Nov 15	WARRANTS FOR PAYMENT OF MONEY.	County court has power to order warrants already issued not to be paid, even though such order be made at a subsequent term of court to the one at which the warrant was issued.
3-33	Nov 27	JUSTICES OF THE PEACE.	Appointment of additional justices in townships having between 75,000 and 150,000 inhabitants.
3-33	Dec 20	Athletic Commission of the State of Missouri.	WITHDRAWN
3-33	Dec 27	STATE AUDITOR.	No restriction on loose leaf system of bookkeeping in Auditor’s Department.

3-33	Dec 28	STATE AUDITOR. GENERAL ASSEMBLY. LEGISLATURE. SALARIES.	Members of the 57th General Assembly convened in extra session only entitled to $5.00 per day for the first 70 days of the session and $1.00 per day thereafter and during the remainder of the session.
3-33	Dec 29	ASSESSOR'S FEES.	Assessors are entitled to regular fees for additional assessments of income taxes when made under Sec. 10128, R.S. Mo. 1929.
4-33	Jan 8	LEGISLATURE.	One house of Legislature, originating bill, can only adopt or reject amendments of other branch. Secs. 26, 29, 30, 32, Art. IV, Constitution.
4-33	June 1	SCHOOL DISTRICT.	School district must enumerate orphans and defective children in the district same as others to obtain state funds.
4-33	Oct 20	Senator D. L. Bales	WITHDRAWN
5-33	Jan 19	COLLECTOR'S BOND.	Section 9885, R.S. Mo. 1929.
5-33	Feb 20	SCHOOLS.	Sections 16 and 17 Laws 1931, pp. 343 and 344. Power of High and other schools to charge for children coming from other districts.
5-33	Mar 16	SCHOOLS.	Supplemental Opinion. Sections 16 and 18 Laws 1931, pp. 343 and 344. Power of High and other schools to charge for children coming from other districts.
5-33	June 16	MUNICIPAL CORPORATIONS.	Cities of the 4th class not authorized to invest city funds in bonds of school districts.
5-33	June 19	COUNTY COURTS. SCHOOL MORTGAGES. BACK TAXES.	County Court may not arbitrarily reduce the principal without payment. County Court may compromise taxes under Section 9950, R. S. Mo. 1929.
5-33	Sept 5	ELECTIONS.	Members of United States Conservation Corps cannot vote in city election.
5-33	Sept 13	ASSESSORS.	Entitled to regular fees for additional assessments on Income Tax Returns.
5-33	Oct 13	COUNTY COLLECTORS.	When Sec. 9885, Laws of Mo. 1933 become effective as to bond.
5-33	Oct 21	OFFICERS.	Under Section 6853, individual cannot be member of board of public works of city and at the same time hold any other public office, whether membership on board occurred prior or after the appointment to other office. (Sec. 7853 R.S. Mo 1929).
5-33	Nov 2	NEWSPAPERS.	Must be published in county in order to qualify for publication advertisements and orders of publication under Sec. 13775, R.S. Mo. 1929; not necessary that mechanical printing be done in county.

6-33	Apr 10	BEER. LIQUOR.	Sell non-intoxicating beer to patrons of barbeque stand in parking lot.
6-33	Apr 10	BEER PERMIT. LIQUOR.	Authorization of applicants having paid fee and not receiving permits on account of printer's delay to sell pending issuance of permit.
7-33	June 24	TAXATION.	Procedure to collect delinquent taxes in suit but not in judgment prior to effective date of Senate Bill 94.
7-33	Aug 23	PUBLIC SERVICE COMMISSION.	Exemption of certificate of convenience and necessity for trucks operated on the highway.
7-33	Aug 25	TAXATION AND REVENUE.	Interpretation of Sec. 1, Laws of Mo. 1933, p. 423.
7-33	Sept 12	ALIENS.	Method of Prosecution.
8-33	Mar 18	BLIND PENSION.	Bona fide resident and who may have lost his or her sight while such – discussed.
8-33	Sept 12	AGRICULTURAL ADJUSTMENT ACT.	Processing tax on cotton goods used by Mo. Commission for the Blind.
9-33	Jan 13	JUSTICE OF THE PEACE.	Must be elected at a general election of county officers held each four years from 1882. Sec. 2136, 2138, 2140, 2144, R.S. Mo. 1929.
9-33	Sept 27	MUNICIPAL CORPORATIONS.	Officer directly or indirectly interested in a contract with the city, or in work done by the city, makes himself criminally liable and subject to forfeiture of office.
9-33	Oct 27	COUNTY COLLECTORS BOND.	Where an additional or new bond is required of the present County Collector the amount thereof is to be calculated as prescribed by Laws 1933 page 464, Section 1, which law repeals and reenacts the old Section 9885 R. S. Mo. 1929 which was heretofore applicable.
10-33	Jan 28	Mr. Herbert M. Braden	WITHDRAWN
10-33	Mar 31	Hon. Herbert M. Braden	WITHDRAWN
10-33	Apr 7	COUNTY TREASURER.	Under Township Organization two bonds required.
10-33	Apr 10	COUNTY SURVEYOR. COUNTY HIGHWAY ENGINEER.	Sections 8009, 8019 and 8030, R. S. Mo. 1929, - Duties and salary when office of Highway Engineer abolished.
10-33	Apr 14	TOWNSHIP. TREASURER.	Right of Treasurer in county having township organization to commission for handling income tax.
10-33	Apr 29	TRADEMARKS.	When similar trade mark can be registered.

10-33	May 17	MOTOR VEHICLES.	Registered operators discussed.
10-33	May 19	SCHOOLS.	Town, city or consolidated district can dissolve if two-thirds of the resident voters and taxpayers present and voting shall so vote.
10-33	June 3	TAXATION.	Delinquent taxes-interest and collector's commission as provided for in Senate Bill 94.
10-33	June 3	TAXATION.	Collection of delinquent railroad tax; suit to enforce payment not barred by Senate Bill 80.
10-33	June 21	PROSECUTING ATTORNEY.	Duty to enforce anti-nepotism section of the Constitution.
10-33	June 22	ST. LOUIS COUNTY.	Salaries of County Judges, clerks and prosecuting attorneys—how determined.
10-33	June 23	BOARD OF HEALTH.	Duty of Secretary under Section 9118. Complaint by Secretary not exclusive.
10-33	Aug 4	OSTEOPATHS.	Right to practice osteopathy within the terms of the Workmen's Compensation law.
10-33	Sept 11	TAXATION AND REVENUE.	Highway Bonds issued by the State are not exempt from taxation in the hands of individuals.
10-33	Sept 14	FAIR APPROPRIATIONS.	Accounts of State Fair filed with Auditor and payment by state warrants on funds drawn therefrom.
10-33	Sept 16	TRESPASSING.	Hunting and fishing on Lake of the Ozarks.
10-33	Sept 26	FEES. TOWNSHIP CLERK.	Township Clerks Fees – Township clerk is entitled to the fees set out in Section 12310 R. S. Mo. 1929 as amended Laws 1931, page 377 in addition to the $2.50 per day salary for services performed.
10-33	Sept 30	CITIES, TOWNS AND VILLAGES.	Under statute, cities, towns and villages are expressly prohibited from exacting license, taxes or fees from any farmer for the sale of produce raised by him when sold from his wagon.
10-33	Oct 5	COMMISSIONER OF AGRICULTURE.	Legislature did not appropriate funds out of which premiums for various kinds of automobile protection and protection on property can be paid.
10-33	Nov 1	DEPARTMENT OF AGRICULTURE.	Employees entitled to what salary?
10-33	Nov 2	TAXATION AND REVENUE.	Liability of improvements on real estate omitted from assessment in previous year or years to assessment and taxation.
10-33	Nov 9	SCHOOL DISTRICTS. TORTS.	School District not liable for negligence in operation of bus hired by it to transport athletic teams; school superintendent, as agent for school board, would not be liable.

10-33	Nov 13	CORONERS.	The county in which the body is found is liable for the cost of the inquest, and not the county where the felony is committed.
10-33	Dec 5	MARSHALL OF SUPREME COURT.	Not duty of Marshall, when criminal case is dismissed to carry out judgment; it is the duty of the local sheriff to convey the prisoner to the penitentiary or carry out the judgment of the court.
10-33	Dec 5	ICE CREAM MANUFACTURER.	Wholesale and retail manufacturers of ice cream required to have permit to manufacture for sale at retail.
11-33	Apr 10	PUBLIC SERVICE COMMISSION.	Authority over taxicabs. Sec. 5264 and 5265. Laws of 1931, p. 304.
11-33	May 13	INCORPORATION.	Incorporation of loan and investment companies can include only one purpose.
11-33	May 20	PENAL-PRISONS.	Revocation of commutation of penitentiary sentence restores original sentence to penitentiary.
11-33	June 2	TRADEMARKS.	Right of St. Louis Dairy Company to register trade name on milk and ice cream receptacles under Sections 12449 to 12555 R. S. of Mo. 1929.
11-33	June 2	CONVICTS.	Non-resident insane convicts' upkeep paid out of appropriation.
11-33	June 12	PRINTING.	"Printing" must include embossing, engraving and lithographing and must be done under "printing" contract.
11-33	June 13	PRINTING.	Printed matter to be bound only on order of Secretary of State under Section 13797 R. S. of Mo. 1929.
11-33	June 14	SECRETARY OF STATE.	State Printing session acts in forms passed by legislature incorrect grammatical errors, misspelled words, etc.
11-33	June 21	TAXATION.	Incorporation tax to be paid on basis of assets and not amount of capital stock, where assets greatly exceed capital stock.
11-33	June 27	CORPORATIONS. EXTENSION OF FRANCHISE.	Meaning of "about to expire" and "not about to expire". Extension of franchise of corporations can be made only on payment of fees.
11-33	July 12	CORPORATION.	Charter of expired corporation cannot be extended; new corporation may be organized.
11-33	July 13	NOTARY PUBLIC.	Bond of Notary Public may be terminated by suit as to future but not past liability.
11-33	July 14	PENAL INSTITUTIONS.	Sentences when concurrent or cumulative.
11-33	Aug 3	COUNTY CLERKS.	Guilty of misdemeanor in office for failure to file notary bonds with Secretary of State.

11-33	Aug 25	SECRETARY OF STATE.	No duty to convene Prohibition Convention.
11-33	Aug 31	TRADEMARKS.	Ferry-Hanly advertising companies eligibility as to registration of trade-mark of the words. “Just a step ahead on petticoat lane.”
11-33	Sept 16	MOTOR VEHICLES.	Only State owned cars are permitted to bear the official license tag of the State.
11-33	Oct 5	APPROPRIATION.	“Egg Dairy Products Inspection” paid out of general revenue fund and all licenses and fees derived by virtue of such inspection to go into general revenue.
11-33	Oct 11	SECRETARY OF STATE.	Not duty of to call House of Representatives together in extra session.
11-33	Oct 23	BONUS.	Only named beneficiaries can claim on death of soldier – soldier under guardianship may claim through guardian.
11-33	Nov 22	TRADE-MARK.	Right to register trade-mark “9-0-5 or Nine-O-Five” applied to whiskies and other intoxicating liquor on ground former registration of said trade-mark was legally extinguished by either abandonment or by cessation of business on the part of owner thereof.
11-33	Dec 5	TRADE NAMES.	Only one name can be registered in one application.
11-33	Dec 14	APPROPRIATIONS. PRINTING.	Emergency relief administration entitled to paper and printing from Printing Commission and be paid out of appropriation under caption “incidental”.
11-33	Dec 27	SALARIES AND FEES.	Foreclosure of School fund mortgage by sheriff, fees same as upon execution.
12-33	Jan 30	BUILDING AND LOAN ASSOCIATION.	Definition of what are receipts under Section 5604 Revised Statutes Missouri 1929, amended 1931, page 155.
12-33	Feb 25	BUILDING AND LOAN ASSOCIATION.	Right of Building and Loan Association to pledge assets, right to borrow money outside of the State of Missouri, right to join Federal Home Land Bank.
12-33	June 5	HOUSE BILL 639.	Relating to registration of voters in towns of 10,000 to 30,000 inhabitants.
12-33	Sept 27	Hon. William H. Burr	WITHDRAWN
12-33	Sept 30	ADMINISTRATION.	Affidavit insufficient for distribution under laws of Missouri.
12-33	Oct 3	GAME AND FISH. PURCHASING AGENT.	Purchasing Agent not necessary party in condemnation suit under Section 8220, R. S. 1929.
12-33	Dec 5	REFORESTRATION.	Amendment to Sec. 11072, page 283, Session Acts Mo. 1933 relating to Reforestation.
12-33	Dec 6	SCHOOLS.	Contractual relation between district and teacher discussed.

		SCHOOL DISTRICTS.	
13-33	Apr 17		Corporation wholesale permittee whose stock is owned by retail grocery merchants cannot sell legally to merchant permittee for resale in original package or for consumption on premises and the corporation wholesale permittee is violating the law in so selling to the merchant retail grocers who own the wholesale corporation.
13-33	Sept 29	CITY ORDINANCES.	Construction of the same in the manner of filling public offices.
14-33	Feb 1	PENALTIES.	Legislature has a right to remit penalties accruing under Section 9914, Revised Statutes 1929, and similar sections.
14-33	July 28	HIGHWAY COMMISSION.	Regulation of highway commission with reference to Section 7787 merely declares policy of commission and does not have the effect of a judicial decision.
14-33	Sept 23	CITIES OF THIRD CLASS.	Upon failure of city to find or select a city depository, city Treasurer should be found who could give bond for the protection of city funds.
14-33	Oct 13	MORTGAGE.	Mortgage recording tax law.
14-33	Oct 18	CONSTITUTIONAL LAW. INTERSTATE COMMERCE.	Tax on beer to be sold or shipped in interstate commerce as violative of the commerce clause of the United States Constitution.
14-33	Oct 25	CONSTITUTION. GENERAL ASSEMBLY. STATE HIGHWAY. AMENDMENT.	Section 44a, Article IV, Constitution of Missouri only prevents the General Assembly from raising fees and taxes provided for in such Section 44a.
14-33	Oct 30	PENAL INSTITUTIONS.	Right of the secretary to use interest fund of prisoners to liquidate thefts within the prison.
14-33	Dec 27	MOTOR VEHICLES.	Officials and employees of corporation owning motor car required to register as operator.
15-33	Mar 16	CHARITIES. NEGLECTED CHILDREN.	Court procedure, Sections 14161, 14162 and 14166 R. S. Mo. 1929, Laws 1931, p. 167. Residence, Section 655 R.S. Mo. 1929.
15-33	Mar 23	COUNTY REVENUE.	County courts may issue warrants when, and may transfer unused or surplus funds from one department to another when. (5% “moratorium” bank depository).
15-33	Sept 14	NATIONAL RECOVERY ADMINISTRATION.	President’s temporary code does not require operators of Beauty Parlors to adopt any fixed schedule of prices.
15-33	Nov 7	HAIRDRESSERS AND COSMETOLOGISTS.	State Board of Health may not require holder of certificate of registration to pay a license fee for the privilege of operating a shop.

		LICENSE FEES.	
15-33	Dec 5	TAXATION.	The fact that a foreign insurance company pays tax upon premiums does not excuse it from paying a property tax upon personal property located within the State.
16-33	June 9	CRIMINAL LAW. LIQUOR.	Act does not make it a criminal offense for one holding distributor's license to be interested in retail business.
19-33	Jan 24	ACKNOWLEDGMENT.	Extending existence of Corporations. Act of 1931, Page 297.
19-33	Feb 14	CONSTABLES.	Tenure of office. County court's right to vacate office. Section 11750 R. S. Mo. 1929.
19-33	Mar 1	MOTOR VEHICLES.	When one car is drawn by another the former not required to have license tags attached.
19-33	Apr 25	CRIMINALS COST. CIRCUIT CLERK'S CHANGE OF VENUE FEES. NEPOTISM.	Under Section 3832, R. S. Mo. 1929. State must pay the cost accruing on failure to convict on penitentiary charge. Sections 11786 and 11815 R. S. Mo. 1929. Right of Collector to employ brother-in law's wife as a deputy.
19-33	May 11	MISSOURI COMMISSIONER OF LABOR.	Power of the Missouri Commissioner of Labor to appoint a Federal Investigator.
19-33	May 12	MISSOURI COMMISSIONER OF LABOR.	Power of the Missouri Commissioner of Labor to collect and adjust wages.
19-33	June 3	NEPOTISM.	Wife of County Recorder helping husband with routine work is violation of Sec. 13, Art. 14 Missouri Constitution even though such relative is not paid.
19-33	June 5	LIQUOR.	Licensing of beer on dining cars.
19-33	June 20	TAXATION AND REVENUE.	Lands bid in by County Court on foreclosure of school fund mortgage are not subject to taxation while held by the County.
19-33	June 22	TAXATION.	Personal property of World War Veteran not exempt from taxation.
19-33	July 10	LABOR AND INDUSTRIAL INSPECTION DEPARTMENT.	Right to inspect office buildings; firms employing one or more persons in cities of less than 3,000; where only owners work; railroad and freight depots; gasoline filling stations; hotels; fraternity houses; collection of unpaid license fees.
19-33	July 19	TAXATION.	Lien for tax extended to insurance for what year. Section 9963b.
19-33	Aug 1	BANKS & BANKING.	Relative to Proclamation of Governor March 13, 1933. Withdrawal of

			funds from banks.
19-33	Aug 10	CRIMINAL COSTS.	Board and medical attention furnished by whom, in change of venue cases.
19-33	Aug 25	Mr. Charles C. Crosswhite	WITHDRAWN
19-33	Aug 26	LABOR DEPARTMENT.	Board of Mediation and Arbitration has not been abolished, and the pertinent statutes appear in Article 3, Chapter 95, R. S. Mo. 1929.
19-33	Aug 26	LABOR DEPARTMENT.	Commissioner has no present authority to draft and promulgate Boiler rules.
19-33	Oct 4	NEPOTISM.	Wife is not related to husband's sister's husband by affinity so as to violate Section 13 of Article XIV of the Constitution of Missouri.
19-33	Oct 5	TAXES.	Taxes levied and collected on property in special road districts.
19-33	Oct 6	FIRE ESCAPES.	No conflict between Sections 13226 and 13757, R. S. Mo. 1929; the first dealing with mercantile establishments, and the second with public buildings.
19-33	Oct 6	LABOR DEPARTMENT.	Bake shops employing three or less persons chargeable with fifty cents inspection fee, under Section 13219, R. S. Mo. 1929; Section 13294, not increasing the fee to one dollar.
19-33	Oct 7	LABOR DEPARTMENT.	In arriving at fee for inspection, only persons employed within building may be counted, and not those employed by same employer in the yards.
19-33	Oct 13	EMERGENCY RELIEF.	Not illegal for county to make Social Welfare Board of city its agent in distributing county and Federal funds for emergency relief.
19-33	Oct 13	LABOR DEPARTMENT.	Under Section 13190 R. S. Mo. 1929, person operating theatrical agency can be required to pay license fee.
19-33	Oct 25	Mr. Joseph C. Crain	WITHDRAWN
19-33	Oct 31	CHARITY AND RELIEF.	The County Court of Buchanan County may enter into an agreement with the social welfare board of St. Joseph for the purpose of distributing county funds for relief work.
19-33	Oct 31	NEPOTISM.	Director voting to elect sister violates Section 13 of Article XIV; teacher so elected cannot collect salary under her contract which is void; director becoming member of board after sister has been elected may continue to hold office.
19-33	Oct 31	PUBLIC SCHOOLS.	School boards cannot use funds received under Sec. 13, Laws of Mo. 1931, p. 340 for incidental purposes.
19-33	Nov 10	SCHOOL DISTRICTS.	Laws of Missouri 1931, page 334, Sec. 18, does not permit student to

		TUITION.	select school which he shall attend; board of district may select school unless the county superintendent shall assign student under Section 18.
19-33	Nov 11	Mrs. Mary Edna Cruzen	WITHDRAWN
19-33	Nov 13	LABOR.	Enclosed letter not illegal in fixing fee in excess of $1.00, or in containing false and fraudulent information.
19-33	Nov 20	GUARDIANS-WARDS.	Estate of World War Veterans are invested—how.
19-33	Dec 1	STATE.	Cattle shipped or carried from stock yards, feed yards, or place of sale, auction or barter within state to another point within state not required to be inspected or tested under Laws 1933, page 174.
19-33	Dec 7	LABOR.	Concern charging no fee from applicant or employee, but furnishing training course for compensation to persons seeking employment, is not within Section 13190, requiring a license.
19-33	Dec 11	STATE HIGHWAY COMMISSION.	Tools not in use by Commission may be loaned by them on public project.
20-33	Jan 14	TAXI DRIVERS.	Taxi-drivers required to obtain contract hauler's permit to transport persons over irregular routes.
20-33	Feb 3	PUBLIC SERVICE COMMISSION.	Commission does not have jurisdiction to discontinue train service where such action would burden interstate commerce.
20-33	Mar 21	Mr. William Daly	WITHDRAWN
20-33	May 12	ROADS AND BRIDGES. TAXATION.	Sections 10 and 22 of Art. 10 of the Constitution construed and applied.
20-33	June 13	COUNTY WARRANTS.	Salary warrants held in possession of county clerk for purpose of distribution to payee not subject to garnishment.
20-33	June 14	STATE BOARD OF CHARITIES AND CORRECTIONS.	Power to return minor child to parents.
20-33	Aug 3	BEER BILL.	Brewers or their agents may sell or give away taps, vents or other vending equipment.
20-33	Sept 11	SALES TAX.	When country clubs serve rooms, meals and drinks strictly to their members and not to the general public, such sales are not taxable if the club itself conducts the selling of the rooms, meals and drinks; if same are sold in the name of the club by private individuals for profit, such sales are taxable.
20-33	Sept 29	RAILROADS.	Employee of railroad company who merely authorizes Company to

			deduct portion of his pay for insurance premiums may revoke such agency at will.
20-33	Oct 4	NEPOTISM.	County official permitting relative to render personal service to him does not violate Section 13 of Article XIV where relative fills no official position and does not render service to the State in such capacity.
20-33	Oct 11	ASSESSORS.	Assessor is entitled to compensation for making additional assessments on income tax returns.
20-33	Nov 3	MUNICIPAL CORPORATIONS. GASOLINE TAX.	Municipal corporation is not entitled to refund of gasoline tax on purchases made for the use of the city.
20-33	Nov 13	TAXATION & REVENUE.	Property bought in by County under foreclosure of School Fund Mortgage exempt from general taxes.
20-33	Nov 28	SCHOOLS.	The district may not charge pupils “incidental” fees.
21-33	Feb 1	DEAF SCHOOL.	Right of Board to have Secretary perform duties of Treasurer and act as such.
21-33	June 17	LIQUOR.	Necessity for State license where beer is sold at church picnics.
21-33	Oct 9	ADMINISTRATION OF ESTATES.	Debts due the United States under the State and Federal statutes are entitled to priority over other debts due by the deceased.
21-33	Oct 14	DRAINAGE DISTRICTS.	Laws of Missouri, 1933, page 419, provides for the deduction of the unpaid principal benefits, which are not delinquent, from the land as valued with the improvements, in arriving at valuation for assessment; amount of unpaid benefits shall be ascertained on each tract according to the records of the district.
21-33	Nov 3	COUNTY SURVEYORS.	1. County surveyor must keep records and leave same for new County surveyor. 2. County Court may employ surveyors other than County surveyor to survey river bars and other accreted lands.
22-33	Apr 22	SHERIFFS.	Expense of conveying prisoners to Boys’ Reformatory at Boonville, Mo. should be the actual outlay for conveyance of Sheriff and prisoners by the method and route from starting point to Boonville which is cheapest. If automobile cheaper than rail, former method should be used and if rail is cheaper, train should be used. Total cost of actual necessary traveling expenses should determine the method.
22-33	June 3	TAXATION.	Sale of real estate for taxes provided for in Section 9952-A enacted by 57th General Assembly.
22-33	June 9	ROADS AND BRIDGES.	County Court, under Section 7900, required to pay all of repairs where

			the repairs exceed $50.00 for one time.
22-33	Oct 12	NEPOTISM.	Daughter of director's cousin not within prohibited degree; wife of director's brother-in-law not within prohibited degree.
22-33	Oct 17	NEPOTISM.	Director who is grandfather by marriage to teacher and director who is uncle of teacher are within prohibition of Section 13 of Article XIV; the appointment of director's wife's brother's wife, or second cousin, is not within the prohibited degree.
22-33	Dec 19	INTOXICATING LICENSE LIQUOR.	License for ardent spirits.
23-33	Nov 10	CITY ASSESSORS.	All personal property owned by a resident though held outside the city is assessable for city taxes.
24-33	Mar 2	SCHOOL FUND.	Profits derived from sale of corpus of school fund created under and by virtue of Art. II, Sec. 8 of the Constitution of Missouri must be considered as "increment to principal" as differentiated from "income".
24-33	May 1	SCHOOLS.	Contract of School Board employing Superintendent for 3 years is not one that is Prima Facie illegal in Missouri but if any collusion shown would be invalid.
24-33	Oct 24	Board of Education	WITHDRAWN
24-33	Oct 25	SCHOOLS. SCHOOL DISTRICTS. TEACHERS WARRANTS.	As to when suits may lie on a teacher's contract against the school district and manner of paying teachers' warrants.
25-33	Apr 18	MOTOR VEHICLES.	Privately owned motor vehicles used in mail service requires Missouri license plates.
25-33	May 10	BONDS. SCHOOL BONDS.	Voted and unused can still be used if purpose voted for still exists.
25-33	May 16	COUNTY DEPOSITARIES.	County unable to receive bids in county or adjoining counties may at subsequent term select such depositary.
25-33	May 17	SCHOOLS – ORGANIZATION OF BOARD.	(1) Law requiring board be organized within four days not compulsory but merely directory. (2) Newly elected member can qualify after four days. (3) When assembled two members may elect a president or select a teacher.
25-33	May 18	CONSTRUCTION OF SENATE BILL NO. 50.	Date of making up tax books under this bill not applicable to year 1933.
25-33	May 24	WEEKS CONVENTION BILL.	Discussion of provisions for mass meetings.

25-33	June 15	ELECTIONS.	Special election under House Bill 514. Precinct and not wards to be used as voting places. Judges and clerks to be specially appointed for elections under House Bill 514.
25-33	June 27	SENATE BILL NO. 124.	Interpretation as relating to college funds.
25-33	July 11	SPECIAL ELECTIONS.	House Bill No. 514. Opinion as to supplies needed in special elections.
25-33	July 21	COUNTY DEPOSITORY.	Liability of Bank where no bond furnished as provided by law.
25-33	Aug 15	RAILROAD TAXES-DELINQUENT.	Application to payment of school district warrants of railroad taxes delinquent for the year 1932 and paid June 28, 1933.
25-33	Oct 5	HABEAS CORPUS.	Convicts may be taken from the penitentiary under a writ of habeas corpus ad prosequendum and tried on another charge.
26-33	Jan 26	Hon. John A. Eversole	WITHDRAWN
26-33	Feb 7	SHERIFFS.	Fees and mileage for summonsing standing jury.
26-33	Mar 7	COUNTY COURT.	Power of County Court to accept warranty or quit claim deed in satisfaction of school fund mortgage and bond or should they foreclose.
26-33	June 7	TAXATION.	Property subject to assessment Baryties, lumber and ties.
26-33	July 7	LIQUOR.	The necessity of a permit when selling beer at picnic or fair grounds.
26-33	July 11	GAME AND FISH DEPARTMENT.	Who required to have license to fish.
26-33	July 14	Hon. J. Dorr Ewing	WITHDRAWN
26-33	Sept 26	COUNTY DEPOSITORY.	Procedure in selection of County Depository; Liability of County Treasurer on official bond in event no depository is selected by County Court.
26-33	Oct 11	ROADS AND BRIDGES.	Refunds under Sections 8127 and 8128, R.S. Mo. 1929, discussed.
26-33	Dec 22	CRIMES AND PUNISHMENT.	Child abandonment means that necessities of life are not provided for child.
27-33	Jan 10	NEPOTISM.	Right of Sheriff to appoint nephew.
27-33	Feb 9	SURETIES.	When surety bond for school fund loan is released.
27-33	Feb 11	COUNTY COURT.	May maintain action against surety on school bond without foreclosure of mortgage.
27-33	Mar 17	GAME & FISH.	Pet deer required by Section 8247 R.S. Mo. 1929 to be licensed under Section 8299 R. S. Mo. 1929.

27-33	Apr 5	COUNTY COURT.	Refund money for roads taken over by State, may be used to purchase farm to market right-of-ways; special road district has no authority to borrow money from county.
27-33	Apr 10	Hon. Roth H. Faubion	WITHDRAWN
27-33	May 25	PROSECUTING ATTORNEYS.	Duty of County to furnish office, stationery, etc.
27-33	May 29	LIQUOR.	Sale of beer by one person under permit issued to another.
27-33	July 12	ANTI-NEPOTISM.	Commission of the township collectors.
27-33	July 13	FEES.	Under Senate Bill No. 124 funds collected prior to Bill going into effect not required to be transmitted to State Treasury. At stated intervals means with reasonable promptitude. Certain exceptions in the Bill.
27-33	July 28	STATE TEACHERS COLLEGE SWIMMING POOL.	Can be promoted by whom, and under what circumstances.
27-33	Oct 17	SECURITIES DEPARTMENT.	Sale of the whole interest in a mining lease is not a certificate of interest under Sec. 7724, R.S. Mo. 1929.
27-33	Dec 15	COUNTY FUNDS.	Federal home owners' loan bonds as lawful investments for funds of county accumulated to meet funded indebtedness.
28-33	Feb 10	BANKS AND BANKING.	Moratorium - waiver of deposits.
28-33	Feb 15	BANKS AND BANKING.	Right of non-consenting depositors to draw his funds if bank restricts payment of checks.
28-33	Mar 10	COMMISSIONER OF FINANCE.	Expenses of Department chargeable to closed institutions.
28-33	Mar 20	NEPOTISM.	Right of State Finance Commissioner to appoint cousin as deputy commissioner.
28-33	Apr 5	COUNTY COURTS.	Effect of closed banking institutions on payment of funds appropriated by County Court.
28-33	Apr 22	BANKS.	Preferred claims, Senate Bill #293.
28-33	Apr 22	BANKS.	Newspaper Notices discussed, Section 5333, R. S. Mo. 1929.
28-33	Sept 12	BUS AND TRUCK LAW.	Trucks not for hire nor common carriers do not have to have license to deliver from Iowa into Missouri.
28-33	Nov 7	BLIND PENSION.	Fact that person upon one examination may refuse to submit to an operation as ordered by the Commission will not deprive applicant of pension if, according to facts as found by Commission upon a

			subsequent examination, she is entitled to pension.
28-33	Dec 2	BLIND PENSION.	An income of $600.00 over any consecutive twelve months makes a person ineligible for a blind pension and said twelve months need not compose the actual calendar year.
29-33	Jan 18	NEPOTISM.	Right of Collector to employ brother-in-law's wife as a deputy.
29-33	Jan 23	COUNTY COURTS.	Pro-rating funds when amount collected is less than that appropriated under Section 9874, R.S. Mo. 1929.
29-33	Feb 4	COUNTY COURTS.	Pro-rating funds when amount collected is less than that appropriated under Section 9874 R.S. Mo. 1929.
29-33	May 22	CHIROPRACTIC BOARD.	Date Governor appointed members, when confirmed by senate relates back to date of appointment—Expenses incurred while in discharge of duties payable out of Chiropractic Appropriation fund.
29-33	Sept 7	PROHIBITION.	Fees of enforcement officers for executing search warrants.
29-33	Sept 18	GENERAL ASSEMBLY.	Sec. 12, Art. IV, Appointment of State representative to Federal position.
29-33	Dec 8	INQUEST COSTS. WITNESS FEES.	To be paid by county. No witness fees payable to witness detained in jail for refusal to give recognizance.
30-33	Feb 2	SCHOOLS.	Outside use of school property discussed under Secs. 9284 and 9205 R.S. 1929 construed herein. Special meeting duly called may prohibit, but not authorize such use.
30-33	Feb 11	TAXES.	Interest and penalties on back taxes, how divided.
30-33	May 4	LIQUOR.	Holder of a five dollar permit for the sale of non-intoxicating beer cannot allow the original package to be broken upon premises described in the permit. Holder of Ten dollar permit cannot sell in the original package non-intoxicating beer to be taken away from premises where sold.
30-33	May 10	SCHOOLS.	Teacher required to finish term provided sufficient revenue from taxes and state aid will eventually come in for current year to meet warrants issued for salary. Board can make contract for ensuing year before annual election.
30-33	July 13	STATE HIGHWAY COMMISSION.	Highway commission has authority to close state highway temporarily, to establish detours, travelers cannot be compelled to use any particular highway or road and the highway commission has no authority to repair roads other than state highways and detours established by the board.
30-33	Aug 8	Mr. Ted Frossard	WITHDRAWN

30-33	Sept 11	Mr. Ted Frossard	WITHDRAWN
30-33	Sept 27	SCHOOLS.	Relating to the use of State School money apportioned to the several school districts as provided under section 9257, R. S. 1929.
31-33	Jan 16	GAME AND FISH.	Persons or corporations using, owning or building a dam in a river, creek or stream are required to operate fish hatcheries when all requirements of Sec. 8279 are reasonable.
31-33	Mar 17	GAME AND FISH DEPARTMENT.	Right to prosecute for possession of more than twenty-five game fish.
32-33	Feb 17	TAXATION-ROADS AND BRIDGES.	Power of the board of commissioners or Road Districts to levy and collect tax without a vote of the taxpayers. (Not under township organization) Section 8067 R. S. Mo. 1929.
32-33	Mar 2	COUNTY SUPERINTENDENT OF SCHOOLS.	State appropriation, applicability to salary under Section 9463 R. S. Mo. 1929.
32-33	Mar 15	TAXATION-ROADS AND BRIDGES.	A supplementary opinion with authorities showing power of board of commissioners of Road Districts to levy and collect tax without a vote of the taxpayers. (not under township organization). Section 8067 R.S. Mo. 1939.
32-33	Apr 10	POLICE RECORDS.	City of St. Louis discussion.
32-33	June 17	MOTOR VEHICLES.	Reconditioning system of the Ford Motor Company does violate Section 7781 R. S. Mo. 1929.
32-33	Sept 26	POLICE.	Relating to Construction of Section 3952 R. S. 1929 and Officer's Rights thereunder.
32-33	Oct 3	COUNTY REVENUE.	Payment of past indebtedness of a county cannot be paid out of current revenue unless there be more than a sufficient amount for current expenses.
33-33	Jan 17	Governor Guy B. Park	WITHDRAWN
33-33	Jan 23	EXTRADITIONS.	Matter of Interstate Extradition.
33-33	Feb 2		State right to cede jurisdiction to Federal Government over lands theretofore purchased.
33-33	Apr 6	Senator B. T. Gordon	WITHDRAWN
33-33	May 4	BALLOTS.	Validity of Senate Bill No. 82. Fifty seventh General Assembly of Missouri providing for altering form of Presidential Ballot by eliminating name of Electors and printing only names of Candidates for President and Vice-President on the ballot.
33-33	May 11	BILLS.	Title to bill must contain what, and when germane.

		COUNTY BUDGET.	
33-33	May 11	HOUSE BILL.	House Bill No. 263 does not violate Article IV, Sec. 28, Missouri Constitution.
34-33	June 14	LIQUOR.	State Fair Grounds, not unlawful for directors to sell concessions for sale of beer therein.
34-33	June 15	MISSOURI REFORMATORY.	Authority of officer of institution to carry arms while attempting to arrest escaped person.
34-33	July 26	ELECTIONS.	City of Kansas City. Who eligible to vote - - Weeks Bill.
34-33	Oct 23	CIRCUIT CLERKS. PROSECUTING ATTORNEYS. COUNTY WARRANTS.	Cannot apply money collected on salary. 1932 warrants cannot be paid out of 1933 revenue.
35-33	Jan 31	BANK SHARES.	Place of assessment.
35-33	Mar 2	MOTOR VEHICLE LICENSE.	Obtaining motor vehicle license by January 31st, but custom and practice permits to approximately March 15th.
35-33	Mar 7	COUNTY COURT.	Power of County Court to accept warranty or quit claim deed in satisfaction of school fund mortgage and bond or should they foreclose; and cannot knock off or reduce interest.
35-33	Mar 10	SCHOOLS.	City extending its limits shall under Section 9325 (Ipso Facto) have the effect to extend the limits of such school district to the same extent.
35-33	July 31	DRAINS AND LEVEE DISTRICTS.	Power of County Collector to accept warrants in payment of drainage taxes.
35-33	Nov 27	STATUTES.	If the title or caption and the body of bill identifies the statute to be repealed so no doubt exists as to what statute is intended to be effected, it is sufficient.
35-33	Dec 29	OPTOMETRY BOARD.	Fourteen different questions answered with reference to the practice of Optometry in the State of Missouri.
36-33	July 20	LIEUTENANT GOVERNOR.	Powers and duties of Lieutenant Governor in the absence of the Governor.
36-33	Sept 1	DENTAL BOARD.	Application of Senate Bill 124 to funds.
36-33	Nov 4	MISSOURI DENTAL BOARD.	Exhibit submitted by Charles R. Mendlick not sufficient to qualify him to take examination.
36-33	Nov 17	TAXATION.	Tax suit may proceed to judgment after December 31, 1933 if filed before July 25, 1933.
38-33	Feb 11	ROAD DISTRICT	Have no right to employ themselves. Sections 8031, 8033 and 8038

		COMMISSIONERS.	RSMo. 1929.
38-33	Mar 8	FARM-TO-MARKET. STATE HIGHWAY COMMISSION.	Power of State Highway Commission to change route of Farm-to-market road after same located by County Highway Commission.
38-33	Apr 11	FOOD AND DRUGS.	Patent and proprietary medicines may be sold in places other than pharmacies and drug stores.
38-33	May 22	COUNTY CLERK'S FEES.	County clerk must account for fees received in his official capacity in making his return and settlement with the county.
38-33	May 26	FEES.	Right of witness and stenographer to be paid legal fees from fund appropriated to pay election contest expenses.
38-33	June 16	CIRCUIT CLERK. COUNTY CLERK.	Salary of Circuit Clerk, Section 11786, R.S. Mo. 1929. Salary of County Clerk, Section 11811, R.S. Mo. 1929.
38-33	June 20	PROSECUTING ATTORNEYS.	Prosecuting Attorney not entitled to any compensation in addition to salary for work done in connection with case in which County was party.
38-33	July 24	BOARD OF BARBER EXAMINERS.	Allowed expense accounts – under what circumstances.
38-33	Sept 23	NEPOTISM.	Official, offending provisions of Section 13 of Article 14, unless he voluntarily resigns, must be removed by quo warranto; the fact that related appointee afterwards resigns does not prevent forfeiture of office under Section 13 of Article 14.
38-33	Sept 30	NEPOTISM.	Treasurer of school district comes within the prohibition of Section 13, Article 14 of the Constitution of Missouri.
38-33	Oct 2	TAXATION.	Accounts receivable identified as personal property subject to assessment for purposes of taxation.
38-33	Oct 4	NEPOTISM.	Recorder receiving personal services from wife does not violate Section 13 of Article XIV of the Constitution of Missouri, as she does not render service to the State in an official capacity.
38-33	Nov 3	MARRIAGE.	Authority of an alien to perform.
38-33	Nov 17	PROSECUTING ATTORNEY.	Special prosecutor not entitled to compensation.
38-33	Nov 21	TAXATION.	Accounts receivable identified as personal property subject to assessment for purposes of taxation.
38-33	Nov 22	OFFICERS.	Secretary of Optometry Board serves at pleasure of Board.
39-33	Aug 8	CHILDREN.	Duties of State Home relative to returning and committing children. Guardianship.

39-33	Aug 11	CITIES AND TOWNS.	Authority of cities and towns to license insurance agents.
39-33	Oct 14	APPROPRIATIONS.	Construction of appropriation act not in conformity with a general statute – state Children's Bureau and Children's Home.
39-33	Dec 30	AUTO LICENSE PLATES. FEDERAL LAND BANKS.	Required on automobiles of Government agents. Required to procure license tags for automobiles.
40-33	July 13	MOTOR VEHICLES.	Rule as to determining capacity of trucks.
40-33	July 25	ACCOUNTING OFFICER.	County clerk is accounting officer under Laws of Mo. 1933, p. 340.
41-33	Jan 26	CIRCUIT CLERK. COUNTY CLERK. COUNTY SUPERINTENDENT OF SCHOOLS. SALARIES.	Section 11786, R. S. Mo. 1929. Section 11811, R. S. Mo. 1929. Section 9465, R. S. Mo. 1929.
41-33	Feb 21	SPECIAL ROAD DISTRICT COMMISSIONERS.	Mayor and city aldermen members' rights of vote selecting commissioners. Section 8026, R.S. Mo. 1929.
41-33	Apr 19	ROADS AND BRIDGES.	Power and pipe line taxes apportionment to road districts, special and general.
41-33	June 30	TAXATION AND REVENUE.	Bonds issued by state and municipality are not exempt from taxation.
41-33	Sept 15	NEWSPAPERS.	Sec. 13775 – must be published regularly and consecutively one year before legal notices are valid.
41-33	Oct 13	MUNICIPAL CORPORATIONS.	Franchise to electric light company in city of the fourth class as requiring vote of inhabitants.
41-33	Dec 5	TAXATION.	Interest on delinquent taxes determined by section 9952, page 429, Laws of Missouri 1933.
42-33	July 26	HOUSE BILL. PHARMACISTS.	A. Druggists required to have permit only for selling ethyl alcohol or wine. B. Doctors not required to have permit.
42-33	Aug 2	NATIONAL RECOVERY ADMINISTRATION.	Does the President's employment agreement of July 27, 1933 apply to employees of State Warehouse Department.
42-33	Oct 18	PUBLIC FUNDS OF COUNTY.	County court may require collector to give new bond or additional security; it is the duty of the Prosecuting Attorney, upon request of the county court, to take such legal action as may be necessary for the

			preservation and protection of public funds of the county.
42-33	Oct 31	NEPOTISM.	The civil rule should be used in computing the relationship under Section 13 of Article XIV of the Constitution.
42-33	Dec 27	COSTS AND FEES.	In appeal to Supreme Court, fees or clerk for making out transcript shall be paid by the state or county if defendant is unable to pay the same, but clerk cannot require payment in advance.
43-33	June 2	ELECTIONS.	Special elections can only be held when provided for by law.
43-33	June 13	GAME AND FISH DEPARTMENT.	What and when fish may be gigged or speared.
43-33	July 12	ROADS AND BRIDGES.	Vacating of roads for non-use.
43-33	Aug 1	PENAL INSTITUTIONS.	Salaries of Director and Commissioners; effective date of reduction of salaries.
43-33	Sept 23	MUNICIPAL ELECTIONS.	Vacancy in office of Assessor of Warrensburg, Missouri.
43-33	Nov 10	FEDERAL TAXATION. EXEMPTION OF AGENCY OF THE STATE.	Missouri Training School at Boonville, being an instrumentality or agency of the state in carrying on a governmental function, cannot be required to pay the Federal Process tax.
43-33	Nov 23	GAME LAWS.	Legal interpretation of still-hunting.
43-33	Dec 28	TAXATION. EXEMPTION OF AGENCY OF THE STATE.	Missouri Training School at Boonville, being instrumentality of the State and carrying on governmental function, shall not be required to pay Federal processing tax on wheat raised or purchased by it and milled.
44-33	Jan 12	Mr. Jos. B. Thompson, Sup't	WITHDRAWN
44-33	Jan 20	INSURANCE.	May only issue insurance policies in conformity to the Missouri Laws.
44-33	Jan 25	SHERIFF'S FEES.	Section 1870, and Section 11789, R.S. Mo. 1929.
44-33	Feb 27	SHERIFF'S FEES.	Section 1870, and Section 11789, R. S. Mo. 1929.
44-33	Apr 7	OPERATOR OR CHAUFFEUR.	License required, but no license obtainable in either case under age of eighteen.
44-33	May 9	INHERITANCE TAX.	Ruling on Estate by entirety.
44-33	May 12	INSURANCE DEPARTMENT.	What constitutes an insurance contact and the doing of insurance business in this state? Penalty for transacting insurance business in this state without authority.
44-33	May 25	INHERITANCE TAX.	War Risk Insurance Service – connected disability adjusted

			compensation. Not subject to inheritance tax.
44-33	May 26	INHERITANCE TAX.	Construction of Will. Stranger taxes five per centum.
44-33	May 27	Mr. Byron A. Stewart	WITHDRAWN
44-33	June 1	INHERITANCE TAX.	Non-resident of state allowed same exemptions as is resident.
44-33	June 7	INHERITANCE TAX.	Suggestions relating to procedure thereto.
44-33	June 9	INHERITANCE TAX.	Age of majority of distributee fixed by the law of the domicile of the ward.
44-33	June 20	INHERITANCE TAX.	Forgiveness of a debt subject to taxation.
44-33	June 21	INHERITANCE TAX.	Bequest for funeral expenses of sister-in-law subject to tax.
44-33	July 19	INHERITANCE TAX.	Taxation of life estate.
44-33	Aug 21	INHERITANCE TAX.	Bequests to Missouri charity not subject to tax.
44-33	Aug 25	Hon. Penn Brace	WITHDRAWN
44-33	Sept 20	INHERITANCE TAX.	Taxation of bequest to adopted daughter and husband.
44-33	Sept 27	INHERITANCE TAX.	Contingent remainder taxable though original bequest made before inheritance tax passed.
44-33	Sept 28	SCHOOLS.	Endorsement of second grade certificate. Teacher must have certificate throughout term of school.
44-33	Oct 4	INHERITANCE TAX.	Transfer by will subject to tax regardless of motive or consideration.
44-33	Oct 4	Mr. George Eigel	WITHDRAWN
44-33	Oct 5	Hon. Richard R. Nacy	WITHDRAWN
44-33	Oct 14	Messrs. Lawson & Hale	WITHDRAWN
44-33	Oct 27	Ryland, Stinson, Mag & Thompson	WITHDRAWN
44-33	Nov 10	LEGISLATURE.	Validity of the Act of extra session introduced prior to message on subject.
44-33	Nov 13	INHERITANCE TAX.	(a) Where property passes by will by virtue of power of appointment contained in earlier will, the transfer is taxed as part of the estate of the decedent who died last. (b) The relationship of the grantee to the donee of the power determines the rate of tax.

44-33	Nov 14	INHERITANCE TAX.	A contingent remainder is taxable although the original trust was created prior to the passage of the Mo. Inheritance tax law.
44-33	Nov 15	INHERITANCE TAX.	Advancements, as such, are not subject to the Inheritance Tax Laws of the State of Missouri.
44-33	Nov 16	INHERITANCE TAX.	A bequest to A for life and remainder to heirs is a contingent remainder. A contingent remainder is taxable although the original bequest be made before the Inheritance Tax Law of the State of Mo. was passed.
45-33	Apr 25	BANKS AND BANKING.	The McCawley Act does not apply to banks being liquidated.
45-33	May 9	Mr. Arch A. Johnson	WITHDRAWN
45-33	July 8	ELEEMOSYNARY INSTITUTIONS.	Commission for the Blind transferred to Board of Managers of Eleemosynary Institutions. Board of Charities and Corrections abolished —Home at Carrollton placed under supervision of the Board of Managers of State Eleemosynary Institutions.
45-33	July 14	PROSECUTING ATTORNEY. FEES.	In what form to be paid to the County Treasurer.
45-33	July 26	ELEEMOSYNARY BOARD.	Validity of contract with member of Board made prior to appointment to such Board.
45-33	July 30	COUNTY TREASURER.	Salary within discretion of county court.
45-33	Aug 1	ELEEMOSYNARY INSTITUTIONS.	Duties and power may not be delegated to sub-board but must be performed by board as provided by statute.
45-33	Aug 4	LIQUOR.	Cities of third class – licensing vendors for an occupation tax.
45-33	Aug 16	NATIONAL RECOVERY ADMINISTRATION.	Hours of work for Barbers.
45-33	Aug 18	TAXATION.	Expense of publication of list of delinquent lands not chargeable to County, Section 9952b.
45-33	Aug 28	STATE PURCHASING AGENT.	Authority to authorize emergency direct purchases.
45-33	Sept 13	COUNTY TREASURER'S BOND.	Amount of under Section 9266 & 12133 R. S. 1929.
45-33	Sept 15	NEPOTISM. EMPLOYEES.	Grandson of mother's half-brother not within fourth degree, using civil law method of computing relationship. Appropriation act permits employment of temporary help.
45-33	Oct 21	ELEEMOSYNARY	Holding that the Board of Managers of Eleemosynary Institutions have

		INSTITUTIONS.	no authority to grant lands or interest in same without act of the General Assembly.
45-33	Oct 25	CIRCUIT CLERKS.	Salary of Clerks and deputies affected by Sections 11786 and 11812, p. 369, Laws 1933.
45-33	Nov 1	ADVERTISEMENTS.	Advertisements for bids by State Purchasing agent – where placed.
45-33	Nov 20	GENERAL ASSEMBLY.	Are constitutionally within the scope of the proclamation of the Governor convening the Extra Session of the 57th General Assembly of the State of Missouri.
45-33	Nov 28	CONSOLIDATED SCHOOL DISTRICTS.	1. Board of Directors in Consolidated School District can compel children living in a certain ward district to attend the building in that ward. 2. When a ward building is closed the Board of Directors of the District must pay the transportation of all children living in that ward who live more than three and one-half miles from any proper school.
45-33	Dec 16	ELEEMOSYNARY BOARD. STATE PURCHASING AGENT.	Without authority to purchase real estate. To purchase real estate for Eleemosynary Board.
45-33	Dec 28	ELEEMOSYNARY INSTITUTIONS.	Fund in hands of steward should be used according to the wishes of the donor.
46-33	May 11	DEPARTMENT OF PENAL INSTITUTIONS. MOTOR VEHICLES.	Department of Penal Institutions has right to manufacture license plates and road signs under Senate Bill 204.
46-33	May 17		Marginal releases in Recorder's Office.
46-33	Sept 30	SCHOOLS.	Tuition required and allowed for non-resident high school pupils.
46-33	Dec 6	Hon. George C. Johnson	WITHDRAWN
47-33	Jan 26	PROSECUTING ATTORNEY'S SALARY.	Refund of sums paid in excess thereof – Section 11314, R.S. Mo. 1929.
47-33	Feb 7	COUNTY DEPOSITARY.	Banks in county or adjoining counties entitled thereto – Section 12189 R. S. Mo. 1929 – Preference where no bond given.
47-33	Feb 8	COLLECTOR.	Fee for collecting delinquent railroad taxes as constituted under Section 10044 R.S. 1929.
47-33	Mar 7	CRIMINAL COST.	State must pay the cost accruing on failure to convict on penitentiary charge.
47-33	Mar 11	POOL HALLS.	Requirement for license by County Court.

47-33	Mar 25	SCHOOL.	Majority of taxpayers voting at election under Sec. 9225 R. S. Mo. 1929, increases tax levy.
47-33	May 5	CRIMINAL COSTS.	Physician's service ordered by state to examine defendant not part of State's costs.
47-33	June 6	TOWNSHIP COLLECTORS.	Must account for funds due State and County as prescribed by statute.
47-33	Oct 3	NEPOTISM.	Public officer appointing child in office who is not appointed to an official position and who is not rendering service in an official capacity, does not violate Section 13, Article 14 by having son render personal service to him.
47-33	Nov 2	OFFICERS, SOLDIERS AND MARINES.	Right to vote in Missouri.
48-33	July 22	TAXATION.	No authority to bring suit for delinquent taxes after July 24, 1933 – Senate Bill 94.
49-33	Jan 31	APPROPRIATION BILLS.	May originate in either house.
49-33	Apr 6	REFUNDS.	Application of money refunded Buchanan County for improvements on roads built where same have been taken over by the state.
49-33	June 2	LIQUOR. CITIES, TOWNS AND VILLAGES.	Towns, villages, and cities of fourth class cannot prohibit sale of "Non-intoxicating beer" within three hundred feet of church, but can regulate and control same and how.
49-33	Aug 7	ELECTIONS.	Absentee voter.
49-33	Aug 18	PHARMACISTS.	What constitutes the meaning of retail druggist as referred to in Missouri Statutes.
49-33	Oct 21	SCHOOLS.	School districts are prohibited from insuring in Farmer's Mutual Insurance Companies where the assessment liability is unlimited, irrespective of Section 6063a, Laws of Missouri 1931, page 240, but may insure in assessment company or other company where liability is fixed and would not exceed in any year the revenue provided for such year.
49-33	Nov 20	TAXATION AND REVENUE.	Assessments – False Return – statutory method of altering so as to include omitted property.
50-33	Nov 3	SCHOOLS.	Compelling members of school board to publish annual reports.
51-33	May 18	LIQUOR. MERCHANTS LICENSE.	Merchants' license as applied to the beer law in Moberly.

51-33	Dec 27	TAXATION.	Inquest fees which are deemed criminal costs may be used to offset delinquent back taxes, otherwise taxes can only be paid as provided for in Section 9911, R. S. Mo. 1929.
52-33	Mar 28	SCHOOL BOARDS.	Operating themselves buses for the transportation of children to and from school, when buying directly from the manufacturer or their agent are exempt from the payment of Federal taxes on gasoline.
52-33	Apr 3	SCHOOL.	Majority of taxpayers voting at election under Sec. 9225 R.S. Mo. 1929, increases tax levy; and who is a tax-payer.
52-33	Apr 10	Hon. Chas. A. Lee	WITHDRAWN
52-33	Apr 13	HIGH SCHOOL LEVY.	Taxpayer Voter. (Supplemental opinion) to be attached to opinion of April 3rd 1933. “Who Is A Taxpayer”.
52-33	June 17	STATE SUPERINTENDENT OF SCHOOLS. VOTING IN SCHOOL DISTRICTS.	Question of right of employees of McCune Home, Jackson County to vote on school affairs.
53-33	Feb 1	BOARD OF CURATORS.	Authority to hire and fix salaries of teachers, instructors, officers and employees.
54-33	Jan 11	TRUCKMAN’S LICENSE.	Truckman’s license and permit for delivery of livestock.
54-33	Feb 20	COUNTY COLLECTOR. SURETIES.	Right of non-resident sureties to withdraw on petition from bond of county collector.
54-33	June 27	TAXATION.	Collection of delinquent taxes of cities of the fourth class provided for in Section 6695, R. S. Mo. 1929, not affected by Senate Bill 94 or 96 amending Chapter 59.
54-33	Aug 14	LINCOLN UNIVERSITY. STATE UNIVERSITY.	Member of Board of Curators who is editor of and stockholder in newspaper may distribute rotogravure section advertising university without compensation to the distributing paper.
54-33	Oct 4	Mr. Minor C. Livesay	WITHDRAWN
54-33	Oct 23	STATE HIGHWAY REFUNDS. ROADS AND BRIDGES. COUNTIES.	Township is not entitled to share in the proceeds on the refund by the State Highway Commission on account of bridges built by the proceeds of a County bond issue.
56-33	Feb 11	COUNTY COURT.	Right to order tax illegally collected to be re-distributed.
56-33	Mar 18	COUNTY REVENUE.	County court cannot issue warrants in excess of the anticipated revenue of any one year under Art. 10, Sec. 12, Mo. Const., but may transfer unused or surplus funds from one department to another.

56-33	Mar 31	OFFICERS.	Appointive – Salary- Tenure – Beginning of Term.
56-33	May 31	PROSECUTING ATTORNEY.	Expenses of prosecuting attorney in change of venue cases.
56-33	June 22	LIQUOR.	A permit issued to a wholesaler permits said wholesaler to distribute from any part of the state and from as many places in the state as he so desires; provided, however, that his business is conducted from several places in good faith and not to evade the permit tax provided in House Bill No. 23.
57-33	Mar 8	AGRICULTURAL PRODUCTS.	License required for sales under Sections 7289 and 13312 R. S. Mo. 1929.
58-33	Feb 1	COUNTY JUDGES. CITIES, TOWNS AND VILLAGES.	1. Salary of County Judges, Sections 11808-2092-655. 2. Municipalities Cities of the 4th class quorum when mayor can vote.
58-33	Feb 18	MOTOR VEHICLES.	In matter of giving away car under plan of Motor Vehicle Dealers Association of Kansas City, Mo.
58-33	Mar 15	CONGRESSIONAL DISTRICT.	Status Congressional Districts of Missouri with reference to circulating referendum petition under state constitution.
58-33	Mar 29	BLIND COMMISSION.	Reasonable Notice Discussed.
58-33	Apr 3	SCHOOLS.	Railroad, tax money in county treasury, when county court can distribute.
58-33	Apr 5	HIGH SCHOOLS.	Per-pupil cost of tuition; outside high school students, and how arrived at, and how paid.
58-33	Apr 6	LIQUOR.	Right of licensed druggist to sell-non-intoxicating beer under Act approved March 15, 1933, legalizing manufacture and sale of beverage having not exceeding 3.2 per cent alcoholic content.
58-33	Apr 19	RECORDER OF DEEDS.	Recordability of instruments subordinating lien of deed of trust to easement.
58-33	May 15	RECORDER OF DEEDS.	Recordability of instrument subordinating lien of deed of trust to easement – Section 3081, 1931 Session Acts, p. 174.
58-33	June 7	PEDDLERS LICENSE.	Is State license good in each county of State?
58-33	June 14	UNIFORM SEED LAW.	Sale without labels is violation thereof.
58-33	July 25	SCHOOLS.	Interpretation of Sections 9470 and 9474 R. S. Mo. 1929.
58-33	Aug 3	LIQUOR.	Wine containing 3.2% alcohol cannot be legally sold in Missouri.
58-33	Oct 4	COUNTY COLLECTOR.	May not collect over-payment of taxes from County Court.

58-33	Oct 20	SCHOOL DISTRICTS.	Where single owner owns land located within three different school districts, county clerk, in assessing the amount of school taxes, should take the value of the land located in each district, in arriving at the amount of taxes due each school district.
59-33	Feb 15	COUNTY COURT.	Right to compromise taxes, Section 9950, R.S. Mo. 1929. Rights in correcting errors, Section 9950, R. S. Mo. 1929. Collector's liability, acting under an unauthorized order of county court.
59-33	May 2	BUILDING AND LOAN ASSOCIATIONS.	Right to engage in insurance business as insurer or agent.
59-33	May 4	BUILDING AND LOAN ASSOCIATIONS.	Rules and regulations that may be made by the Supervisor under Senate Bill Number 263.
59-33	June 9	BUILDING AND LOAN ASSOCIATIONS.	Fees required to be paid Supervisor for examination of "Participating Reserve Fund."
59-33	June 9	BUILDING AND LOAN ASSOCIATIONS.	Ratio or pro rate in which matured shares should be paid.
59-33	June 24	BUILDING AND LOAN ASSOCIATIONS.	Approved form of permanent stock certificate.
59-33	July 11	BUILDING AND LOAN ASSOCIATION.	Free shares of stock owned by borrowing shareholders may not be credited on loan or notices withdrawal value, but such free shares withdrawn and pro-rated according to the statutes.
59-33	July 29	BUILDING AND LOAN ASSOCIATION.	Rent for office space not chargeable to appropriations made for B. & L. supervision.
59-33	Aug 4	BUILDING AND LOAN ASSOCIATION.	Right to enter into an agreement to extend payment of note and deed of trust.
59-33	Aug 7	BUILDING AND LOAN ASSOCIATION.	Home Owners "Loan Corporation" bonds may not be accepted by B & L Associations.
59-33	Sept 2	BUILDING AND LOAN ASSOCIATION.	Shares pledged as security for loans not to be sold as collateral but must be withdrawn and withdrawal value applied on loans.
59-33	Sept 6	BUILDING AND LOAN SUPERVISOR.	Power to appoint local attorney discussed.
59-33	Sept 8	BUILDING AND LOAN.	Withdrawing shareholders not entitled to subsequent dividends or earnings.
59-33	Sept 21	BUILDING AND LOAN ASSOCIATION.	Home Owner's Loan Corporation bonds.
59-33	Nov 15	BUILDING AND LOAN ASSOCIATION.	"Mutuality" necessary in all Building and Loan plan of stock.

59-33	Nov 16	JURORS.	Jurors not on the regular panel but who are retained on the panel of qualified jurors from which the jury is selected, are entitled to their per diem and mileage.
59-33	Dec 6	APPROPRIATIONS. BUILDING AND LOAN ASSOCIATION.	Bureau of Building and Loan Supervision emergency fund construed.
60-33	Jan 28	PROSECUTING ATTORNEY. CIRCUIT CLERK.	Cannot apply money for collection of fees to payment of salary, must be paid into county treasury. Sec. 11315, 11314, 11317, 11813, 11814, 11816, 11817, 11830, R.S. Mo. 1929.
60-33	Mar 3	GASOLINE TAX.	Gasoline tax is legally enforceable on tractors and maintainers owned by townships, counties and contractors.
60-33	Mar 31	COMMISSIONERS. NEPOTISM.	Right to accept contracts for work performed in their districts. Right of Commissioner to employ relatives.
60-33	June 3	INDIGENT PERSONS. INSANE PERSONS.	Resident requirement and who responsible for upkeep in State Hospital.
60-33	June 5	COUNTY TREASURER.	County Treasurer to effect settlement with County Court for County funds – how?
60-33	July 29	INFORMATION.	Opinion on form of Information.
60-33	Aug 8	PHARMACISTS.	Does pharmacist have to secure permit from County Court to fill physician's prescription under the act of 1933, (Session laws of Mo. 1933, p. 277). Relating to medical prescription for intoxicating liquors.
60-33	Aug 22	LIQUOR.	Right of the Food & Drug Commissioner to revoke permits by a summary procedure.
60-33	Sept 1	BOARD OF HEALTH.	Qualifications of applicant for medical license.
60-33	Oct 4	NEPOTISM.	Public officer receiving personal service from daughter does not violate Section 13, Article XIV, where daughter is not appointed to an official position.
60-33	Oct 7	BOARD OF HEALTH.	Without authority to issue temporary or conditional license to practice medicine.
60-33	Oct 7	INSANE PERSONS.	Opinion relating to the liability of counties for the cost of the criminal insane transferred from the penitentiary to state hospitals for the insane upon the warrant of the Governor.
60-33	Oct 17	NEPOTISM.	Section 13 of Article XIV of the Constitution of Missouri does not prohibit the appointing by a public officer of a second cousin. It prohibits the appointment of first cousin and those more closely related, and the civil rule is to be used in computing the relationship.

60-33	Nov 17	BOARD OF HEALTH.	Jurisdiction of Board of Health to protect city water supply from pollution by city sewer, Jefferson City.
60-33	Nov 22	TAXATION.	Construction of the word “destruction” as used in Section 9963b, p. 448, Laws of Missouri 1933.
60-33	Dec 8	SCHOOLS.	Interest compounded on county school mortgages not to be cancelled by county court.
61-33	July 22	SCHOOLS.	Special State aid under Sections 9220, 9223 and 9431 R. S. Mo., 1929, not to be pro-rated or affected by laws of 1931, page 334.
62-33	Jan 16	COUNTIES.	Refunds from State, taking over bridge to which county contributed, may be put in general revenue fund of county by county court. On transfer or paying back to other counties their contribution no commission allowable under 12316, R.S. 1929.
62-33	Sept 14	CITIES OF THE THIRD CLASS.	Must issue Sewage Disposal Bonds under Section 7276.
63-33	May 23	ASSESSORS. TAXATION.	Sections 10025 and 9760 discussed. Assessment of local property other than distributable. Time of assessor.
63-33	June 14	PROPERTY TAX.	Tax commission has no jurisdiction to reassess property if resort to county board of equalization is not made before applying to tax commission.
63-33	Aug 8	TAXATION.	Various problems concerning the application of Senate Bill 94 to the collection of delinquent State and County taxes.
63-33	Nov 15	TAXATION.	Various problems concerning the application of Senate Bill 94 to the collection of delinquent State and County taxes.
64-33	Feb 17	SHERIFF’S RESIDENCE.	County court’s duty in relation thereto. Sections 8524 and 8526, R. S. Mo. 1929.
64-33	Mar 1	TOWNSHIPS.	Has authority to appropriate money from the General Road Fund to secure right-of-way and turn same over to State Highway Commission for construction and maintenance of state highways thereon.
64-33	Mar 17	TAXATION.	Suit for taxes delinquent Jan. 1, 1933. Cannot be joined in suit begun in 1933 for taxes delinquent Jan. 1, 1932.
64-33	Apr 10	OSTEOPATH.	Right to practice medicine and surgery, write prescriptions.
64-33	May 3	BANKS AND BANKING.	Par value of shares of stock—Amount necessary for director to own discussed.
64-33	May 11	SCHOOLS-NEW OR OLD DISTRICTS.	Should be left with at least $50,000 assessed valuation and 20 school pupils or 8 square miles and 20 school pupils.
64-33	May 25	BANKS AND	Preferred stock set out in articles of agreement must be subscribed

		BANKING.	and paid up before incorporation.
64-33	May 27	BANKS & BANKING.	Sec. 5312 R.S. of Mo. 1929 and subsequent sections thereto provide that the Commissioner of Finance must consider certificates of indebtedness issued in pursuance to said sections of the statutes as restoration of capital for the purpose of determining whether banks should be closed or not in the interest of creditors.
64-33	July 24	COMMISSIONER OF FINANCE.	Authority to appoint special deputy to supervise liquidation and pro rate expense to defunct institutions.
64-33	July 25	TRUST COMPANIES.	No power to purchase the majority of the Stock of a National Bank.
64-33	July 25	PROCESS AGAINST CORPORATIONS.	Process against corporations charged with a crime is obtained – how?
64-33	July 28	FERRIES. HIGHWAYS.	Grant of license by county court does not authorize in itself the use of landing. Public has no right to use as landing places.
64-33	Aug 1	PUBLIC OFFICERS.	Vacancies by resignation or abandonment.
64-33	Aug 5	BANKS AND BANKING.	Liabilities of stockholders in a National Bank.
64-33	Sept 19	BUS AND TRUCK LAW.	Prosecutions for violations of sub-division (c) Sec. 5270, Laws of Mo. 1931 in county where acceptance was made.
64-33	Sept 26	FEES.	Relating to Fees of Prosecuting Attorneys in Change of Venue.
64-33	Sept 28	BANKS AND BANKING.	Proper parties to distribute special deposits in restricted banks.
64-33	Oct 6	NEPOTISM.	Where Board votes unanimously in favor of a teacher, director who is first cousin of teacher violates Section 13 of Article XIV of the Constitution of Missouri.
64-33	Oct 10	TAXATION.	Personal property of World War Veteran not exempt from taxation.
64-33	Oct 11	BANKS & BANKING.	Construction of House Bill 91 – Laws 1933, page 405. Depositors permitted to participate in reorganization plan of bank.
64-33	Oct 13	BANKS & BANKING.	Public deposits of State, county, cities and school districts come within the exception of the Federal Reserve Act permitting member banks to pay interest on demand deposits.
64-33	Oct 17	COUNTY WARRANTS.	(1) Warrants are acceptable in payment of taxes. (2) The County Treasurer should accept and give credit to the collector for county warrants accepted in payment of taxes in the monthly settlement of the collector. (3) Must the county warrant be presented by the original payee, or is it

			acceptable from the assignee?
64-33	Oct 21	LIQUOR.	Permit for rectifying whiskey in Missouri.
64-33	Nov 16	BANKS & BANKING.	Res judicata applied to judgment against a restricted bank.
64-33	Nov 23	BANKS & BANKING.	Constitutionality of House Bill No. 92, Senate Bill No. 43, Extra Session – Capital notes issued by bank or trust company.
64-33	Nov 27	SCHOOLS. SCHOOL BOARD ELECTION.	Qualifications of voters thereat.
64-33	Dec 4	BANKS & BANKING.	May the capital of a new bank be provided by assignment of the assets of an old bank? May the new bank adopt the name of the old bank?
65-33	Apr 24	COUNTY DEPOSITORIES.	Designation of County Depository.
65-33	July 7	DEPARTMENT OF PENAL INSTITUTIONS.	Not liable in suit for damages for negligence.
65-33	Sept 14	RESTAURANTS.	City ordinance governing sanitary conditions.
65-33	Oct 11	Hon. Lee Mullins	WITHDRAWN
65-33	Oct 27	SURETY BONDS.	Executed to Athletic Commission may or may not be cancelled at the mere pleasure of the Commission.
65-33	Nov 14	AUTOMOBILES.	1. Dealer resident of Missouri running cars from another state in Missouri to negotiate sales must use Missouri dealers licenses on them. 2. Dealer may not use dealers licenses for private purposes and pleasure.
65-33	Nov 17	COUNTIES. COUNTY BUDGET LAW. PLEDGING OF WARRANTS.	Under Section 12184a, Laws of Missouri 1933, page 358, County Court may not issue warrants now or in the future to pay back indebtedness and pool and pledge them under said Section; the Section only applies to warrants already issued and outstanding; such construction compelled by provisions of County Budget Act.
66-33	Apr 12	COUNTY COLLECTOR.	Maximum amount in commissions County Collectors can retain as compensation.
66-33	Apr 16	LIQUOR.	Wholesale permittee cannot sell to another wholesale permittee—Permittee for consumption where sold cannot sell in original package to be consumed elsewhere than where sold.
66-33	May 19	LIQUOR.	The use of beer on trains with diner attached.
66-33	May 20	TREASURER'S DRAFT.	Not required to be surrendered to endorser.

66-33	May 24	WORKMEN'S COMPENSATION COMMISSION. ATTORNEYS AT LAW.	To represent a claimant before the commission one must be a member of the Bar.
66-33	June 1	AWARD.	Right of Mortgagee to award made under condemnation proceedings.
66-33	June 15	PAPER AND STATIONERY.	Duties of Commissioners of Public Printing under Sec. 13806 R. S. of Mo. 1929 in view of Senate Bill 192.
66-33	June 30	LIQUOR.	Successor to Food and Drug Commissioner.
66-33	July 10	INSURANCE.	Mutual casualty companies organized under Article 7, Chapter 37, is entitled to license to write surety insurance.
66-33	July 14	CONTRACT.	Workmen's Compensation Commission, right to terminate Tabulating Machine Company contract at end of quarter.
66-33	Aug 21	STATE TREASURER.	Right to make sales of real and personal property in view of State Purchasing Act.
66-33	Aug 29	STATE HIGHWAY DEPARTMENT.	Salaries of all employees.
66-33	Aug 30	ARSON.	Burning of unoccupied dwelling house by owner is criminal offense.
66-33	Sept 30	TAXATION. ASSESSMENTS.	Separation of powers of County Assessor and City Assessor within such county.
66-33	Oct 27	TAXATION.	Institution of suits not stayed by Senate Bill 80.
67-33	Sept 11	JURIES.	Board of Jury Commissioners in counties of 200,000 to 400,000 inhabitants receive no compensation, and have no power to appoint clerks or assistants.
67-33	Nov 29	LEGAL PUBLICATIONS.	What newspaper may be selected for publication under R. S. Mo. 1929, Sec. 7074 when no newspaper published in city.
69-33	Apr 8	COUNTY COURT.	What may be accepted as collateral to secure county funds?
69-33	Apr 24	TOWNSHIP COLLECTOR'S BOND.	Section 12279, R. S. 1929.
69-33	May 4	TAXATION OF CORPORATIONS.	Business and manufacturing corporations taxed—9764 R. S. Mo. 1929.
69-33	May 29	INSURANCE DEPARTMENT.	Bond of Superintendent may be signed by either or both natural persons or surety companies.
69-33	July 8	INSURANCE DEPARTMENT.	What constitutes insurance contract and doing insurance business? Steuben Health Clinic.

69-33	July 18	DRAINS AND LEVEES.	Duty of Drainage Districts to maintain and erect destroyed bridges.
69-33	Sept 12	INSURANCE.	When insurance company liable for premium tax – Mutual Benefit Health and Accident Association of Omaha, Nebraska.
69-33	Oct 9	NEPOTISM.	Official is not related to wife's sister's husband within the prohibited degree; duty of Prosecuting Attorney to remove officials of his county who violate said constitutional provision.
69-33	Oct 20	LIQUOR.	Criminal prosecution not appropriate for unlawfulness in declaring it to be a misdemeanor by the act.
69-33	Oct 27	INSURANCE.	Approval of Declaration - Allied Mutual Insurance Company.
69-33	Nov 3	Hon. John B. Owen	WITHDRAWN
70-33	Jan 10	CROSS EXAMINATION.	Cross examination of witness about prior conviction even though appeal from said conviction was pending.
70-33	Apr 14	BONDING COMPANY.	Bonding Company qualified in Missouri can sign county official's bond – If County under township organization, County Treasurer must give bond as Treasurer also bond for school district money, and for money received as ex-officio collector – Treasurer failing to give bond and not inducted into office predecessor holds over until Treasurer either is inducted into office or gives bond and qualifies or does all three. Giving bond is a directory and not mandatory provision and has nothing to do with election and qualifying of Treasurer. If Treasurer gives bond after being inducted into office and before ouster proceedings filed, Treasurer cannot be ousted for failure to give bond.
70-33	July 13	MOTOR VEHICLES.	Act relating to transportation of persons and property by motor vehicle; penalty for violation thereof.
70-33	July 14	TAXATION.	Real estate in the custody of guardian for an insane war veteran may be taxed for state and local purposes.
70-33	Sept 13	SHERIFF.	Fees of Sheriff of Macon Co. in extradition proceedings.
70-33	Oct 18	EXTRADITION.	Sufficiency of information.
70-33	Dec 5	LIQUOR.	Constitutionality of SB 51.
70-33	Dec 6	EXTRADITION.	A person paroled from one state and parole thereafter revoked is a fugitive from justice within the purview of the extradition laws.
71-33	Feb 1	BONDS. PENAL-PRISONS	Regarding authority for payment of premiums on bonds of state officials.
71-33	Feb 6	PAROLES.	Right of commissioners of the Department of Penal Institutions to approve parole and grant legal discharge.
71-33	Feb 9	APPROPRIATIONS.	Holding appropriations for state penal board are not available after the

		PENAL-PRISONS.	two calendar years expires for which the appropriations are made.
71-33	Feb 11	PENAL INSTITUTION. CONVICTS.	What days are holidays for convicts?
71-33	Mar 9	PENAL INSTITUTIONS.	Selection of depository, right to preferences in failed banks.
71-33	Mar 13	PENAL INSTITUTIONS.	Right to terminate contract for manufacture goods.
71-33	Apr 3	PENAL INSTITUTIONS.	Right to pay out money convicts acquired under Section 8402 Revised Statutes Missouri 1929.
71-33	Apr 11	PENAL INSTITUTIONS.	What liability insurance, if any, to be carried by Department of Penal Institutions.
71-33	May 11	PENAL INSTITUTIONS.	State Purchasing Agent has the right when Senate Bill 192 goes into effect to make all purchases heretofore made by the Department of Penal Institutions.
71-33	May 19	BANK AND BANKING.	Collection charges on bank drafts cleared during bank holiday.
71-33	Aug 17	RELIEF OF INSOLVENT CRIMINALS CONFINED.	Construction of Section 3859 R. S. Mo. 1929.
71-33	Aug 23	CRIMINAL LAW.	Misbranding of motor oil an offense under Section 4302, R. S. Mo. 1929.
72-33	Feb 2	CONSTITUTION.	Sec 13 of Article V of the Constitution of Missouri, adopted Nov. 8, 1932, is self-enforcing.
72-33	Feb 13	COUNTY RECORDER OF DEEDS.	Marriage license blanks, by whom furnished, Section 11527, R. S. Mo. 1929.
72-33	Mar 6	COUNTY COURTS.	Power of County Courts to compromise taxes after State Board of Equalization has fixed assessed valuations.
72-33	June 13	HIGH SCHOOL.	School District has right to charge tuition on non-residents, the rate to be determined under Sections 14 and 16, Laws of Missouri, 1931, pages 342-344.
72-33	June 15	TAXATION. CONSTITUTION.	Property occupied by state militia or National Guard as armories not exempt from taxation. Section 13870 violates Sections 6 and 7 of Article X of the Constitution of the State of Missouri.
72-33	Sept 26	CITIES, TOWNS AND VILLAGES.	City Council may not appoint Councilman to remunerate his position under City contract.
72-33	Oct 18	TAXATION AND REVENUE.	Laws of Missouri 1933, page 419, imposing upon County Clerk the duty to ascertain benefits in the assessment of drainage and levee districts, makes no provision for compensating the Clerk for such services.

72-33	Dec 12	PUBLIC SERVICE COMMISSION. TRUCK PERMIT. MOTOR VEHICLES.	Trucks of one and one-half ton capacity and less not required to pay truck permit license. Capacity measured how.
72-33	Dec 12	GAME AND FISH COMMISSIONER.	Game and Fish Commissioner and his deputies have a right to inspect hunting licenses of hunters under what circumstances.
73-33	Feb 11	COUNTY ASSESSORS.	Fees to be paid. Section 9806 R. S. Mo. 1929.
73-33	Feb 23	STATE HIGHWAY. COUNTY HIGHWAY DEPARTMENT.	Duties, power and rights of State Highway Department and County, under Article 2, Chapter 42, to grade and construct roads with the county.
73-33	Mar 31	Hon. Leo Politte	WITHDRAWN
73-33	Apr 3	SCHOOL.	Majority of tax payers voting at election under Sec. 9225 R. S. Mo. 1929, increases tax levy; and who is a taxpayer.
73-33	May 15	FEES.	Sheriff in this case not entitled to $1.25 a day fee for keeping prisoner while undergoing examination preparatory to commitment.
73-33	June 1	DRAINAGE DISTRICTS.	Board of Supervisors cannot appoint special collectors to collect tax when the county collectors refuse to give bond for same.
73-33	June 30	LIQUOR.	Permit required to sell beer from whom?
73-33	Oct 11	PUBLIC FUNDS.	Under Section 12186, R. S. Mo. 1929, interest accruing on school funds in public depository shall be credited to school funds respectively, and not otherwise.
74-33	Oct 7	TAXATION.	Judgment for taxes rendered prior to 4-13-33 not subject to Senate Bill 80.
75-33	Mar 7	COUNTY COURT.	Power to employ one of their own members to perform administrative acts.
75-33	Apr 21	TAXATION.	Deposits in United States postal depositories held taxable.
75-33	Apr 24	TOWNSHIP.	Requirements of bond for township depository and county depository; also personal bond for township trustee.
75-33	June 2	HIGHWAY ENGINEER.	Power and authority of County Court to remove Highway Engineer, where he is not ex officio Highway Engineer.
75-33	July 13	AUTOMOBILE LICENSE.	Provisions relating to revocation of.
75-33	July 27	Hon. Owen C. Rawlings	WITHDRAWN

75-33	July 28	LIQUOR.	Various questions answered concerning the Beer Bill.
75-33	Sept 27	ALIENS.	The right of a Hindu to own real estate in Missouri.
75-33	Oct 30	PUBLIC SCHOOLS.	Under Sec. 9329 Laws of Mo. 1931, p. 333, when there is an equal division of the Board in the hiring of a teacher, the Co. Sup't. has authority when requested by three directors to cast the deciding vote.
76-33	Jan 10	COUNTY COURT.	Right to compromise back taxes.
76-33	Jan 13	TOWNSHIP ORGANIZATION LAW.	Right to repeal enabling act carrying out Sec. 8 of the Constitution of Mo. and filling vacancies in office caused by such repeal.
76-33	Jan 30	Hon. E.L. Redman	WITHDRAWN
76-33	Feb 4	SOLDIERS HOME.	Board of Trustees of Soldiers Home at Higginsville, Missouri, has authority to appoint and employ superintendent for that Home.
76-33	Feb 4	COUNTY COURT.	Right to regulate directions and locations of billboards.
76-33	Feb 28	PENAL INSTITUTIONS.	Right of officer to make contract beyond his term. Right of Penal Board to make contract without approval of Governor.
76-33	Oct 20	OFFICERS.	In view of Section 11202, county officer may not be removed except for neglect of duty, as specified in Section 11202; mere arbitrary removal or for cause not specified therein would be illegal.
77-33	Mar 8	CORONER.	Duty to hold inquest, When.
77-33	Mar 14	COUNTY COURT-SCHOOL MORTGAGES.	(1) Cannot accept deed but must foreclose mortgage; (2) Has discretion when to foreclose; in meantime can accept part payment if without extending; (3) If bid in by county, must be in name of whom.
77-33	Mar 24	SHERIFF.	Right of sheriff to practice law.
77-33	May 2	LIQUOR. SALE OF NON-INTOXICATING BEER.	Sale for consumption on premises and sale for consumption off of premises by holders of the two classes of retail permits. When illegal.
77-33	July 28	SCHOOLS. SCHOOL DISTRICTS.	Issuing of warrants by a school director.
77-33	Oct 17	NEPOTISM.	While appointments prohibited by Section 13 of Article XIV are illegal, members of the board voting for related teacher, until they resign or have been removed, may function as directors and their actions bind the district; board may not date contract back so as to reward teacher for services performed under illegal contract voted by related directors.
77-33	Oct 21	FEES OF COUNTY CLERK.	1. County clerk making up tax books and using ditto marks to designate townships and ranges allowed to charge for same at rate of ten cents per hundred words and figures.

			2. County clerk not allowed to charge for writing the minutes of the County Court Record from which the record of the court is written.
77-33	Nov 26	SCHOOLS. SCHOOL DISTRICTS.	Under Section 9217, R. S. Mo. 1929, school districts must accept colored students and then collect the tuition quarterly from the school district sending them.
78-33	Feb 24	CITIES, TOWNS AND VILLAGES. RIGHT OF WAY.	Has the City of the third class (Excelsior Springs) the right to deed to the State Highway Commission right of way through public parks for highway road purposes.
78-33	Apr 13	SCHOOLS.	Cannot employ member of school board as teacher and should not employ member for other work. (Sec. 9360 R. S. 1929, does not apply).
78-33	May 13	Hon. Raymond S. Roberts	WITHDRAWN
78-33	May 25	CHATTEL MORTGAGES.	Can a contract for a crop mortgage be filed as a chattel mortgage; priority question.
78-33	May 29	MARRIAGE LICENSE.	When marriage license becomes a public record.
78-33	June 12	SCHOOL DISTRICTS.	Directors of school district cannot be compelled to draw warrants where funds are not available, but such fact is not decisive as to district's liability for debt.
78-33	Aug 14	COUNTY DEPOSITORY.	Liability of County Treasurer on official bond where no depositary bond given.
78-33	Aug 22	NATIONAL RECOVERY ADMINISTRATION.	Hours of work for grocers.
78-33	Aug 24	TAXATION.	Operative dates of Sections 9969 and 9952 as contained in Senate Bill 94, respecting penalties.
78-33	Aug 25	BUS AND TRUCK LAW.	When a violation of the same.
78-33	Aug 29	BLIND PENSIONS.	Fees of Probate Judges for taking applications for blind pensions.
78-33	Sept 6	COUNTY DEPOSITORIES.	County funds preferred claims in National Banks; where no bids submitted for county funds; county authority to buy U. S. Bonds; power of county treasurer to select depository; Construction of Federal Banking Act on insured deposits.
78-33	Sept 20	MERCHANT'S LICENSE.	Authority of City to levy on Wholesale and retail business.
78-33	Sept 23	COUNTY DEPOSITORY.	Liability of County Treasurer in event no selection by County Court.
78-33	Oct 19	TAXATION AND	Laws of Missouri 1933, pages 255-267 of the Beer Act does not

		REVENUE.	exempt beer from general property taxes. The prohibition contained in Section 13139z10 only forbids cities and counties from levying license and occupation taxes against holders of permits.
78-33	Nov 16	TAXATION. REVENUE.	Grain stored in elevators is subject to taxation against the individual owner or corporation owner, according to the general laws regulating other property.
79-33	Mar 11	MOTOR VEHICLES.	Trucks used in State work exempted from regulation by Public Service Commission.
79-33	Mar 17	GAME AND FISH DEPARTMENT.	Right to prosecute for possession of more than twenty-five game fish.
79-33	Apr 26	PUBLIC SERVICE COMMISSION.	What constitutes “suburban territory” in Sec. 5264, 1931 Laws, p. 305?
79-33	May 9	BLIND PERSONS.	Maintained in public, private or endowed institutions.
79-33	May 20	RECIPROCITY LICENSE LAW.	Applies to persons operating under Kansas license tags.
79-33	May 22	BLUE SKY DEPARTMENT. CORPORATIONS.	Corporation cannot act beyond the corporate powers and Blue Sky Commissioner cannot supervise securities unlawfully issued.
79-33	Aug 23	COUNTY DEPOSITORY BOND.	Does not cover funds deposited by County Collector under Section 9885, Laws of 1933, page 464.
79-33	Aug 26	SECURITIES DEALER’S BOND.	Under Section 7744 R. S. Mo. 1929, the total aggregate liability of surety on Securities Dealer’s Bond is limited to $5,000.00.
79-33	Sept 21	SECURITIES.	Credit union to pay examination fees.
79-33	Sept 22	ABSENTEE VOTING.	Authority and method in City Election.
79-33	Oct 4	NEPOTISM.	Public officer receiving personal service from wife does not violate Section 13 of Article XIV, where wife is not appointed to an official position.
79-33	Oct 18	CORPORATIONS, EXTENSION OF FRANCHISE.	Building and loan associations are required to pay the fees required under the general corporation laws, Section 4556, and may not extend corporate existence by merely paying the $5.00 provided for in Section 5613, Laws 1931, page 158.
79-33	Oct 20	INVESTMENT CERTIFICATES.	Investment certificates used by corporations making loans on automobiles are under the supervision of the Securities Dep’t. of the State of Mo.
79-33	Oct 27	COMMISSION FOR THE BLIND.	Scope of, powers and duties of.

79-33	Nov 27	SCHOOLS. SCHOOL DISTRICTS.	Distance of pupil from school house calculated, how.
80-33	Feb 14	RECORDER OF DEEDS. CHATTEL MORTGAGES.	Duty of recorder with reference to filing and recording. Sections 11543, 11544 and 11545. R. S. Mo. 1929.
80-33	Feb 14	COUNTY COURTS. SCHOOL FUND MORTGAGE.	Procedure required to foreclose.
80-33	Apr 14	PENAL INSTITUTIONS.	Form of sentence of trial court in sentencing to Intermediate Reformatory. Transfer of inmates to Intermediate Reformatory.
80-33	May 12	NOTARIES PUBLIC.	Deputy Circuit Clerks may take acknowledgments of affidavits of age for marriage licenses.
80-33	May 20	CONSTABLE FEES.	Applicability of Section 11777 and Section 11791 as to fees of Constables.
80-33	June 23	ELECTIONS-SPECIAL. SHERIFF-VACANCY IN OFFICE.	Nominations of candidates in special election to fill vacancy in sheriff's office must be made by central committee or by convention.
80-33	June 26	BANKS AND BANKING.	Delinquent taxes are a preferred claim against the assets of a closed bank.
80-33	July 15	COUNTY JUDGES.	Laws 1933, re population determining salaries. Does not affect present judges holding office.
80-33	July 17	PENAL INSTITUTIONS.	Right to re-number convict on re-sentence.
80-33	Aug 5	PENAL INSTITUTIONS.	Sentence required to be served after return of subject from insane hospital.
80-33	Aug 21	COUNTY FOREIGN INSURANCE TAX FUND.	Sec. 38, Laws of Mo. 1933, p. 85 held unconstitutional.
80-33	Aug 28	EXTRADITION.	Officers' expenses are paid – in what manner.
80-33	Sept 27	OFFICERS. EMPLOYEES.	No person entitled to compensation as de facto officer or employee unless there is a legal office.
80-33	Sept 29	SCHOOL DISTRICTS.	Where there are less than eight colored children of school age in a school district, they shall be sent to school in the nearest district where separate colored schools are maintained.
80-33	Oct 21	ELECTION COMMISSIONER.	Election Commissioner of St. Louis County ineligible for appointment to office auditorium commission of City of St. Louis, Mo., under Section 10535 R. S. Mo. 1929.

80-33	Nov 9	PENITENTIARY. WARDEN. CONVICT.	Authority of law to imprison convicts.
80-33	Nov 14	Mr. William H. Sapp	WITHDRAWN
80-33	Nov 15	CONVICTS. JUDGMENT IN CRIMINAL CASES.	Sentences for escaped convicts to be cumulative.
81-33	Jan 10	SCHOOLS.	Sec. 9340, R.S. 1929, requiring county and township collectors to turn over school moneys of city, town and consolidated districts to treasurer of board of education thereof, modifies Sec. 9264 and 9266, requiring such moneys for all classes of schools paid to county treasurer.
81-33	Jan 13	SCHOOLS.	Section 9217, R.S. 1929, requiring districts to maintain separate schools for negro children resident therein, or in lieu thereof transportation to and tuition in such a school in the county, on penalty for failure of being deprived of public schools funds, is mandatory and State Superintendent of Public Schools should ascertain facts and act thereon in apportioning such funds.
81-33	July 26	COUNTY ENGINEERS.	St. Louis County – right to hire and fire employees of Highway Department.
81-33	Oct 26	COUNTY WARRANTS.	Warrants, school or county, of 1932 issue cannot be paid out of 1933 revenue. Sec. 12140, R.S. Mo. 1929 is the guide for the County Treasurer in the payment of warrants.
81-33	Dec 13	LIQUOR. WHOLESALE DRUGGISTS.	Right of Wholesale Druggists to import whiskey for medicinal purposes and ship it to their retail drug customers for medicinal purposes.
82-33	Jan 28	NON-RESIDENT ATTORNEYS.	Effect of prior disbarment in this state, construction of – Sec. 11692, 11693, 11696, Sec. 11703, 11695, R.S. Mo. 1929.
82-33	Mar 8	CORPORATIONS.	Incorporation fees, similarity in names.
82-33	Apr 5	FOREIGN CORPORATIONS. CORPORATION SUPERVISOR.	Foreign corporations not entitled to transact business in this state unless qualified.
82-33	Apr 12	NOTARY COMMISSION.	Valid if issued on April 13th, Jefferson Day.
83-33	Jan 16	SENATE BILLS.	Senate Bill No. 427 is unconstitutional.
83-33	Sept 15	RECORDER OF DEEDS.	Affidavits to release deeds of trust if glued in permanent book comply

			with the statute relative to recording.
83-33	Sept 26	LEGISLATURE.	Election of officers at an extra session.
83-33	Nov 14	TAXATION. COUNTY COLLECTORS.	County Collectors have no right to charge County Court for “indexing tax books”.
83-33	Nov 29	JUSTICE OF THE PEACE.	Applicability of R.S. 1929, Sec. 938 to actions in justices’ courts so as to allow continuances when party or counsel is at session of General Assembly as member thereof.
84-33	May 23	LOSS BY THEFT OF STATE FUNDS BY AN OFFICER.	The officer and his bondsmen are responsible for same.
84-33	Oct 21	TAXATION.	Cities are not exempt from paying state gasoline tax on gasoline purchased; occupation taxes upon gasoline dealers levied by cities apply to purchases made by state and its political subdivisions.
84-33	Dec 6	COUNTY COURTS.	May reduce compensation of County Treasurer during term of office.
85-33	Jan 26	DISTRICT ROAD FUND.	Section 8047 and 8060, R.S. Mo. 1929.
85-33	June 21	COUNTY FARM BUREAU.	Suggestion and citation of cases to support county defense in suit by Bureau for appropriation.
85-33	Oct 11	TAXATION.	Fact that a foreign insurance company pays tax upon premiums does not excuse it from paying a property tax upon office of fixtures located within the State; livestock located within this State on June 1st is taxable in the name of the holder or agent though owner is a non-resident.
85-33	Oct 13	LIQUOR.	Quantities of beer stored in county is subject to property tax, even though owner is a holder of a beer permit.
85-33	Nov 10	COUNTY BUDGET LAW. COUNTY TREASURER.	In 1934 treasurer should be personally liable for payment of protesting of warrant prior to the date of the filing of the budget, but will not be personally liable for protesting warrants presented in 1933.
86-33	Aug 1	NATIONAL RECOVERY ADMINISTRATION.	Would an agreement entered into by business men as to time for opening and closing of stores, also number of employee work hours per week be contrary to existing state law?
86-33	Dec 16	LABOR DEPARTMENT.	Missouri State Nurses Association is not employment agency within Section 13190, R. S. Mo. 1929.
87-33	June 1	SCHOOLS.	Rolla School of Mines, handling of funds.
87-33	June 7	ACCOUNTS.	Accounts in State Auditor’s office with various departments must be

			carried according to the appropriations made in House Bill 661, and it is not permissible to group these various divisions for which appropriations are made and carry the aggregate appropriation made for each department in one item.
87-33	June 10	APPROPRIATIONS. BLIND PENSION FUND.	Sec. 2-a of House Bill 645 is unconstitutional. Surplus of fund after payment to pensioners and providing for adequate support of Commission must be transferred, if at all, to Public School Fund created under and by virtue of Sec. 6 of Art. XI.
87-33	July 13	BANKS. SCHOOLS.	Board of Curators of Rolla School of Mines may withdraw cash from depository for emergency purposes and keep the same as a trust fund in a bank at Rolla, Missouri, to be re-delivered on order of the treasurer or board.
87-33	Aug 3	COSTS.	Informant in insanity matter may be required to give bond for costs under Section 1237 if non-resident before suit is commenced, and if a resident and unsettled in his affairs, may be required to give security under Section 1238 after suit is commenced.
87-33	Sept 22	CITY COUNCIL-COUNCILMEN.	Qualifications and Residence of Councilmen in Cities of the 3rd Class.
87-33	Oct 7	Mr. Lon Stanton	WITHDRAWN
87-33	Nov 29	TAXATION-CITIES, TOWNS AND VILLAGES. CITY TAXES.	Cities of the third class collected under Senate Bill 94.
88-33	Jan 12	COUNTY COLLECTOR.	County Collector must collect penalties on delinquent taxes, and County Court has no authority to remit the penalties on taxes and school districts have no power to remit penalties on delinquent taxes.
88-33	Feb 16	SCHOOLS.	Authority of School Boards in consolidated high schools and schools having six directors to decide the location and erecting of new buildings.
88-33	Mar 21	BANKS AND BANKING. GRAND JURY. TELEPHONE.	Opinion Letter to Hon. William E. Stewart
88-33	May 6	SCHOOLS. ORGANIZATION OF BOARD.	Law requiring board to be organized within four days not compulsory but merely directory. Three members of school board, in case of division of whole board, can call in County Superintendent who shall be considered a member of board for that purpose.
88-33	May 26	NEPOTISM.	Road overseer may not appoint sons to employment – County Court

			may remove or removable by quo warranto.
88-33	July 18	ELEEMOSYNARY INSTITUTIONS.	Counties liable for clothing of charity patients in Missouri State School.
88-33	July 28	ELECTIONS.	Registration and special election under the Week's Bill.
88-33	Aug 3	LIQUOR.	House Bill Number 23 does not provide a punishment for sale of beer outside of the premises described in the permit. A person having a permit under Subdivision C of Section 13139e may also have a permit under Subdivision D of Section 13139e, otherwise one person is not entitled to two permits. License cannot be transferred from town to town.
88-33	Aug 22	STATE HIGHWAY COMMISSION.	Salaries of Chief Counsel and legal Assistants.
88-33	Sept 1	ELECTIONS AND REGISTRATION.	Cities of between 10,000 and 30,000 population are required to have registrations, under the provisions of Laws of 1933, pages 239-249.
88-33	Sept 1	SHERIFF.	Duties and fees: (1) Duty in regard to meeting of County Board of Equalization; (2) Duty in regard to summoning appraisers; (3) Fees for bringing prisoners from other counties. (4) Fees in extradition proceedings; Fees in transferring prisoners from County jail to penitentiary.
88-33	Sept 12	STATE HIGHWAY DEPARTMENT.	Supplemental opinion of salaries of Legal Department.
88-33	Oct 14	PUBLIC SCHOOLS.	Any pupil between ages of 6 and 20 has right to do eighth grade work over after having received diploma and has right to use of free text books.
88-33	Oct 23	SCHOOLS.	A contract with a bus company for free transportation of students is illegal because it does not conform to Section 9197, R. S. Mo. 1929.
88-33	Nov 10	HIGHWAYS.	Authorization of state officials to take necessary steps to secure federal aid.
89-33	Apr 7	SCHOOL DISTRICTS.	Limit of levy for maintenance. Constitution, Sec. 11, Article X.
89-33	Apr 13	Hon. Edward D. Summers	WITHDRAWN
89-33	Aug 25	TAXATION.	Federal check tax does not apply to County warrants.
89-33	Sept 1	ANTI-TRUST LAWS.	Proposed agreement between Westinghouse Electric Manufacturing Company of Pittsburgh, Pennsylvania, and Superior Electric Products Corporation of Saint Louis, Missouri, to the anti-trust laws of Missouri.

89-33	Oct 18	PAYMENTS OF PAST INDEBTEDNESS OF A COUNTY.	County Courts cannot pay criminal cost incurred in past years from current revenue.
90-33	Apr 26	NEPOTISM.	Applies to officials and employees of cities of all classes in the State of Missouri.
90-33	Apr 27	BUILDING AND LOAN.	A – Power of Directors to amend by-laws. B – Power of Directors to amend by-laws when present by-laws specifically give Board such power.
90-33	Sept 13	NEPOTISM.	Section 13 of Article 14 of the Constitution not violated because teacher marries daughter of director, or because daughter of director is elected by other directors when the related director was not present, had no knowledge and does not participate in her election.
90-33	Nov 3	LEGISLATURE.	Power to designate Supervisor of Food & Drugs administrative head of Liquor Control Acts.
91-33	Mar 13	SCHOOL FUND MORTGAGE.	State is not affected by the laches of its agents in the management and care of school funds.
91-33	Mar 28	INSURANCE COMPANY.	Right of insurance company to loan money on bank stock as collateral.
91-33	May 11	INSURANCE DEPARTMENT. CORPORATIONS.	Insurance companies may increase capital stock and issue preferred or common stock therefor and fix the priorities, preferences and voting power of such stock.
91-33	May 12	INSURANCE DEPARTMENT.	What constitutes an insurance contract and the doing of insurance business in this state? Penalty for transacting insurance business in this state without authority.
91-33	May 19	INSURANCE DEPARTMENT. CORPORATIONS.	Any insurance company incorporated under Section 5793 R.S. 1929, may increase its capital and issue common or preferred stock therefor and fix the priorities, preferences and voting power of the preferred stock.
91-33	June 1	TAXATION OF INSURANCE COMPANIES.	Insurance Company, though purporting to be organized as an assessment company in foreign states, is taxable under section 5979, where it does business in this State.
91-33	June 8	INSURANCE DEPARTMENT.	What constitutes an insurance contract and the doing of insurance business in this state? Penalty for transacting insurance business in this state without authority.
91-33	June 8	INSURANCE DEPARTMENT.	Insurance Company has right to reduce capital stock under Section 5915, by surrendering stock and distributing surplus assets.
91-33	June	INSURANCE	Insurance Company organized under article 4, chapter 37, R. S. Mo.

	15	CORPORATIONS.	1929, may incorporate for perpetual term.
91-33	June 17	TAXATION AND REVENUE.	County Courts may compromise “back taxes” under the requirements of Section 9950 R. S. Mo. 1929.
91-33	June 20	INTERMEDIATE REFORMATORY.	Commitments at intermediate reformatory to commence when?
92-33	Jan 31	STATE TREASURER.	Right to collect interest on state deposits after losing of state depository.
92-33	Feb 7	ASSESSORS.	Fees for assessment lists, authority to make in absence of return.
92-33	Feb 7	COUNTY CLERKS, DEPUTY HIRE.	Sec. 11811 counties over seven thousand and less than forty thousand.
92-33	Feb 7	CONSTABLE.	Holding office until successor is elected and qualified.
92-33	Apr 21	GENERAL ASSEMBLY.	Sec. 46, Art. IV, Mo. Constitution of 1875 forbids payment by General Assembly of counsel fee of contestor or contestee in contest for seat in lower House of Mo. General Assembly.
92-33	May 4	INSURANCE COMPANY.	Insurance Company agreeing to accept assignment of unearned premium due from solvent company constitutes discrimination and rebating.
94-33	Sept 16	FEDERAL AID.	Authority to issue bonds for municipal improvements.
94-33	Oct 5	NEPOTISM.	The fact that teacher not related to director at time of appointment afterwards becomes related within the fourth degree will not work a forfeiture of office.
95-33	July 22	ELECTIONS.	City of St. Louis “Qualified electors” under Weeks Bill defined. Who eligible to vote?
95-33	Aug 3	ELECTIONS.	Weeks Bill.
96-33	Jan 25	Hon. Gordon Weir	WITHDRAWN
96-33	Mar 16	MERCHANTS TAX.	Remitting Merchants Tax by collector – Duty of.
96-33	May 18	SCHOOLS.	City, Town and consolidated school districts must advertise and secure depositaries for their funds under Section 9362 and take bond to secure same as provided for under Section 12187.
96-33	June 12	STATE LIEN.	State lien for taxes attached to Insurance only when liability on the company: Tax lien taxes to Insurance money payable as damages to the particular tract against which taxes are assessed.
96-33	Nov 4	PROSECUTING ATTORNEY.	Cannot recover a refund of salary overpaid to him since January 1, 1931.
97-33	Oct 17	CLERKS OF COURTS	(1) Power of Circuit Clerk to appoint deputy;

		OF RECORD.	(2) Sec. 11812, Laws of 1933, p. 371 governs appointment of deputy since July 24, 1933.
97-33	Nov 21	PROSECUTING ATTORNEYS. BONDS OR RECOGNIZANCES FORFEITURE.	Special prosecuting attorneys may be appointed by court.
98-33	Mar 9	MOTOR VEHICLES.	Who required to register as registered operators?
98-33	July 7	CONFEDERATE HOME. ELEEMOSYNARY INSTITUTIONS.	Receipts of sale of products from farm operated by home not to be transmitted to state treasurer.
98-33	Oct 5	Miss Agnes Mae Wilson	WITHDRAWN
98-33	Oct 12	NEPOTISM.	Where Board votes unanimously in favor of teacher, director who is first cousin of teacher violates Section 13 of Article XIV of the Constitution of Missouri.
98-33	Nov 25	ROADS & BRIDGES.	Special tax on distributable property of utility companies apportioned to districts wherein property located.
98-33	Nov 28	ROADS AND BRIDGES.	Refund for bridges of Missouri River to be made under Section 8129, R. S. Mo. 1929. Refund received, if in cash, should be paid to county, city or road district which advanced funds in the first instance.
98-33	Dec 16	TAXATION.	Grain stored in elevator subject to taxation.
98-33	Dec 30	SCHOOL FUND. COUNTY OFFICERS.	Money in county school fund or township fund withdrawn from treasury by warrant or order by board of directors or treasurer.
99-33	Sept 15	POLICE OFFICER.	Special motorcycle police in Carterville.
99-33	Dec 8	TAXATION-SALES TAX. CONSTITUTION.	House Bill No. 5 pending before the 57th General Assembly is unconstitutional.
99-33	Dec 21	SALARY OF DEPUTY CIRCUIT CLERKS.	County Court has right to fix salary of deputy circuit clerks immediately on the becoming effective of section 11812, Laws 1933, page 371, without regard to present deputy clerks assumed fixed term of office.

ESCHEAT FUND - Duty of State Auditor to make payment to representative of an estate. Sections 623 and 624 R. S. Mo. 1929.

February 16, 1933.

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Hon. Orin J. Adams
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Mr. Adams:

Your letter of January 25, 1933, addressed to the Attorney-General, attention of W. C. Buford, Assistant Attorney-General, together with a certified copy of a decree of the Circuit Court of Caldwell County, entered on the 28th day of January, 1933, and rendered at the November Term, 1932, "In the Matter of the Escheat of Martin Kanan, Deceased", has been referred to the undersigned for attention.

The certified copy of the decree contains the following recitals:

> "Now on this day comes Sarah Kenney, Administratrix of the estate of Martin Kana deceased, and presents her petition duly verified by her affidavit, setting forth and alleging that on the 18th day of June 1914, the same being the fourth day of the June Term 1914 of this court, there was ordered to be paid to the State Treasurer of Missouri, to the credit of the Escheat Fund, the sum of Seven Hundred Three and 9/100 dollars ($703.09), being the amount due Martin Kanan as his distributive share of real estate sold in partition by W. K. Feltis, Sheriff of Caldwell County Missouri, in the cause wherein Madge E. Kanan, Maurice P. Kanan, Orin H. Kanan, Infants, by their Guardian and Curator, were plaintiffs, against Sarah Kenney, Joanna Laws, Daniel Kanan, Edward Kanan, Ellen Lawler, William Kanan, Martin Kanan and Rose Sholtze were defendants, said order being of record in Book 2 at Page 166, of the records of this court.

"And it appearing to the court that a copy of said petition was duly served upon O. J. Adams, Prosecuting Attorney of Caldwell County Missouri, and that the said O. J. Adams, Prosecuting Attorney did, on the sixth day of July, 1931, make and file an answer herein, in accordance with the provisions of Section 637, Revised Statutes, 1929, and that in said answer the said Prosecuting Attorney admitted the facts set forth in said petition to be true; and the court having seen and heard the evidence finds that the allegations of the petition are true, and that Sarah Kenney is the duly appointed, qualified and acting administratrix of the estate of Martin Kanan deceased, and is entitled to the said sum of Seven Hundred Three and 9/100 dollars ($703.09), it is therefore ordered, adjudged and decreed that the State Auditor of Missouri be, and he hereby is directed to issue his warrant on the State Treasurer of Missouri, for the payment of said money, to the said Sarah Kenney, Administratrix of the estate of the said Martin Kanan, deceased."

You ask for an opinion from this department as to whether the decree meets the requirement of Sections 623 and 624, R. S. Mo. 1929. In the event that such decree and order of the court does meet the requirement of these sections and is properly certified to the State Auditor, then, you request an opinion as to whether such order is a sufficient voucher to the State Auditor, entitling and authorizing him to issue a warrant on the State Treasurer in favor of Sarah Kenney, as Administratrix of the estate of Martin Kanan, deceased, for the escheat fund in the state treasury and as described in the decree.

Section 623, R. S. Mo. 1929, provides,

"Within twenty-one years after any money has been paid into the state treasury by an executor or administrator, assignee, sheriff or receiver, any person who appears and claims the same may file his petition in

the court in which the final settlement of the executor or administrator, assignee, sheriff or receiver was had, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the prosecuting attorney, who shall file an answer to the same."

Section 624, R. S. Mo. 1929, provides,

"The court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim, but without interest or costs; a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant."

It will be noted that Section 623, R. S. Mo. 1929, provides that, "any person who appears and claims the same may file his petition ....". The estate of Martin Kanan, deceased, being in the process of administration, it was the duty of the administratrix to collect in the assets of the estate. She was not only permitted under Section 623, R. S. Mo. 1929, to file the petition within the time required by law, but this fund being an asset of the estate, it was the duty of the administratrix under Section 57 and 94, R. S. Mo. 1929, to collect in the fund for the benefit of the estate.

The applicant for letters of administration at the time of application is required under Section 13, R. S. Mo. 1929, to make an affidavit stating the names of the heirs of deceased so far as known to such applicant.

Sections 238 and 239, R. S. Mo, 1929, provide for the probate court to order distribution of the money or personal property of the estate according to the rights of those entitled to distribution of the estate.

It is the opinion of this department that when the state auditor shall have issued his warrant to the person found by the circuit court to be entitled to said escheat fund, he will have properly discharged his duty under the facts of this case, and under the above quoted sections of the statute. Representing the estate of Martin Kanan, deceased, as Administratrix, it becomes the duty of said administratrix under the order of the probate court to make distribution of the funds. A failure upon her part to discharge her duty in this respect would render she and her bond liable for such failure to the heirs.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:EG

CIRCUIT CLERK'S SALARY - Section 11786 R. S. Mo. 1929.

March 23, 1933.

FILED
1

Hon. Geo. F. Addison
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Mr. Addison:

Your recent request to the Attorney-General for an opinion relative to salaries of Circuit Clerks has been handed the undersigned for attention. In connection with your request you state the following:

"Mr. Wm. H. Welch, our Circuit Clerk, just now presented your letter of the 10th. inst. to me and requested me to write you for the opinion he desired relative to salaries of Circuit Clerks. Please render this opinion.

"As you know, of course, Sec. 11786, R. S. 1929 has previously ruled on as the section governing salaries of Circuit Clerks. It recites that Circuit Clerk's salaries are determined by multiplying the total number of votes cast at the last preceding presidential election by five. The total vote cast in this county last Nov. 8th. was 3017 which when multiplied by five gives this county under said sec. 11786 a population of 15,085, which also under said sec. 11786 would make the Circuit Clerks salary $2000.00 a year.

"Mr. Welch informs me that the county court refuses to pay him at the rate of $2000.00 a year but continue to pay him at the rate of $1900.00.

"Mr. Welch also informed me that he had read in the papers several times where Circuit Clerks all over the state are getting advantage of this increase."

Section 11786, R. S. Mo. 1929, is the provision under which the circuit clerk's salary is to be ascertained. It provides that he should be paid on the basis of five times the vote of the last presidential election. We construe the "highest vote at the last presidential election", to mean the highest vote cast for any office at that election.

We are of the further opinion that, if from a calculation of the vote as above indicated cast at the November election 1932, it should result in an increase of the population and thereby an increase in the salary, the circuit clerk is entitled to such increased salary and should be paid on the new basis.

The county court, no doubt, has in mind the constitutional inhibition against the increase in salary during the tenure of office. In this connection, we call your attention to the case of State ex rel Harvey v. Linville, 300 S. W. 1066, wherein the court holds,

> "Increase of officer's salary, which statute in force at time of his election permits, after election showing an increase in population, does not violate Constitution as increasing salary during officer's term of office since salary is fixed by law which permits ascertainment of amount of salary at subsequent periods."

We hope the above and foregoing satisfactorily answers your inquiry. In the event, however, you desire additional information upon the subject, we shall be pleased to go into the matter further.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA: G

BUILDING AND LOAN:
A - Power of Directors to amend by-laws.
B - Power of Directors to amend by-laws when present by-laws specifically give Board such power.

April 27, 1933.

FILED
1

Bureau of Building and Loan Supervision
State Capitol
Jefferson City, Missouri

Attention: Chief Clerk Mr. Acer

Dear Sir:

In your letter to this office dated April 19, 1933, you request an opinion as to whether Directors of the Association may provide in their by-laws to amend, change, or repeal at any regular meeting of the Board of Directors by a two-thirds vote of the members the by-laws of their Association.

Sec. 5590, Laws Mo. 1931, under the heading of "Building and Loan Associations" provides:

> "The shareholders of such corporation may make and adopt all necessary by-laws for the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state. A copy of such by-laws shall be filed with the supervisor of building and loan associations, and such by-laws, and any amendments thereto or changes therein, shall not be in force and effect, and no action shall be taken thereunder until the same are approved by the supervisor of building and loan associations as being practically and financially sound and in the best interest of the shareholders.***"

Sec. 4553, R.S. Mo. 1929, under the heading "Corporations" provides:

> "By-laws to direct a manner of taking the vote of the stockholders on the question of increasing or diminishing the number

> of directors or trustees, of changing the corporate name, may be made by the directors of the corporation for the time being."

It will be noticed therefore that neither under the general incorporation laws or under the sections of the statutes dealing specifically with building and loan associations are the directors of a corporation, given the power generally to make, amend or repeal by-laws.

The directors under section 4853 supra can only make by-laws concerning the matter stated; Brinkerhoff Co. vs. Lumber Co. 118, Mo., 447; 24 S.W. 139; and even these exceptions are not included in Section 5590 supra referring to building and loan associations.

Indeed as will be noticed by reference to Section 5590, Laws Mo., 1931, these duties are specifically intrusted to the shareholders of such corporations.

In the case of Klix et. al. vs. Polish etc. Parish, 137, Mo. App., 347; 118 S.W. 1171, the Court held:

> "By-laws of the corporation must be adopted by the members of the corporate body and cannot be changed by the directors unless the charter or fundamental law so provides."

In Endlich on "Building Associations", Sec. 271 the author says:

> "Ordinarily this power (to make by-laws) resides in the corporate meeting of the stockholders to be exercised by them in the same manner in which the charter directs them to exercise other powers or to transact other business.
>
> "It is only by express charter provision that this power can be delegated to particular officers or body of members, e.g. the Board of Directors."

In the case of Garlick et. al. vs. Mutual Building and Loan Association, 129, Ill. A. Reports 403, l.c. 412, the Court held:

> "Such associations can under the statute only adopt by-laws at a meeting of the stockholders."

Examination of the statutes has not brought to light any provision whereby directors have the authority to make by-laws or to amend them after they are made and adopted. The general rule of law applicable in such cases is that the power to alter, amend, and repeal the by-laws is vested in the same body in which is vested the power to enact them in the first instance, that is the shareholders and in such body only, 14 Corpus Juris 358.

It may be contended, however, that even though the statute vests the power to make by-laws in the shareholders, nevertheless if the shareholders see fit to delegate that power to the Board of Directors and do so, then the Board of Directors may properly exercise such power. In answer to this contention, we quote from 14 Corpus Juris 354.

> "The power to make by-laws cannot be delegated to a Subordinate Board or Officers by the body in which it is expressly and exclusively vested by the charter or governing statute; and it has been held that a by-law which surrenders to the directors the exclusive power to alter or amend the by-laws is unreasonable, illegal, and ultra vires."

To the same effect, see Alters vs. Journeymen, etc.,"Association" 19, Pa. Super. 372.

The above point has been passed on by this office in reference to the ratification of by-laws in connection with other savings and loan associations, in both instances in which the by-laws providing the Board of Directors may amend or repeal by-laws haveboen held inconsistent with the laws of Missouri because such power is vested in the shareholders only.

From the foregoing it is the opinion of this office that the Board of Directors does not have the power to amend the association's by-laws even though the present by-laws specifically give the Board such power, this power being vested in the shareholders of the association.

Very truly yours,

APPROVED_____
ROY McKITTRICK
Attorney-General

JOHN W. HOFFMAN,JR.
Assistant Attorney-General

JWH:AJ

5604 R.S.Mo 1929

Building and Loan Associations: No Power to give notes to retire stock.

April 29, 1933

FILED
1
19

Bureau of Building and Loan Supervision
State Capitol
Jefferson City, Missouri

Attention: Chief Clerk.

Dear Sir:

In your letter of April 13, 1933, you request an opinion from this office as to the legality of Building and Loan Associations giving notes to retire either full paid or matured stock under Section 5604 R. S. Mo. 1929. This section, however, has been amended in Laws of Missouri 1931.

Cases are few upon this point. Conflicting opinions will be found in cases arising in jurisdictions other than Missouri. We must of necessity however, confine ourselves to the law as we find it laid down in the cases arising in Missouri. No good purpose could be gained by an exhaustive review of authorities from other jurisdictions, for we regard the point as settled in this State.

In the case of Appeal of Powell, 93 Mo. A. 296, Judge Broaddus held:

> "* * * In this instance, the defendant corporation, instead of complying with the directions of the statute quoted, when the stock in question was presented, by retiring and cancelling it, and satisfying the holders from the cash monthly receipts in its treasury, resorted to the expedient of giving the notes of the association. If the cash receipts of the month on hand had not been sufficient for that purpose, then the retirement of the stock could not have been legally accomplished. This is too plain for controversy. Such a course of procedure wholly ignores the explicit mandatory provisions of the statute. It was a

> flagrant violation of the association's charter.*** It is true that if the by-laws of the defendant authorized the borrowing of money, the statute permitted it to so do for temporary purposes, but only for temporary purposes.* * * But money borrowed for such purposes could not, under the statute, be applied to withdrawals. In such cases the funds must come out of the monthly cash receipts of the corporation, acquired through the ordinary channels of its business.* * *"

This case has never been overruled in Missouri, and it is therefore the opinion of this office that a Building and Loan Association is without the power to give notes in order to retire full paid or matured stock under Section 5604 R. S. Mo. 1929.

Very truly yours,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

Attorney General.

JWH:MM

INFORMATION: Section 5429, subdivision 1, Section 4119--
Approved.

May 27, 1933 6-2

FILED

25

Hon. Orin J. Adams
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Sir:

We wish to acknowledge your letter of April 26th, 1933, which is as follows:

> "The opinion of your department is respectfully requested, as to whether the enclosed information, which is a substitute to a grand jury indictment, sufficiently charges an offense under Section 5429, R. S. 1929, relating to restrictions on loans made by officers of a trust company. The punishment provided is set out in Section 4119.
>
> The only cases that I can find on the subject are as follows:
>
> State vs. Settle, 46 S. W. (2nd) 882.
>
> State v. Lloyd, 7 S. W. (2nd) 344.
>
> Brown v. Stotts City Bank, 38 S. W. (2nd) 722."

The copy of information filed in your court appended to your letter, is based on statute 5429, subdivision B thereof, R. S. Mo. 1929. The punishment provided for such offense being found in Section 4119 R. S. Mo. 1929.

The information seems to be well drawn and apparently it meets the requirements of the statute as to both form and substance.

Section 4119 R. S. Mo. 1929, fixes the punishment, and you will notice that the punishment aimed at in this section is for the making or concurring in the making of loans by officers or directors to individuals or others.

The informations in the cases of State v. Lloyd, 7 S. W. (2nd) 344, and State v. Settle, 46 S. W. (2nd) 882, may be distinguished from the one drawn by you in that the information drawn in the Lloyd Case the court held was based on Section 5357, subdivision 8. The court reached the conclusion that the felony statute did not cover offenses against subdivision 8. Section 5357 relates to banks and Section 5439 to trust companies. Both sections are similar in character and purpose.

In the Settle case the court in holding the information bad said:

> "The accused should know whether he is charged with making an excessive loan either directly or indirectly, since the statute denounces both methods. If the excessive loan was made by means of a promissory note, defendant should be particularly advised of the charge in the information. And in like manner, if any other method of lending was used. It is a matter of common knowledge that banks lend money in a variety of ways." " "

And further:

> " " "It may be assumed that the prosecuting attorney in drawing the information tried to steer a safe course between the rock of Scylla and the whirlpool of Charybdis." " "

The court also made this observation at page 885:

> " " "The information is not attacked upon the ground that it does not negative the exceptions to subdivision 1. But the six exceptions may be epitomized thus: etc." " "

We do not believe the court means that the information must negative the exceptions but call them to attention in view of its previous statement at page 884, namely:

> "The law of this case is to be found in one section of the statutes and in part of another. Both are crudely drawn. They denounce acts in the disjunctive and the felony statute described the offense only by reference to the other statute which is of a civil nature." " "

We suggest it would be good pleading to set out the fact that W. S. Bathgate is an individual, so as to further contra-distinguish subdivision 1 and 8.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

J H:MM

SCHOOL AND SCHOOL DISTRICTS: Tuition and school warrants.

8-24

August 18,1933

FILED

39

Hon. Orin J. Adams
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Sir:

In your letter of July 26th, 1933, addressed to this department, you request an opinion relative to the school law. Your letter is as follows:

> "Your opinion is respectfully requested relative to the School law on the following proposition:
>
> A girl, whose mother is dead and whose father is a resident of the state of Nebraska, and who contributes $10.00 per month for the support of the girl, moved into a rural school district from Nebraska. She attended High School at Hamilton, in another district, as a freshman last year, and at the close of the school years, the Hamilton Board of Education requested payment of the tuition, and without the authority of the Board, and without the signature of the President of the Board to the warrant, the Clerk of the district issued a warrant to the Hamilton Board of Education for the payment of the tuition claimed which warrant was cashed and paid notwithstanding the fact that the same was not signed by the President of the Board. The girl resides with an uncle.
>
> I would like to have your opinion, FIRST, as to whether the Hamilton Board of Education could be compelled to refund the money so paid and received by them, and SECOND, as to whether the district was and is

liable for the payment of tuition in such cases."

We shall endeavor first to take up your second question "as to whether the district was and is liable for the payment of tuition in such cases." It is our opinion that prior to the 1931 session of the Legislature that the district would not have been responsible for the tuition of the high school student mentioned in your letter. Section 9207 R. S. Mo. 1929, would have been the governing section, said section being as follows:

> "The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

In 1931 the Legislature passed the following law relating to tuition. Section 16, p. 343, Laws of Mo. 1931:

> "The board of directors of each and every school district in this state that does not maintain an approved highschool offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupil shall not be counted in determining the teaching units of the district maintaining the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final: Provided further, that when any school district makes provision for transporting any or all of the children of such district to a central school or schools and the method of transporting and the amount paid therefor is approved by the state superintendent of schools, the amount paid in state funds for transportation, not to

> exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district: Provided, the provision of this act regarding the payment of tuition and transportation shall apply if the students attend any school supported wholly or in part by state funds."

As the high school student had evidently finished the district school and was pursuing her high school studies at the Hamilton high school, we think the above section is applicable. This section does not exempt anyone and the fact that the student in question had attended the district the prior year, in our opinion under this section the district would be compelled to pay her tuition regardless of the fact that she had been living with an uncle prior thereto and that her mother was dead and her father out of the state.

There has been some question as to the constitutionality of the above section. The e has been no direct action to test its constitutionality, and we are not passing on the question in this opinion, but, in giving you the opinion of this department, we are assuming that it is constitutional.

Section 9207 quoted above would still exempt the high school student in question from being personally liable from any tuition due to the fact that 'one of her parents is dead.'

As to your first question as to whether or not the Hamilton Board of Education could be compelled to refund the money so paid and received by them presents a peculiar situation. The Hamilton high school board has done nothing illegal in the demanding and receiving the money for the tuition, provided that the tuition was rightly due the district, but there enters the question of the warrant itself. The board of directors of the rural district did not order the warrant issued, the president of the board did not sign the warrant, the clerk issued the warrant and the same was cashed. We are at a loss to understand why a county treasurer would pay a warrant in such form.

Section 9312 R. S. Mo. 1929, provides the form of warrant:

> "The warrants thus drawn shall be in the following form, and shall be signed by the president of the board and countersigned by the district clerk:" * *No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund;" * * *"

Section 9311, omitting the parts which are not pertinent provides the duty of the president with respect to the warrant:

> "* * *and further provided, that before drawing any such warrant, the president of the board shall first visit the office of the county or township treasurer, and record his signature in a book to be kept in the office of said trasurer for that purpose, and for making such trip such president of the board shall be allowed one dollar per day and his necessary traveling expenses, payable out of the incidental funds of his district."

We are citing you herewith the decision which clearly shows that the warrant in question was illegal. School district v. Correll, 220 Mo. A. l. c. 325, 329, 331:

> "* * *This action is brought by a common school district against the county treasurer to recover funds wrongfully and illegally paid out by him. On trial to a jury the verdict was for plaintiff in the sum of $1411.20, and from the judgment thereon, defendant has appealed.* * *"

> "* * *There was also an offer to prove that the immediate predecessor in the office of the president of board had authorized C. A. Wells to issue warrants and sign the president's name by 'C. A. W.' There was no attempt to prove that any member of the board, other than the president, had any knowledge of such manner of issuing and signing warrants of the district or ever consented to such action in any manner. The most that can be said as to the offer of proof in respect to the board as a whole or members other than the president having knowledge thereof, is that, since a great number of warrants were signed in the manner heretofore indicated over a period of years, the board as a whole, must, by inference, have had knowledge thereof. But in a suit of this character no such inference can fairly be drawn. Our statute in relation to the payment of district

indebtedness of districts such as here, evidently was intended to place every possible safeguard around the issuance and payment of warrants. It requires an order of the board of directors and the warrant must specify clearly the species of indebtedness. The president of the board shall first visit the office of the county treasurer and record his signature in a book to be kept for that purpose. (Sec. 11222, R. S. 1919). It is also provided that the warrants shall be drawn in a particular form set out in the statute, 'and shall be signed by the president of the board and countersigned by the district clerk.' It is further provided that, 'No Treasurer shall honor any warrant unless it be in the proper form etc.' (Sec. 11223 R. S. 1919)."

"* * *The law, as heretofore indicated, has placed every safeguard around the paying out of the school districts' moneys. The act of the county treasurer in paying these warrants was directly in the face of the statute. The warrants signed by the clerk and payable to the clerk were in themselves a warning. The district is out its money for which no benefit was received. The act of the clerk was fraudulent. To permit the district to be thus defrauded of its money by the act of its agents would absolutely nullify the statutory safeguards the Legislature has been fit to provide. While no improper motive or lack of good faith can be attributed to defendant in this case, we do not believe it to be a situation in which the exception to the general rule of estoppel as to municipal corporations can be invoked. We hold, therefore, the trial court did not err in sustaining the objection to the evidence offered by defendant relative to an estoppel.

Some contention is made in regard to the fact that the president failed to record his signature with the treasurer as required by

> law. This was a duty which the law imposed but his failure to perform that duty can in no way effect the merits of this controversy. The warrants did not purport to be signed by him. The fact that his name was not recorded could not have misled the treasurer. More than that, there is no contention that he was misled thereby, but the principle defense is bottomed on the proposition that the clerk was authorized to sign the president's name. If such were true and estoppel would lie, the recording of the president's signature could not possibly have affected the situation.
>
> It is urged that defendant's duties and obligations were those of a bailee to exercise ordinary care to keep the property safe and return it when the time of bailment had expired as at common law. That could only be true where the statute fails to state what the treasurer's duties are. As heretofore pointed out, the statute specifically provides under what circumstances money of the district may be disbursed. Therefore the law of bailor and bailee has no application to this case.

In the above case the president of the board had permitted the clerk to sign his name for more than five years, thus we see the treasurer was held liable. In the instant case you state that the president did not even sign his name or authorize it to be signed by any one else.

In view of the foregoing authorities, it is the opinion of this Department that an action would lie to recover from the county treasurer the amount of the warrant in question by the rural school district.

Yours very truly,

OLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:MM

PROSECUTING ATTORNEY - Allowance of expenses in the county; allowance of expenses in change of venue cases in the county.

October 24th, 1933

FILED

55

Hon. George F. Addison
Prosecuting Attorney
Salem, Missouri

My dear Sir:

This acknowledges receipt of your request of October 5th 1933 for an opinion. Your request is as follows:

> "On February 23, 1932, an opinion was issued by the then Attorney General relative to Sec. 11316 of the R. S. M. 1929, to the effect that Prosecuting Attorneys are entitled to reimbursement for expenses incurred in attending to duties in other places than in the county seat. Please send me an opinion as to whether this is the true law on the subject and also as to whether the term expenses includes all reasonable expense incurred or mileage to and from the point, only."

Your request involves a construction of Section 11316 R. S. Mo. 1929, which is as follows:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall re-

> ceive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said court, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city".

This opinion involves three propositions of law:

1st. The distinctions between "Payment for services" and "Expenses", as made by the Missouri courts.

2nd. Whether the prosecuting attorney is entitled to expenses in the performance of his duties in the county outside of the county seat; and

3rd. Whether the prosecuting attorney is entitled to reasonable expenses in change of venue cases from one township to another.

We shall treat the three in order.

I.

THE COURTS APPLY A STRICT RULE IN DETERMINING COMPENSATION FOR AN OFFICE AND A LIBERAL RULE AS TO THE ALLOWANCE OF EXPENSES.

We have in Missouri a strict rule as to payment for services, fees, salary or compensation of an officer which requires the officer claiming such compensation to place his finger upon statutory authority for same. An officer can only recover such compensation as is specifically authorized by statute. Williams v. Chariton county,

85 Mo. 645 (1885); State ex rel. v. Adams, 172 Mo. 1 (1903); Hill v. Butler County, 195 Mo. 511 (1906)); 22 Mo. Dig. - officers -94.

Furthermore, an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. King v. Riverland Levee District, 279 S. W. 195, l. c. 196 (1926).

The courts have taken a different attitude with reference to the allowance of "expenses" necessarily incurred in the performance of official duties. The general rule as to such matters is found in 46 C. J. p. 1018, Section 246 in the following language:

> "But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where public duty is demandant of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done".

This rule has been accepted and consistently followed in Missouri. County of Boone v. Todd, 3 Mo. 140 (1833); Harkreader v. Vernon county, 216 Mo. 696 (1909); Buchanan v. Ralls county, 283 Mo. 10; 222 S. W. 1002 (1920).

In Ewing v. Vernon County, 216 Mo. 681 l. c. 694, the court said,

> "Conceding there are no fees allowed for the delivery of a deed after recording or for transmitting a deed from one county to another, yet the statute does not contemplate that he should pay money out of his pocket in the performance of his official duty. Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore, those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo".

It is, therefore, the opinion of this office that the question o "compensation", and its allowance by law, does not furnish the basis

for the adjudication of "expense" accounts.

II.

A PROSECUTING ATTORNEY IS ENTITLED TO REASONABLE TRAVELING EXPENSES IN THE COUNTY, OUTSIDE OF THE COUNTY SEAT WHILE IN THE DISCHARGE OF OFFICIAL DUTIES.

Under the provisions of Sec. 11316, supra, it is made the duty of the prosecuting attorney to "commence and prosecute all civil and criminal actions" in his county, "in which the county or state may be concerned, defend all suits against the state or county and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties, and forfeiters accruing to the state or county".

Thus we have the duties of the prosecuting attorney specifically defined and limited by law. We must, therefore, determine what is reasonably necessary for the prosecuting attorney to do in order to fully discharge these duties. Whatever is necessary, and reasonable expenses incurred therein, go together. In this connection we must turn to the decisions of the Supreme Court to learn the reasons for the allowance of expenses.

In Ewing v. Vernon County, supra, l. c. 693, the Supreme Court said,

> "Finally, we shall assume that among civilized people approved advances and results in scientific research make janitor services in public offices (i.e., the prevention of the propagation and spread of disease from filth), a necessity, and that the Legislature knew and gave effect to that fact.* * * * Is the general public not interested in and benefited by clean windows, clean floors, clean furniture, clean spittons, heat in winter and wholesome, healthy air at all times in public offices? It is useless to argue that question. It answers itself".

Reasoning by analogy, it may be said that the protection of life and property from the criminal element and the maintenance of law and order is equally essential to the general welfare as the prevention and control of disease. It is indispensable to successful prosecution of criminal cases pending that sufficient evidence be gathered upon which to successfully conclude said prosecution, and the gathering of such evidence in criminal cases pending often involves expense. In examining such expense accounts, the county court, before allowing any such items of expense, should ascertain whether or not the items and charges are reasonable and whether or not they were necessarily incurred by the prosecuting attorney in the official discharge of his duties.

In the foregoing cases from Ralls, Vernon, and Boone counties, supra, the only statutes involved provided for the payment to the county officer for his services. Yet, in all the above cases, without statutory authority, the court held that expenses cannot be imposed upon an official without reimbursement.

It is, therefore, the opinion of this office that the prosecuting attorney is entitled to his reasonable expenses which are necessarily incurred in the performance of his official duties within his county, away from the county seat.

III.

THE PROSECUTING ATTORNEY IS ENTITLED TO REASONABLE EXPENSES IN THE FOLLOWING CHANGE OF VENUE CASES FROM ONE TOWNSHIP TO ANOTHER.

This question involves a construction of that part of section 11316 R. S. 1929, supra, which is as follows:

> "In all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."

The term "Cases", as used above, includes both misdemeanor and felony cases because the laws of change of venue apply to each. The jurisdiction of justice courts in misdemeanor cases is in the township where it is claimed the offense was committed. Section 3414 R. S. 1929, states:-

> "Provided, that all prosecutions before the justices of the peace for misdemeanor shall

> be commenced and prosecuted in the township wherein the offense is alleged to have been committed."

This statute has heretofore been construed and followed by the courts in State v. Alford, 142 Mo. App. 412; and in State v. Taylor, 167 Mo. App. 104.

In misdemeanor cases, a change of venue is authorized and a case may be sent to another township in the county:

> "The defendant shall be entitled to a change of venue if he shall, before the trial of the case is commenced before the justice, or before the jury is sworn, file an affidavit, stating that the justice is prejudiced against him, or is a near relation to the injured party or prosecuting witness, stating in what degree, or interested in the subject of the offense, or is a material witness in the case, or that the defendant cannot have a fair trial in the township, on account of the bias or prejudice of the inhabitants thereof, as the defendant verily believes."
>
> - Section 3429 R. S. 1929.

> "If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers and a transcript of all his docket entries in the case to the next nearest justice in the township, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that the other justice in the township is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to the injured party or prosecuting witness, stating in what degree, or that he cannot have a fair and impartial trial before such justice in the township, in which case, then to a justice in some other township in the county, or, if the change be allowed on

> account of the bias or prejudice of the inhabitants of the township, then to a justice in some other township in the county; and the justice to whom such case shall be sent shall forthwith proceed with the same in like manner as if said cause had been originally brought before him. No more than one change of venue in the same case shall be allowed."
>
> - Section 3430 R. S. 1929

Further, the granting of a change of venue is mandatory. State ex rel. v. Watkins, 212 Mo. App. 501. When a case is transferred on a change of venue from one township to another, under the above statutory law, it is necessary for the prosecuting attorney "to follow" the case and prosecute the same. We think this duty is specifically covered by the provisions of Section 11316 R. S. 1929, supra, and that the expenses of the prosecuting attorney for such are specifically authroized by that statute which makes it his duty "to follow and prosecute or defend, as the case may be, all said causes, for which, * * by law he shall receive his actual expenses.

The above provisions, (Sections 3429-3430 R. S. 1929) are made applicable to preliminary hearing under the terms of Sec. 3432 R. S. 1929:

> "Sec. 3432. THREE PRECEDING SECTIONS APPLICABLE IN OTHER CASES.--The provisions of the next three preceding sections shall be extended to cases brought before justices or other magistrates for examination and bail, as provided in articles 3 and 5 of this chapter, so far as applicable. R.S. 1919 Sec. 3777.)".

It is therefore the opinion of this office that the prosecuting attorney, in either felony or misdemeanor cases, when a change of venue is taken in the justice court from one township to another, must follow the same and perform the duties imposed upon him by law, and in the discharge of such duties, he is entitled to reimbursement from the county for the reasonable and neces-

sary expenses incurred in discharging such duties.

Respectfully submitted,

FRANKLIN E. KREAGAN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FEK:FE

TAXATION: The County Board of Equalization has authority to assess property omitted from assessor's books for current year only; and any attempted assessment for previous years is void.

October 27, 1933.

10-28

FILED

Hon. Orin J. Adams,
Prosecuting Attorney,
Caldwell County,
Kingston, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion dated October 14, 1933 upon the following state of facts:

'"Your opinion is respectfully requested on the following statement of facts:

One Amos Clark, a resident of Hamilton, Missouri died in January, 1933, seized and possessed of a town lot in Hamilton, and $3500.00 in money, which had been on time deposit in a bank, for more than five years prior to his death. The personal property had never been assessed, and the fact that the decedent had this amount of money was unknown to the assessor, with the result that no assessment list was made covering the personal property at any time. The County Board of Equalization, at its meeting in April, 1933 ordered the said amount of $3500.00 assessed for the years 1928, 1929, 1930, 1931 and 1932, as 'omitted property'.

The question has been raised by the Administrator of the estate challenging the authority of the Board to assess the property, save and except for the year 1932, and I would respectfully request your opinion on the question.'"

I.

The County Board of Equalization has authority to assess property omitted from assessor's books for current year only; and any attempted assessment for previous years is void.

Section 9816, R.S. Mo. 1929 provides in part as follows:

> "The county board of equalization, at its annual meeting in each year, in addition to the powers now conferred by law, shall have authority to assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board, and in case said board shall add any property, real or personal, to said assessor's books, it shall cause notice in writing to be served upon the owner of such property, stating the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter, when and where such owner may appear before said board and show cause why said assessment should not be made."

61 Corpus Juris, p. 803 states the general rule applicable here:

> "Authority to assess property because of its omission from taxation in previous years must be derived from some statute, and, in the absence of a statutory provision conferring it, such an extension of the general power to add omitted property is not recognized. The provisions of some of the statutes empowering officers or boards to add omitted property to the assessment list have been held not to be restricted in operation to the taxes of the current year but to authorize the assessment of back taxes for former years on such property, in like manner and to the same extent as additions for the current year are authorized, subject, however, to such further regulations and limitations as may be specifically declared and made applicable to such addition of back assessments. Under other statutes, however, it has been held that the power of addition of any, or of particular property by the designated officer or board is limited to property omitted for the current year, without any power to add for omissions prior thereto; ****

In the case of State ex rel. Western Tie & Timber Co. v. Pulliam, et al, (Sup. Ct. Mo. 1911), 135 S.W. 443, respondents, composing the County Board of Equalization, met in September 1905, and took an oath that they would "fairly and impartially adjust the merchants' and manufacturers' statement book of all the merchants and manufacturers within Ripley County, Missouri as assessed by the County Assessor June 1, 1905." Among other proceedings was the following: "Added by the board of equalization: Western Tie & Timber Co. for 1904, tram R.R. $12,000.00; Western Tie & Timber Co. for 1905, tram R.R. $25,000.00." The Court held:

> "'The attempted addition of property for 1904 was invalid for the reason that neither in the act of 1903, nor elsewhere, is there power given to the board of equalization to add for assessment property omitted for any year prior to the then current year. The act of 1903 provides that the board shall have power to 'assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board.' This plainly refers to the books for the current year only, as they are the only ones 'under examination by said board.'"

Therefore, it is the opinion of this department that the County Board of Equalization had no authority to assess as omitted property, the personal property of Amos Clark for the years 1928, 1929, 1930 and 1931; however, the assessment of this property for the year 1932 was within the jurisdiction of the Board, and the assessment for that year was properly made.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

PUBLIC AUCTIONEERS: Discussed. Non-resident may not obtain license.

12-27

December 22, 1933.

FILED

65

Hon. N. R. Aldrich
Member of Legislature
Jefferson City, Missouri

Dear Mr. Aldrich:

We herewith render our opinion as requested by you on the following facts stated in a letter from Mr. C. R. Dawson of Grant City, Missouri, to you, which reads as follows:

> "I wish you would go into the Attorney General's office and ask Mr. McKittrick to look up the Revised Statutes of Missouri of 1929, Section 13718 and the following. Now this is in regards to the auction business. I want to know if these boys over in Iowa have a right to come over in Missouri and cut prices, unless they pay a fee that is set out in these sections I mentioned above.
>
> I like competition if it is clean, but I don't like this cut throat business. Business is hard enough to get now without having competition like this coming in on a fellow.
>
> If he thinks these boys should take out a license, have him write the Prosecuting Attorney or the Sheriff of this County."

It is our opinion that persons doing an auction business must have a license to do same. Chapter 111, R. S. Mo., 1929, pertains to public auctioneers and Section 13718 of said chapter

provides as follows:

> "No person shall exercise the trade or business of a public auctioneer by selling any goods or other property subject to duty under this chapter, or real estate, without a license."

Section 13730 reads as follows:

> "There shall be levied and paid upon the proceeds of the sales of all property at auction, except as hereinafter excepted, a duty to the state on the proceeds of all sales of personal property, except corporation stocks, one and a half per cent."

Section 13733 provides what sales of property at auction shall be free of duty, and reads as follows:

> "Sales of property at auction shall be free of duty in the following cases: First, when directed by any statute of this state or of the United States; second, in executing any order, judgment or decree of any court or justice of the peace of this state or any court of the United States, in case of bankruptcy or insolvency, pursuant to any law of this state or of the United States; third, when sold by any trustee in conformity to a deed of trust to secure the payment of debts; fourth, property of deceased persons sold by authority of executors or administrators; fifth, boats, vessels, rafts, lumber and other property wrecked, stranded or found adrift in any of the waters of or adjoining this state; sixth, live stock, agricultural productions, farming utensils and household and kitchen furniture sold in the county of the owner's residence; seventh, land or leasehold interest therein; eighth, each licensed merchant shall have the privilege of selling off, at auction, at

> the end of every twelve months after the commencement of his business, any refused stock of goods which he may have had on hand for six months preceding, without obtaining an auctioneer's license for that purpose."

It is thus seen that a person engaged in business as a public auctioneer must have a license when he sells goods or property subject to duty and must likewise account to the State for the duty.

We call attention to other sections of the statutes, to-wit, Section 13719, which reads as follows:

> "Every person who shall exercise the trade or business of an auctioneer without a license shall be liable for the amount of duty payable by law on the property sold."

Section 13725, reads as follows:

> "There shall be levied upon every license, to be paid to the collector before the delivery thereof, as follows:
> I--On each license for one month, twenty-five dollars.
> II--On each license for three months, fifty dollars.
> III--On each license for six months, seventy-five dollars."

Section 13728 provides for a bond to be given before any license shall be granted.

Section 13742 provides a penalty for violation of the provisions of said chapter.

Section 13720 reads as follows:

> "The clerks of the respective county courts shall issue, at each term, as many blank auction licenses for ten days, and for one, three and six months, respectively, as the county courts shall direct."

We call attention to this section in the statute, which in our opinion, as well as the other sections heretofore referred to, bars persons not resident of the State from coming into this State and here exercising the business or trade of public auctioneering; which is Section 13727 R. S. Mo., 1929, and reads as follows:

> "No person shall be permitted to sell property at auction of any kind unless he shall have resided in this state six months next preceding the time of making application for license."
>
> (Note underscoring.)

Therefore, if auctioneers, resident of the State of Iowa, come over into Missouri and here practice the business or trade of "public auctioneering," such violate the statute and are subject to prosecution for misdemeanor. Even if these parties from Iowa desired to be licensed they could not be. (Sec. 13727).

We believe that this answers your inquiry and if you will send a copy of this opinion to your Prosecuting Attorney with the request that if these violations are occurring in his County, we are certain that he will put a stop to them.

If we may be of further assistance to you please command.

Yours very truly,

James L. NormBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLN:EG

COUNTY WARRANTS Received by Circuit Clerk and Ex-officio Recorder for his salary, though unpaid and protested, cannot be offset by him against Recorder's fees collected by him and to be paid monthly to county treasurer

January 27th, 1933

FILED
2

Hon. E. W. Allisch,
Prosecuting Attorney, Phelps County,
Rolla, Missouri.

Dear Sir:

Your letter of January 12, 1933, contains the following inquiry and request:

> "Now the question I request your opinion is this: Can the Circuit Clerk and Ex-Officio Recorder turn in to the county court or treasury the unpaid salary warrants which he holds against the county and thereby butt accounts with the Recorder's fees which he has collected but has not as yet turned in to the county? In other words, can he keep Recorder's fees to the amount in unpaid salary warrants which he holds and surrender the salary warrants to the county? It would be a transaction similar to turning the county warrants in as payment of county taxes."

In our opinion there is no legal authority for the Circuit Clerk and Ex-Officio Recorder of Deeds' offsetting recorder's fees collected by him for the county against his unpaid salary warrants. Sec. 11786, R. S. Mo. 1929, requires the Circuit Clerk who is ex-officio recorder of deeds to pay such fees monthly to the county, and we can find no statute permitting him to apply such fees so collected upon his unpaid protested county warrants received by him for his monthly salary.

Section 9911, R.S. 1929, does permit legal holders of warrants to apply them in payment of county taxes for the same year as that of the warrants' issue

but that is the only authority given by law to make such offsets, and it cannot be extended beyond its express terms to other matters. So the law is written, and it must, of course, be followed.

Respectfully yours,

Denton Dunn,
Assistant Attorney-General

Approved:

Roy McKittrick,
Attorney-General

Corporation permittee for sale for consumption on premises having an affiliate corporation used as adjunct to first named corporation and controlled by same interests as control first named corporation, cannot under wholesaler's permit sell to the affiliate corporation 3.2 per cent beer in original package for resale by latter corporation under permit as merchant to sell in original package.

April 15, 1933.

FILED
2

Hon. E.W. Allison,
Prosecuting Attorney - Phelps Co.,
Rolla, Missouri.

Dear Mr. Allison:

Your letter reads as follows:

"I write to ask your opinion concerning the recently passed beer law, but will have to state to you the facts on which to predicate my question as follows:

The Rolla Wholesale Grocery Company is a corporation organized under the laws of Missouri and doing business at Rolla, as is also the Ozark Supply Company. The Rolla Wholesale Grocery Company, as the name implies, deals in groceries at wholesale.

The Ozark Supply Company deals in fuel oil, fuel of all kinds, and maintains a bottling works and sells and distributes carbonated beverages at retail and wholesale.

The Rolla Wholesale Grocery Company has procured a permit as a distributor of beer. It happens that some of the directors and stockholders of the Rolla Wholesale Grocery Company are also directors and stockholders in the Ozark Supply Company, but as above stated, the two companies are separate and distinct corporate units and operate at different locations in the city.

Now the question is, since the Rolla Wholesale Grocery Company holds a permit from the State and Federal government for the distribution of beer, would they be permitted to sell the Ozark Supply Company for resale in the original package, providing the Ozark Supply Company holds permits for that purpose, in view of the latter part of Section 13139H, Senate Bill No. 26, passed by the 57th General Assembly and recently approved by the Governor?

I might add one further fact, to-wit: That the Rolla Wholesale Grocery Company as a corporation does not own or hold any stock or interest in the Ozark Supply Company, nor does the Ozark Supply Company as a corporation own or hold any stock or interest in the Rolla Wholesale Grocery Company. The sole and only interlocking interest is that

certain business men happen to be directors and stockholders in both corporations."

Section 13139H reads as follows:

"***and provided further, no manufacturer or distributor, to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company or corporation, applying for, securing, or holding, a permit under either sub-paragraph "C" or sub-paragraph "d" of Section 13139e of this Act. "

The only authority for selling in original package to consumers direct is a permit authorizing sale as a grocer or merchant. Therefore, although you do not say, I assume the affiliate corporation has a permit to sell 3.2 per cent beer as a grocer or merchant. Your letter states that the Rolla Wholesale Grocer Co. has a wholesaler's permit.

I assume from your letter the Ozark Supply Company is used as an adjunct to the Wholesale Grocer Co. and that while the wholesale grocer company as a corporate entity does not own any of the stock of the Ozark Supply Company, yet the same people control and operate both corporations; and under these conditions it is my opinion the provisions of the Act legalizing the sale of 3.2 per cent beer hereinabove quoted, prohibiting a holder of a wholesaler's permit to sell 3.2 per cent beer from being directly or <u>indirectly interested</u> in the business of any corporation applying for or holding a permit to sell said beer for consumption on the premises where sold, or selling same as a merchant, would make illegal the sale of beer by the Rolla Wholesale Grocer Co. to the Ozark Supply Co.

Very respectfully yours,

EDWARD C. CROW.

APPROVED:

Attorney General

ECC:AH

COUNTY COLLECTOR: Consolidation of offices of county collector and county treasurer in certain counties - Senate Bill No. 76.

SB 76 A-C 12 13 a 1 33

June 19, 1933.

FILED
2
30

Hon. E. W. Allison
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Mr. Allison:

Your letter of June 7th addressed to this department received in which you request an opinion of this office, and which letter of request is as follows:

"As Prosecuting Attorney of Phelps County, I write to request the opinion of the Attorney-General on the following facts:

At the general election in November, 1932, a County Treasurer was elected by the people along with other elective officers but the person elected failed to qualify in that he failed to give the necessary bond under the law. Therefore the old County Treasurer is still holding the office.

A law recently passed by the last General Assembly of Missouri consolidates the offices of County Collector and County Treasurer after the year 1936, as I understand it. I write to ask the opinion of the Attorney-General as to whether or not the new law would apply to the case existing in this county wherein the elected County Treasurer failed to qualify and the present Treasurer is a holdover, and whether or not the law would be applicable at this time and if not applicable now, would said

law be applicable in so far as consolidating the offices of County Collector and County Treasurer after the general election in November, 1934.

Thanking you in advance for your opinion on this matter, I am, "

The new law which you refer to in your letter is evidently Senate Bill No. 76, which repeals Sections 12130, 12133, 12134, 12137 and 12138, Art. VIII, Chap. 85, R. S. 1929, and enacts eight new sections to be known as Sections 12130, 12132a, 12132b, 12133, 12134, 12137, 12138 and 12138a.

Your request for an opinion is divisible into two questions; first, whether the new law would apply to the case existing in your county wherein the elected county treasurer failed to qualify and the present county treasurer is a holdover, second, whether or not the law would be applicable at this time and if not applicable now would said law be applicable insofar as consolidating the offices of the county collector and county treasurer in your county after the general election in 1934.

We are assuming that your county (Phelps) has a population of less than 40,000 according to the last decennial United States census and is not under township organization, which information we have obtained from the Blue Book, 1931 and 1932. Therefore, your county would come under the provisions of Section 12132a of Senate Bill No. 76, which is as follows:

"On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed

by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

By the reading of this section it will be seen that it does not operate until "on and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936". On the last above date the county collector shall take over the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer, and therefore, it will not affect the situation in your county wherein the elected county treasurer failed to qualify and the present treasurer is a holdover for the very obvious reason that the law will not be operative until December 31st, 1936.

Our answer to the first question answers your second question and it will be seen that the above section would not be applicable insofar as consolidating the offices of county collector and county treasurer after the general election in November, 1934, for, as stated above, it does not become operative until December 31st, 1936.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

STATE PURCHASING AGENT LAW:

Appellate courts do not come within the provisions of the state Purchasing Law.

June 23, 1933.

7-4

FILED
2

Hon. Perry T. Allen,
Presiding Judge,
Springfield Court of Appeals,
Springfield, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 7, 1933, in which you inquire as follows:

"We have just received a copy of Senate Bill 192, which provides for a state Purchasing Agent. No where in the bill is the Springfield Court of Appeals or either of the other appellate courts mentioned. We would like to have an opinion from your office, as to whether our Court comes under the provision of said bill.

Heretofore, our purchases, which are usually in small amounts, have been made through local dealers and we would like to know if it will be necessary to buy all supplies through the Purchasing Agent, at Jefferson City.

Under Sec. 1904 R. S. 1929 the Judge of this court have always made the contracts for rent and quarters, which we have been able to secure at greatly reduced rates.

We have had our court dockets printed in Springfield, which has been very satisfactory. We have been able to hold up sending the docket to the printer until the last moment and thus get most of the cases on the printed docket. If we had to send the docket away to be printed we would probably have to send it several weeks before the time fixed by law (which is 40 days before the first day of the term) for sending out the docket and all of the cases which were filed after the docket is sent to the printer would not appear on the printed docket. As the court is up with its docket it is essential that the cases appear on the docket so that we will know how many we are going to have, and how to set them.

We would also like to have an opinion regarding our appropriations. In House Bill 661 our appropriations are divided into four sub-divisions - A. B. C. D. Under "B" which is the appropriation for the upkeep of the libraries at Springfield and Poplar Bluff, we are allowed

$2000.00, which is a reduction of $3,000.00 from the appropriation for 1931-32, and is not sufficient to pay the subscriptions to the Reporter System, without the purchase of any new text books.

We might be able to make some saving under "D" and we would like to know if the amount saved under "D" could be used for the purchase of books, office furniture and equipment. As several of these sub-divisions seem to overlap, we would also like to have an opinion from you as to just how close we are confined as to purchases under sub-divisions B. C. & D.

Personally, I feel that we probably are better advised as to our needs and ability to keep within our allowance than a Purchasing Agent, unless he should be pretty well informed about our situation. The Legislature cut us down about $2,000.00 this year, and we really only asked for what we needed. We can not keep our Libraries up with what has been appropriated. However, I have hopes that when times get better, which I think will not be long, the boys will raise the ante for us.

With best regards to you and all the other boys, I am."

You inquire whether or not Senate Bill No. 192, which created the office of state Purchasing Agent, applies to the appellate courts. No where in the Act is the word "courts" used. The Act refers throughout to "departments." Section 11 of the Act provides * * * "The term 'department' as used in this Act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the State." Whether or not, therefore, the Act applies to appellate courts depends on whether or not courts come within the legislative definition of the word "department" as above defined.

Legally and in common parlance the words "office, board, commission, bureau and institution" are not courts. It must be determined then whether the appellate courts are a "department" as the term is used in this particular Act. Article 3 of the Constitution of Missouri provides:

"The powers of the government shall be divided into three distinct departments; the Legislative, Executive and Judicial * * * *."

The word "department" is used in that provision of the Constitution, and the Judicial Department is named as one of the three Departments of the government. We do not believe, however, that the work "department" as used in the above constitutional provision means the same as the word "department" as used in the state Purchasing Agent Law. In Section 11 of the Act, the

word "department" is defined. If the word "department" as used in the Act has the same meaning as the word "department" as used in the Constitution, then it would have been unnecessary for the Legislature to define the word "department" as meaning "department, office, board, commission, bureau, institution" because all of the enumerations contained in the legislative definition of the word "department" come under one of the three departments of the government, to-wit; the Legislative, Executive or Judicial. If the Legislature had intended the word "department" as used in the Act to mean the same as the word "department" as used in the Constitution, then it would have been unnecessary and merely surplusage to further enumerate the various bodies, because they would be included in the meaning of the word "department". The entire government of the State, including every office, board, commission, etc., must necessarily come under one of the three departments created under Article 3 of the Constitution. It is, therefore, apparent that when the Legislature took pains to define the word as it did in Section 11, it did not intend that the word "department" as defined, should have the same meaning as the word "department" did in the above constitutional provision. The word "department", as used herein, is used in its usual and ordinary meaning. In common parlance, the word "department" has a wellknown and well-recognized meaning, to-wit; a division of the executive branch of the government. The various powers and duties of the executive branch of the government are delegated and performed by various sub-divisions, known as "departments." As an example of the sub-divisions of the executive branch, we have the Insurance Department, the Highway Department, Fish and Game Department, etc. In popular concept there is no division of the Legislative branch of the government known as a department, nor in popular concept is there any division of the Judicial branch of the government known as a department. The Legislature, therefore, must be deemed to have used the word "department" in the common meaning so generally used in common parlance, to-wit; a division of the executive branch of the government.

In 18 C. J. 490, "department" is defined as: "One of the divisions of the Executive branch of the government; a part or division of the Executive government." Both by legal definition and in common parlance the word "department", as used in the Act, must be deemed to have been used to mean a division of the executive branch of the government. Such ruling must govern our decision in your inquiry, unless appellate courts can be said to be included in the words, "or any other agency of the State," which is the balance of the definition as set out in Section 11.

The general rule in the construction of Statutes, known as ejusdem generis, is that where in a Statute general words

follow particular words, the general words will be considered as applicable only to persons or things of the same general character or class and can not include wholly different things.

> State Savings and Loan Co., v. Swimmer, 236 S. W. 1057,
> State ex rel Goodloe v. Wurdeman, 227 S. W. 64,
> Industrial Loan Company v. Missouri State Ins Co.
> 3 S. W. (2d) 1046.

It appears then that the words "any other agency of the State" do not tend to broaden the enumeration set out in Section 11 so as to include courts, because courts are not of the same general character or class as the enumerated classes, "department, office, board, commission, bureau, institution."

In construing Statutes, words of common use are to be construed in their natural and ordinary meaning. Hannibal Trust Company v. Elzea, 286 S. W. 371; Bellerive Inv. Co., v. Kansas City, 13 S. W. (2d), 628.

In view of the foregoing, it is therefore the opinion of this Department that the word "department" must be construed to mean a division of the executive branch of the government, and not to include appellate courts; that no other word in the definition or the general words at the end can give the construction that this Act was intended to apply to the appellate courts of this State.

As to your second inquiry, it is our opinion that the appropriations must be used for the purpose for which they are made. In 36 Cyc, 895, it is said,

> "Appropriation Acts specify the purposes for which the appropriations made shall be used, and appropriations made for one purpose can not be used for any other purpose."

It is, therefore, our opinion that you are not authorized to divert funds appropriated for a particular purpose to be used for purposes other than those specified. If some of your appropriations are of such character as might reasonably fall within more than one specific appropriation, we see no objection in paying for such purchases out of either appropriation.

Very truly yours,

Frank W. Hayes
Assistant Attorney General

APPROVED:

_____

Attorney General.

FWH:S

TAXATION: No authority in Senate Bill 80 for refund of penalties, interest or costs paid prior to April 13, 1933

Cross index under 'Delinquent Taxes."

August 29,1933

FILED
2

Hon. E. W. Allison
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Mr. Allison:

We herewith acknowledge receipt of your request for an opinion of this office, your request reading as follows:

> "* * *In cases where taxpayers paid delinquent and back taxes between January 1st, 1933 and April 13th, 1933, the dates respectively on which 1932 taxes became delinquent and the 'remission' law became effective, and included in their payment all penalties, interest and costs, should such taxpayers be entitled to recover the amount of such penalties, interest and costs, in view of the fact that other taxpayers who waited till after Senate Bill No. 80 became effective were relieved of all their penalties, interest and costs for taxes delinquent over the same years.* * **"

Senate Bill 80, providing for the remission of penalties, interest and costs, under certain circumstances, is found on page 423 of the Laws of 1933. Section 1 of said Bill is as follows:

> "In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for the year 1932,

> the collectors of revenue of the counties and cities of the state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; Provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1933; if paid after June 30, 1933, and not later than August 31st, 1933, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31st, 1933, and not later than October 31,1933, such remission shall be 50 per cent of such penalties, interest and cost; if paid after Oct. 31, 1933, and not later than Dec. 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs: Provided, further, that after Dec. 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

It is to be noted that this act only applies to taxes which remain unpaid, which are "on the delinquent personal lists" and are "upon the lists of delinquent and back taxes." No mention is made at any place in the bill of any refund to be allowed to those who had paid penalties, interest and/or costs prior to the passage of the Act. Accordingly no relief is granted to them. The Act was one primarily designed to accelerate the payment of taxes so as to relieve the state and county governments from the financial distress resulting from four year of economic depression. To permit a refund of penalties, interest and costs would defeat the purposes of the Act.

The failure of the legislature to permit the refund or legislate on the matter of penalties, interest and costs already paid into the public treasuries was recognized and considered by our Supreme Court in the case of State ex rel. v. Koeln, 61 S. W. (2d) 750. The defendant in that case, the collector of revenue of St.Louis, attacked Senate Bill No. 80 on the ground

(among others), that the Bill was unconstitutional as it discrimated between taxpayers in not permitting or authorizing a refund of penalties paid prior to the passage of the Act. Judge Hays, in considering the point, stated as follows on pages 753,754:

> "* * *In support of his contention the respondend argues in substance that the act would destroy the uniformity of 'burden of taxes' to which it relates, that no provision is made to restore uniformity by refunds to those who have already paid delinquent taxes together with the penalties, and no provision made for differentiating between delinquent taxpayers who are needy and those merely shiftless. Evidently the argument proceeds upon a misconception as to what constitutes taxes in the proper sense. We have already pointed out that the penalties affected are not part of the tax. The tax is presumed to have been uniformly and properly imposed. Both the tax and the 'burden' thereof remain without change. <u>The state is under no obligation to refund taxes or penalties, or both, once they have been paid.</u> * * *"

It is therefore the opinion of this office that there is no authority under Senate Bill 80 for the refunding of penalties, interest and costs paid into the public treasuries prior to April 13, 1933.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General.

APPROVED:

_____
Attorney General.

HGW:MM

BANKS & BANKING: Taxes payable by liquidator of failed bank for taxes assessed before failure.

11-3

October 31, 1933.

FILED
2

Hon. E. W. Allison
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Mr. Allison:

This office is in receipt of your letter of October 9th with request for an opinion from this Department, which letter is as follows:

> "The Bank of St. James, in this County, closed its doors and was was placed in the hands of the Finance Commissioner about August 22, 1932. It had at the time outstanding capital stock of $50,000. The assets of this bank are now in the hands of a Special Deputy Finance Commissioner as liquidation officer.
>
> A tax bill for general state, county, road and school purposes has been presented to the Special Deputy Finance Commissioner against the capital stock of this closed bank for about $700.00. This tax bill is based on the 1932 assessment.
>
> I write to ask your opinion if the above taxes are legally chargeable against the assets of the bank now in the hands of the Special Deputy Finance Commissioner and should be paid by him out of such assets, or whether they should be paid by individual owners and holders of shares of capital stock."

The question is: Are state, county, road and school taxes chargeable against the assets of a failed bank on an assessment made before the failure of the bank, or should the taxes be paid by the shareholders of the bank?

Section 9765, as amended by Laws of Missouri, 1931, page 357, and Section 9766 R. S. 1929, are the sections which pertain to the assessment of banks, which two sections are herein set forth and are as follows:

"Sec. 9765. ASSESSMENT OF MANUFACTURING AND BUSINESS COMPANIES AND STOCK IN OTHER CORPORATIONS.--The property of manufacturing companies and other corporations named in article 7, chapter 32, insurance companies organized under the laws of this state and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate names. Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business; Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent. of the capital, surplus and

undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinbefore provided: Provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers in addition to such taxes shall not exceed one hundred dollars per annum. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required to be sent to the state auditor, valuation of all property assessed under this section under the head of 'corporate companies,' and, in addition thereto, he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, on or before the twentieth day of February, in each year, an abstract of the assessment of all corporations or persons doing a banking business in his county, showing the name of each bank, the number of shares of stock and their face value, the amount of reserve funds, undivided profits, premiums or earnings, and all other values, together with the assessed value thereof, also the value of the real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book."

"Sec. 9766. SUCH TAXES, HOW PAID AND RECOVERED. The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

In an early case in regard to the payment of taxes of a failed bank assessed before the failure of same, the Supreme Court said:

"The state has a right paramount to other creditors to be paid taxes due it from

> assets in the hands of a receiver, and the court should see that such taxes are paid before distribution to other creditors, although the demand was not presented by the collector within the time prescribed by the court for the presentation of claims."
>
> Greeley v. The Provident Savings Bank et al., Sexton, Collector, 98 Mo. 458 (Quoting from the syllabus).

In the case of State ex rel. Bay, Collector, v. Citizens' State Bank, 202 S. W. 382, l. c. 385, 274 Mo. 60, which was a suit b the Collector of Revenue of Shannon County against the Citizens' State Bank for taxes due said County assessed in June, 1913, against the stockholders of the Birch Tree State Bank, which had formerly done a banking business in said county and which bank and its assets had been bought by the Citizens' State Bank, the following was said by the court:

> "The legislators of this state evidently contemplated that a large portion of the stock in both state and national banks might be held by nonresidents of the state; that in some of the banks there might be a large number of shareholders whose respective interests were small; that it would be both inconvenient and expensive for the collector to recover the tax from the delinquent stockholders as provided in sections 11461, 11463, and in the Laws of 1913, at pages 739 and 740. Hence section 11359, R. S. 1909, was enacted to meet the above difficulties. Said section reads as follows:
>
> > 'The taxes assessed on shares of stock embraced in such list (referring to section 11357, supra) shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made.'
>
> The language used in this section is plain, unambiguous, and mandatory in its terms. It should receive a reasonable construction at our hands, and unless the Birch Tree State

Bank, without any sale of its assets having been made, in a suit against it for these taxes, could have shown that it had under its control no funds or property with which to pay the same, the collector, on the record before us, would have been entitled to a judgment against said bank for the taxes aforesaid. State ex rel. v. Shryack, 179 Mo. loc. cit. 440, 78 S. W. 808; (Many other cases cited to support this statement) * * * * * * * * * * * * * * * A recovery is not permitted on the theory that the bank is primarily liable for the taxes assessed against the shareholders, but upon the principle that the latter have been legally assessed with thepayment of same; that the bank is required by section 11359, supra, to pay the taxes thus assessed; that it has refused to pay the same, although having in its possession funds or property applicable to the payment thereof.

On the facts above stated, the Birch Tree State Bank could have been held as garnishee for the taxes assessed against the respective stockholders. In order to avoid a multiplicity of proceedings against the stockholders, the Legislature saw fit to provide a more direct way of dealing with the subject by the passage of section 11359, which requires the bank to pay the tax, and to become reimbursed as therein provided. We are of the opinion that there is neither hardship nor injustice, under the circumstances aforesaid, in requiring the bank to pay the tax, nor in holding it liable therefor in case of its neglect or refusal to pay the same.

In State ex rel. v. Shryack, 179 Mo. loc. cit. 440, 78 S. W. 812, we said:

> 'After the assessment is thus made against the shares of stock in the names of the shareholders, it is legal to make the bank pay the tax and recover it from the stockholders. Section 9155, R. S. 1899; National Bank v. Commonwealth, 9 Wall. 353 (19 L. Ed. 701); Aberdeen Bank v. Chehalis Co., 166 U. S. 440 (17 Sup. Ct. 629, 41 L. Ed. 1069).' (Italics ours.) "

In the case of State ex rel. Donnell, Collector, v. People's Bank of DeSoto, 263 S. W. 205, which was,

> "* * a suit, at the relation of the collector of the revenue of Jefferson county, against the People's Bank of DeSoto, in charge, at the time, of a special deputy bank commissioner, appointed under the statute, to assist in the liquidation of the business of the bank, it being insolvent. The action is based on a claim for unpaid back taxes alleged to be due the county for the year 1920, in the sum of $2,423.66, including interest and the collector's commission.
>
> After the overruling of a demurrer to the petition, alleging that no cause of action was stated, defendant filed, as an answer, a general denial, and the issues thus joined were tried by the court, resulting in a judgment in favor of the plaintiff, and against the defendant, for $2,512.61, and the further sum of $251.26, attorney's fees, and that the plaintiff was entitled to priority of payment over the depositors and general creditors of the bank. From this judgment, rendered January 21, 1922, the defendant has appealed."

This case is decisive of the question submitted in your letter above, and the Supreme Court said, in affirming this judgment, the following:

> "The manifest purpose of section 12775, supra, is to afford the assessor authentic information as to the owners of the shares of stock in a corporation, that such shares may be properly assessed against them. St. L. Bldg. & Sav. Ass'n v. Lightner, 42 Mo. loc. cit. 426. Why thus assessed when the banking corporation (section 12777, supra), is required to pay the taxes on the shares, and be repaid by the shareholders, is of no concern to us in the solution of the question at issue. The Legislature, in its wisdom, saw fit to prescribe this manner of assessing and collecting

> taxes of this character, and therefore our inquiry is limited to ascertaining and determining whether the statute has been substantially complied with in furnishing the assessor with the required information to enable him to make a valid assessment. * * * * * * * * *"

A more recent case on the question submitted in your letter is the case of State ex rel. Wyatt, Collector of Revenue, v. S. L. Cantley, State Finance Commissioner, 325 Mo. 67, l. c. 74, 26 S. W. l. c. 979. The court said :

> "This brings us to the final contention of appellant which is, 'that the assessment and payment of this personal tax by the corporation itself is a mere matter of convenience, the banking corporation serving as the agent of the stockholders, which agency ceased when the banking corporation closed its doors and discontinued the banking business, said corporation not being responsible for any taxes falling due after the date of the closing of such institution.'
>
> Whether or not, as between the bank and its shareholders, the bank is their mere agent for the payment of their taxes, the statute in plain terms makes the bank directly responsible for the payment of the taxes assessed against the shareholders. The duty of the bank to pay the tax, if it has assets with which to pay it, is a personal liability of the bank to the tax collector. (State ex rel. Bay v. Citizens State Bank, supra, pages 68 to 71.) It affirmatively appears from the agreed statement of facts that the Peoples Bank of Charleston had ample assets to pay the taxes and that said assets were transferred to the Peoples Exchange Bank in consideration of the agreement of the latter bank to assume the liabilities of the former bank. Under the facts in this case the Peoples Exchange Bank must be held liable for the payment of the taxes assessed against the shareholders of the Peoples Bank. (State ex rel. Bay v. Citizens State Bank, supra.)

> The reasons for the existence of the statute requiring a failed or closed bank to pay the tax assessed against its shareholders out of its assets in the hands of its liquidating officer or of the successor bank, which takes over its assets and assumes its liabilities, are, to say the least, just as controlling as they are where the bank is a live and going concern when the assessment against its shareholders is made.
>
> Assuming, as appellant contends, that the collector may proceed against the individual shareholder, if he can reach him, and may collect from him directly the tax on his shares assessed against him, it does not at all follow that the collector may not assert his claim against the assets of the bank made liable for the tax in the first instance and collect the tax from any person, corporation or officer in possession of such assets and standing in the shoes of the bank whose shareholders were assessed."

While the shareholders of the bank are primarily liable for the payment of the taxes on their shares of stock in the bank, yet it is the duty of the bank to pay the taxes assessed on the shares of stock as provided in Section 9766 R. S. 1929, supra, and if, and when, a bank fails and is placed in the hands of the Commissioner of Finance, the Collector of Revenue may look to and compel payment of the taxes out of the assets of the failed bank on a legal assessment made before the failure of the bank.

It is, therefore, the opinion of this Department that the Special Deputy Commissioner of Finance in charge of the affairs of the Bank of St. James, should pay these taxes out of the assets of the bank. However, this does not relieve, in our opinion, the shareholders from payment of same because it is their primary duty to do so.

Should there be any further question relative to this matter, we shall be glad to give the matter further attention.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General.

Judges: Salaries begin on qualifying by taking oath of office for all judges. Retiring Circuit Judges have one day in January this year. Number of days in calendar month makes division to calculate divisions of monthly salary.

Note appended correction

January 19, 1933

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Att: Mr. E. L. Pigg, Warrant Clerk.

Dear Sir:-

We have your inquiry of January 17, 1933 as follows:

> " Will you please advise the Auditor's office concerning pay of the Circuit Judges and the Supreme Court Judges for the month of January. Are the retiring Circuit Judges entitled to one or two days pay, and also what number of days pay are the Court of Appeal Judges and Supreme Court Judges to receive? Is the pay to be divided on the basis of thirty or thirty-one days to the month?"

The terms of the Circuit Judges begin on the first Monday in January next ensuing after their election (Sec. 1937, R.S. Mo. 1929), they shall hold their offices for the term of six years (Sec. 25, Art. VI, Constitution of Missouri).

The result is that a retiring Circuit Judge receives one day's pay only in January, that is for January 1st, if his successor qualifies on the first Monday, which is January 2nd, this year. Of course, if the new judge fails to qualify by taking his oath of office, the retiring judge holds over up to the day of his successor's qualifying, unless the retiring judge disqualifies himself by qualifying in another office or otherwise vacating the office. (Sec. 5, Art. XIV, Constitution of Missouri).

Under Sec. 7, Art. VI, Constitution Missouri, the ten year terms of the Supreme Court judges begin on January first next ensuing after their election, but they are not entitled to the salary of the office until they enter upon the duties of their offices by taking the Constitutional oath of qualification. Under the same Article, Courts of Appeals judges also begin their terms of office on January first, or as soon as they qualify likewise on or after January first (Sec. 1825, R.S. Mo. 1929).

As the annual salaries are paid in twelfth parts or each calendar month, each month's pay where a division is necessary should be divided by the number of days in the calendar month, or thirty-one in January.

As Judge Burney and Tipton qualified on January 2nd, 1933, they will draw thirty-thirty firsts of the January salary of the office, the other thirtyfirst in each case going to their predecessors in office, but Judge Burney, is entitled to one day's salary as Circuit Judge of Jackson County, as his term as such did not expire until the night of January First, 1933.

Judge Hays did not qualify until January 9th,1933, so that Judge Ragland is entitled to eight days as holding over that long in January after the expiration of his term of office, and Judge Hays is entitled for the same length of time to his salary as Circuit Judge which office he retained until he took his oath of office as Supreme Court Judge.

Respectfully yours,

DENTON DUNN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DD/mh

COUNTY HIGHWAY ENGINEER - Authority under Sec. 8011 Revised Statutes of Missouri, 1929 to appoint assistants - definition of assistant.

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P
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January 25,
1 9 3 3.

FILED
3

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

My dear Mr. Anderson:

I acknowledge receipt of your request addressed to this office of January 12, 1933 endorsed upon the letter of Mr. John M. Crutsinger wherein you request the opinion of this office as to the authority of the County Highway Engineer of St. Louis County to employ truck drivers, mechanics, operators and superintendents.

We have received a request from William H. Bray, County Counselor, which request is as follows:

> "I am asking for your opinion as to whether or not the county court in counties of a class of St. Louis, has the power of appointing the various offices in the Highway Engineer Department."

As both of these requests cover the same situation and undoubtedly the same set of facts, we are answering you both with this one opinion.

The first proposition to be considered is the status of the County Surveyor, to-wit: Is he, or is he not Ex-officio Highway Engineer of St. Louis County by virtue of his office as County Surveyor? It is the opinion of this office that without any doubt Mr. Crutsinger is the Ex-officio County Highway Engineer by virtue of the provisions of Section 8011, Revised Statutes of Missouri, 1929:

> "***Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex-officio county highway engineer***."

The portion of Section 8011 above quoted is the portion that applies to the County of St. Louis, which has a population

(Hon. C. Arthur Anderson)

in excess of 50,000, a taxable valuation in excess of forty-five million dollars, and is adjoining a city in excess of 100,000 in population. Your county falling under such classification, the wording of the statute is mandatory and the county court has no discretion or choice in the matter of the appointment of the Ex-officio Highway Engineer.

The question as to the constitutionality of the proviso above referred to has been heretofore passed upon by the Supreme Court and has been held valid. This was determined in the case of

STATE ex inf.BARKER vs. SOUTHERN, 177 S.W. 640, l.c. 643

where it is said:

> "***The purpose in each clause of the sentence was to create a distinction based upon differences in population and in wealth; for if, as the Legislature rightfully assumed, counties of 50,000 inhabitants would acquite coincidentally a taxable wealth of $45,000,000, it might be well assumed that such counties would not have less wealth when they should embrace or adjoin cities containing 100,000 inhabitants. *** Our conclusion is that this proviso of the statute is not obnoxious to the provisions of the Constitution forbidding the enactment of certain special laws. *** "

While it is true that in the above case the Supreme Court held the last proviso of Section 8011 to be unconstitutional, it also held that such unconstitutionality of that portion did not affect the constitutionality of the portion of the statute herein quoted.

The second proposition to be considered is the power of the County Surveyor and Ex-officio Highway Engineer to make the appointments referred to in your request for this opinion. The authority, if any, of the County Surveyor and Ex-officio Highway Engineer to make these appointments is founded upon Section 8011, Revised Statutes of Missouri, 1929. This section provides, among other things, that:

> "***the county surveyor, as surveyor and ex-officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum.*** "

Before directing your attention to the purport of the above proviso, we will first consider the contention made by the County Counselor of the County of St. Louis, to-wit: That this legislative grant is violative of Section 36, Article VI of the Constitution. That

(Hon. C. Arthur Anderson)

section of the Missouri Constitution is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

The above provision of the Constitution is interpreted by the Legislature in Section 2078, Revised Statutes of Missouri, 1929, which is as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

While it is true that the County Court cannot be deprived of powers granted by the Constitution, it is the creature of the statutes and has only such power and jurisdiction as is plainly and clearly given by the statutes. See:

KING vs. MARION COUNTY, 249 S.W. 418, L.C. 420

Even then it has been held that there are acts of a certain nature which may be delegated to others. Corpus Juris, Volume 15 at page 465, states as follows:

> "Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant."

In many statutes the Legislature has placed on county officers the duties and responsibilities of certain ministerial and executive acts. It has done so in Sections 8010, 8012, 8013, et seq., which sections provide for the powers and duties of the County Surveyor and Ex-officio County Highway Engineer. It is accordingly the opinion of this department that the foregoing proviso of Section 8011 is constitutional and that under said proviso the County Surveyor and Ex-officio Highway Engineer has the power and authority to appoint his assistants subject to the approval of the County Court, and that he alone possesses that power. This opinion is confirmed by the decision of the Supreme Court of this state in the case of

BUTLER vs. SULLIVAN COUNTY, 106 Mo., page 630.

The plaintiff in this case, an attorney, was attempting to collect from the defendant county for professional services rendered on behalf of the county under an employment by the county court to prosecute suits for delinquent taxes. In this case the Supreme Court stated at page 638 the following:

> "The only power conferred upon county courts *** is contained in Section 6883, Revised Statutes, 1879, which provides that it shall be the duty of the prosecuting attorney of each county to prosecute all suits for taxes under this article. County collectors shall have power, with the approval of the county court, *** to employ such attorneys as may be deemed necessary *** and the court in which suit is brought shall, if plaintiff obtains judgment, allow such attorneys a reasonable fee ***
>
> The statute neither authorized the county court to employ to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; his compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment ***"

The third proposition to be considered is the meaning and significance of the word "assistants" as used in Section 8011. This section as heretofore stated, provided in the following language that the Highway Engineer may appoint his assistants:

> ***"The County Surveyor as Surveyor and Ex-officio County Highway Engineer, may appoint, subject to the approval of the County Court, such assistants as may be necessary *** "

Although there has been no decision in this state defining or interpreting the word "assistants", as used in the above statute, we find the following definition in Corpus Juris, Volume V at page 1327:

> "Assistant - One who helps, aids or assists; one who stands by and helps or aids another. The word is susceptible of considerable variety of meaning, to be made definite in each case by the aid of the context, the circumstances, and other materials of interpretation. It has been held to include an agent, or servant, and a deputy."

The above definition was adopted practically verbatum from the Missouri case of

STATE ex rel BARTRAM vs. LONGFELLOW, 95 Mo. App. 600

in which case a building inspector of the City of St. Louis was held to be an assistant to the Commissioner of Public Buildings.

Upon this authority it is the opinion of this office that the County Highway Engineer is empowered to appoint, with the approval of the County Court, such assistants as are necessary to enable him to perform all the duties that are required of him by the statutes. In other words, such employees of the Highway Engineer as directly assist and help him in fulfilling his duties under the statutes are the ones contemplated by the statute as his appointive assistants.

In applying the foregoing to Section 8013, it is our opinion that this section requires the Highway Engineer to supervise the construction and maintenance of the roads of the county. By the very words of the statute his duties are to supervise and not to perform the details of construction or maintenance.

Webster defines "Supervise" - "To oversee for the purpose of direction; to superintend", and this definition has been adopted by various others, including our own. See

BOLTE vs. BROUGHTON, 21 S.W. 1125; 115 Mo. 271

In applying our conclusion to Section 8012 it is our opinion that this section requires the Highway Engineer to be the custodian of the tools, materials and machinery belonging to the road district and the county. He has the care and responsibility and the safe-keeping of the county property therein enumerated and may, under certain conditions deliver the same to others, but the statute gives him no further right or duty than that of a custodian. He is not required to maintain or repair the tools or equipment, nor to do other than to keep them safely in a proper place. None of the approved definitions of custodian of property, or custodian, require more than a safe-keeping. The New York courts in

PEOPLE vs. MUNN, 41 How. Prac. 293

have defined custodian of property as follows:

> "" The term 'custodian of property' as contradistinguished from legal possession, means the charge to keep and care for the owner, subject to his order and direction without any interest or right therein adverse to him*** -

Corpus Juris in Volume 17 at page 439 defines a custodian as

> "*** One whose duty it is to watch, guard and account for that which is commanded to his custody"

and approves the definition of "custodian" as set out in

TURNER vs. COFFIN, 74 Pacific 962

which is as follows:

"Custodian. The term means the keeping, guarding, care, watch, inspection, preservation or security of a thing"

and further defines "custodian of property" to be

"The keeping of property by one who is charged with or assumes responsibility for its safety"

In applying our conclusion to Section 8014, we find the duty placed on the Highway Engineer by this section to be that of inspecting the condition of the roads, etc. of the county. There can be little doubt in reasonable minds as to what duties are here required of the Highway Engineer. He shall visit the various parts of the road system for the purpose of determining their condition and cause any bad or damaged condition to be remedied. This places a duty on him of investigation and correction, but not necessarily to do the actual manual labor in correcting the bad or damaged conditions found.

In considering Section 8011 the duty this statute places on the Highway Engineer is to maintain an office and to keep and preserve various records. These duties may be many and varied and it does not take any stretch of the imagination to perceive that in a large county with considerable activity in this department the duties required by this section might by themselves become more than any one or two persons could efficiently perform.

The foregoing consideration of these statutes has been made for the purpose of determining the duties of the Highway Engineer under these sections. This was necessary in order to ascertain the type and kind of assistants the Highway Engineer is empowered to appoint subject to the approval of the County Court. In other words, the Highway Engineer is without authority under Section 8011 to appoint assistants to perform duties which the statutes do not directly and approximately place upon the shoulders of the Highway Engineer.

We have not in the foregoing paragraphs considered all of the statutes placing a duty upon the Highway Engineer and do not by this opinion limit his power to appoint to the duties as set out in the four sections herein considered. In other words, in determining whom he may appoint as assistants, all the statutes placing a duty on him must be considered, and such employees as properly fall in the class of "those who stand by and assist" may properly be appointed by the Highway Engineer with the approval of the County Court.

Very truly yours,

APPROVED:_____
Attorney General

H.G. [illegible]LTNER, Jr.,
Assistant Attorney General

W:AH

COUNTY FUNDS: Minimum rate of interest. Cannot be invested in bonds.
COUNTY TREASURER; Term of Office--Old Treasurer holds over until new treasurer has qualified--amount of bond
12189-12133 RSM-1929

January 26, 1933

FILED
3

Mr. Omer H. Avery
Attorney at Law
Troy, Missouri

Dear Sir:

Your communication of January 14th, has been referred to me and the request for an opinion upon the following items:

First: "Lincoln County's depositary bank failed. The County Court advertised for bids for the money and has received no bid; in fact, all the County Bankers have appeared before the Court and stated that they do not wish to carry the account at the statutory interest rate. Consequently, the Court is "at its rope's end" with regard to the statutory designation of a depositary. I wish your opinion as to the right of the County Court with reference to the funds of the County; that is, whether or not it can deposit the funds in a bank without interest, or for a lesser rate than the statute requires."

Second: "The newly elected County Treasurer is unable to give bond and qualify, due to the lack of a county depositary; the old treasurer, of course, continues to act until the new treasurer is elected and qualified. I wish your opinion as to whether or not the County Court has the right under the Statute to declare the office of Treasurer vacant and thus bring about the appointment of a new Treasurer, or, does the old Treasurer hold over until the new treasurer qualifies, regardless of the length of time involved."

Third: "Has the County Court authority to invest the county funds in Government bonds."

Fourth: What bond shall be required of the County Treasurer."

In answer to this first proposition, we believe that Section 12189 R.S. Missouri 1929 provides a minimum rate of interest of one and one-half per centum, per annum, and is controlling upon the County Courts. The County Court is without authority to accept less than this rate of interest.

The deposit of public funds without the bond prescribed by statute makes the fund so deposited a trust fund for which a preference is allowed against the bank accepting the said funds. Consolidated School District v. Bank, 22 S.W.(2d) 781.

In answer to your second proposition, the County Court has not authority to declare the office of Treasurer vacant since the previous County Treasurer holds office until his successor is elected and qualified. Section 12130, R.S. Mo. 1929. Under this Section and Section 5, Article XIV, Missouri Constitution the old Treasurer holds over until the newly elected Treasurer qualifies by giving a bond as is provided for. Section 12133, R.S. Mo. 1929.

In answer to your third question we hold that the County Court has no authority to invest the County money in any security whatever unless specifically authorized by statute to do so. The only authority lodged in the County Court to invest any money is found in Sections 9250, 9251, 9252 and applies only to money belonging to the capital of the school fund. The failure of the County Court to select a depositary makes the County Treasurer and his bondsmen liable for the County funds. Section 12198, and the acceptance of a bond by the County Court which does not comply with the statutes, does not change this rule. State v. Thompson, 22 S.W.(2d) 196. Bragg City v. Road District, 20 S.W.(2d) 22.

As to what is a sufficient compliance with the statute with reference to a depositary bond, see Boone County v. Cantley 51, S.W. (2d) 56, l.c. 58, wherein the Court indicated that any non-compliance with the statute in order to be fatal must prejudicially affect some right involved.

In answer to your fourth proposition, the County Treasurer after his election shall enter into bond to the County in a sum not less than 20,000 to be fixed by the County Court. Section 12133, R.S. Mo. 1929. Under this section, the County Court should determine as a matter of fact how much bond is necessary to adequately protect the County. It is not necessary for the County Court, in fixing the amount of the bond, to attempt to fix it at an amount sufficient to cover the entire four year term of his office, since the County Court has the authority every six months to require the County Treasurer to give a new bond or additional security. Section 12134, R.S. Mo. 1929.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

Approved:

ROY McKITTRICK
Attorney General

SALARIES-JUDGES- Dividing January warrants as to terms, Court of Appeals' judges begin 1st Monday like circuit judges. (Opinion modifying January 19th opinion.)

January 28th, 1933

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Attention Mr. E. L. Pigg, Warrant Clerk.

Dear Sir:

I find an error in our opinion to you of January 19th, 1933,with reference to the beginnings of the terms of the Courts of Appeals' judges, which under Sec. 1890, R. S. 1929, begin like the circuit judges on the first Monday in January following their election instead of on January first like the Supreme Court judges.

There seems to be no other provision as to the Springfield Court of Appeals judges, and as to the St. Louis Court of Appeals, Sec. 16. Art. VI. of the Constitution of Missouri begins its judges' terms on the first Monday in January, next ensuing their election, though Sec. 4 of Amendment of 1884 to Article VI of the Constitution started the terms of the first judges of the Kansas City Court of Appeals on January 1, 1885, which fact led the writer to assume that the appellate judges' terms had all so continued.

However, it would seem best to follow the statute Sec. 1890, R. S. 1929, as uniform as to all the judges of the courts of appeals, as has no doubt been the practice.

Respectfully yours,

DD/N

Denton Dunn
Assistant Attorney-General

Approved:

Roy McKittrick,
Attorney-General

COUNTY COURT.
PENALTIES: County Court has no authority to waive penalties on delinquent taxes or change time when such penalties go into effect.

FILED
3

February 2, 1933

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Your inquiry in letter dated February 1, 1933, is as follows:

> "Is the County Court vested with the authority to waive the penalty of one per cent per month imposed by Section 9914, R. S. Mo. 1929, upon property taxes, referred to in that section, collected by the collector of taxes after the 1st of January; or can the County Court extend the time when such penalty will become effective?"

Article VI of Chapter 5 of the Revised Statutes of Missouri, 1929, contains a scheme for the levy, assessment and collection of taxes in the State of Missouri by the various authorities or bodies authorized to levy, assess and collect same. Subsequent sections relate to when and how such taxes shall be collected and paid. Section 9914 and Section 10152 Revised Statutes Missouri, 1929, provide penalties for the failure to pay taxes at the time when the same are required by the law to be paid.

So long as the two last named sections are in effect it is as much the duty of the collecting officers to collect the penalty as it is to collect the body of the tax itself, and there is no statute in existence in this state which expressly or impliedly authorizes the county court in Missouri to waive the collection of such penalties when the same have accrued, or to change the time fixed by statute when such penalty shall commence.

The only authority a county court has to compromise or remit interest "by which is meant penalty" on taxes is to be found in Section 9950 Revised Statutes Missouri, 1929, and that may be done only when it appears to the county court that any tract

of land or town lot contained in a "back tax book" is not worth the amount of taxes, interest and costs due thereon, or where it appears to such court that the town lot or tract of land would not sell for the amount of such taxes, interest and costs, such court may compromise such taxes which we take it also includes interest. This section applies only to delinquent taxes as contained in a "back tax book".

It is the opinion of this department that the county court of any county in the State of Missouri does not have authority to waive the accrued penalties on delinquent taxes, nor can such court lawfully fix the time when such penalties will become effective, as that has been done by the legislature.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

TAX ATTORNEY -ALLOWANCE OF FEES ALLOWED under Sec. 12941 -

COLLECTOR : Employment of tax attorney; fees allowed.

Op. 711

February 3rd, 1933

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

Your letter of January 30th requesting an opinion from this department has been handed the undersigned for attention. In your inquiry you state the following facts:

> "We would like to ask you for anoopinion regarding the fees allowed the tax attorney appointed to assist the collector in his collection of taxes.
>
> It is our understanding that prior to 1921 the statutes provided that such attorney should receive his fees only for bringing suit for the collection of taxes, but this section, after the amendment of 1921, at present reads that such attorney shall be employed " for the purpose of collecting such taxes and prosecuting suits for taxes under this article. '
>
> The question, as it has been brought to us, is, after the collector has filed his back tax bill with his tax attorney, and collection of the tax is made before suit has been filed in Circuit Court, is the tax attorney entitled to any fees? "

By section 12944, R. S. Mo. 1919, it was made the duty of the collector to enforce payment of back taxes by suit; and, for that purpose, he was authorized to employ such attorneys as he deemed necessary who should receive as fees in any suit not to exceed ten per cent of the amount actually collected and paid into the treasury, as agreed upon between such collector and attorneys in writing, and after approval by the county court. The fee of the tax attorney was to be taxed as costs and no fee or compensation could be paid him for such services except as provided for in said section.

As suggested in your letter, the above section was amended by the laws of 1921, page 676, and as amended now appears in the 1929 statute as Section 9952.

The only changes made by this amendment of Section 12944 was by adding the words "collecting such tax and" immediately following the words " and for the purpose of" in the 13th line of Section 9952, and adding the words " and an additional sum not to exceed $3.00 for each suit instituted for the collection of such taxes where publication is not necessary and not to exceed $5.00 for each suit where publication is necessary "which wording follows "and paid into the treasury" in the 22nd line thereof as will be disclosed by a comparison of the two section.

That portion of the section pertinent to your inquiry, as amended and brought forward into the 1929 statutes, reads as follows:

> "Sec. 9952. Enforcement of payment of taxes by suit, etc.---If, on the first day of January of any year, any of said lands or town lots contained in said 'back tax Book' remain unredeemed, it shall be the duty of the collector to proceed to enforce the payment of the taxes charged against such tract or lot, by suit in a court of competent jurisdiction of the county where the real estate is situated, which said court shall have jurisdiction, without regard to the amount sued on, to enforce the lien of the state or *such cities; and for the purpose of collecting such tax and prosecuting suites for taxes under this article, the collector shall have power, with the approval of the county court, or in such cities, the mayor thereof, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not tonexceed ten per cent of the amouht of taxes actually collected and paid into the treasury, and an additional sum not to exceed $3.00 for each suit instituted for the collection of such taxes, where publication is not necessary, and not to exceed $5.00 for each suit where publication is necessary, as may be agreed upon in writing, and approved by the county court, or in such cities the mayor thereof, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided * * * ** * *."

After the first day of January of any year under the above section, it shall be the duty of the collector to proceed to enforce payment of the taxes remaining unredeemed in the "back tax books" for this purpose (which is the enforcement of the taxes), the collector is authorized and empowered to employ attorneys with the approval of the county court, and for their services in that behalf the statute provides that such attorneys shall receive a sum not in excess of ten per cent. of the back tax which may be actually collected, together with a definite fee dependent upon the character of service obtained upon the delinquent taxpayer in the event of suit.

Prior to the amendment of the statute there was no provision for a fee except upon the filing of suit, therefore such statute was susceptible of but one interpretation or construction.

> "The words 'and' and 'or' when used in a statute are convertible as the sense may require. A substitution of one for the other is frequently resorted to in the interpretation of statutes when the evident intention of the lawmakers requires it." (Words and Phrases, Vol. 1, page 388, par. 1 and cases thereunder cited.)

The Legislature no doubt realizing that the real purpose of the law originally was the collection of the back tax , not necessarily by suit, but by any method which would accomplish that end, added the words " collecting such tax and"; being aware also that in many cases the court costs occasioned by a suit would greatly exceed the tax and all penalties assessed thereon, was no doubt actuated in making the amendment in relation to a nominal fee on the filing of suit as above noted.

One could hardly construe the words " for the purpose of collecting such tax and prosecuting suit for taxes under this article" as requiring a double duty before the attorney should receive any compensation. If a tax is collected by the attorney, it would necessarily release any duty upon his part for the prosecution of a suit therefor. Then, too, it occurs to us, that the Legislature anticipated that a collection might be made wihout an actual suit and the costs necessarily connected therewith, by providing for a percentage fee upon the amount actually collected and turned in to the treasury and an additional sum for each suit instituted by such attorney. Having stated what, in our opinion,

was the legislative intent, we interpret this section as meaning that where the attorney has been duly appointed with the approval of the county court, an agreement reached between him and the collector as to what his percentage fee should be, and the back tax bills actually delivered to him for action, he would be entitled to add the contracted percentage agreed upon with the collector as a part of the costs to be recovered from the taxpayer. He could not, however, add the additional fee of three or five dollares provided for in said section, unless and until he had actually instituted suit.

Very truly yours,

Carl C. Abbington,
Assistant Attorney-General

CCA/N

In re: Transfer of funds by treasurer from state interest fund to general revenue fund.

February 27, 1933

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:-

You have written me the following letter:

> "In 1924, the Fund Board transferred $110,081.53 from the State Revenue Fund to the Interest Fund, and in 1925 they transferred $27,945.98 from the Revenue Fund to the Interest Fund. The Revenue Fund has never been repaid.
>
> Please advise if the Fund Commissioner has authority to transfer back to the Revenue Fund from the interest Fund this amount of money which was borrowed from the Revenue Fund."

Section 11496, R. S. Mo. 1929 relating to duties of Fund Commissioners provides,

> "It shall be the duty of the fund commissioners, * * * before the interest on bonded indebtedness of the state falls due--or before the maturity of any state bonds, or the date when option bonds of the state are to be paid--to draw their requisition on the state auditor for the amount necessary to pay such interest on bonds, and the necessary expenses to be incurred in transmitting such money; whereupon the state auditor is required to draw his warrant upon the state treasury therefor in favor of the president of the board of fund commissioners payable out of the current appropriation made by the general assembly for the state interest fund or state sinking fund as the case may be; and if there is not sufficient money in the treasury belonging to such funds to pay such warrant, then the deficiency should be paid out of any other moneys in the treasury belonging to the general revenue fund."

This statute did authorize the transfers made in 1924 and 1925 from the state revenue fund to the interest fund.

I fail to find any constitutional or statutory authority that would in my opinion authorize you to take from the interest fund the amounts transferred thereto as above set forth, in 1924 and 1925. This interest fund is a constitutional fund and it was the intention, in my opinion, that when money goes into the interest fund that it should be applied to that purpose only.

The only theory upon which legislative act might be based to authorize the return of this money drawn out from the revenue fund in 1924 and 1925 would, in my opinion, be that the constitutional intent to have the interest fund kept intact and no withdrawals therefrom, should be applied only to money raised by taxation for the interest fund but I can find no decision of our courts upon this question and I am not even prepared to say that a legislative act if passed, would authorize you to transfer from the interest fund back to the state revenue fund the amount of moneys borrowed from the revenue fund in 1924 and 1925.

Very truly yours,

EDWARD C. CROW

APPROVED:

ROY McKITTRICK
Attorney-General

ECC/mh

CIRCUIT CLERK'S CHANGE OF VENUE FEES -- Sections 11786 and 11815 R. S. Mo. 1929.

February 28, 1933.

FILED
3

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Your request for an opinion from this department upon the matter of fees of circuit clerks has been referred to the undersigned for attention. You request an opinion upon the following question:

> "This department would be pleased to have an opinion from the Attorney General as to the total amount of fees allowed to a Circuit Clerk in any county, particularly as to whether or not the Circuit Clerk is entitled to retain in addition to his regular salary paid to him by the County Court, fees received from any or all of the following sources: drainage district cases, change of venue cases, i.e., cases coming in from other counties, and fees for making up transcripts in sending a case out of the county on a change of venue.
>
> Has the proviso contained in the latter part of Section 11811, R. S. Mo. 1929,
>
> > '**** Provided, that the clerks of the circuit courts shall be allowed to retain, in addition to the fees and deputy hire allowed under this section, all fees earned by them in cases of change of venue from other counties; ***'
>
> been repealed by implication by any later or other law, or is it still in effect?

The only sections pertaining to fees of Circuit Clerks, that we are able to find, are Sections, 11785, 11786, 11787, and 11810 to 11830, R. S. Mo. 1929."

11786

Section 11876 R. S. Mo. 1929, provides in substance that the clerks of the circuit courts shall receive for their services annually certain sums dependent upon the county population. In counties having a population of less than 7,000, the clerk shall receive no salary but shall be allowed to retain all fees earned by him, out of which he shall pay his deputies and assistants. In any county wherein the clerk of the circuit court is ex officio recorder of deeds, the offices shall be considered one for the purpose of said section. The section is not applicable to counties containing a city of 75,000 population or more, or to counties containing 80,000 and less than 150,000 population in which circuit court is held in two or more places; a method is therein provided for ascertaining the county population. The duties of a circuit clerk who is also ex officio recorder are therein set forth.

Sections 11785, 11787 and 11788 R. S. Mo. 1929, set forth the fees to be charged by the respective clerks for their services in connection with said office.

Section 11813 R. S. Mo. 1929 provides that the circuit clerk and his deputies shall be paid out of the county treasury in monthly installments, etc.

Section 11814 R. S. Mo. 1929, provides in part that,

"It shall be the duty of the clerk of the circuit court to charge and collect for the county, in all cases, every fee accruing to his office and to which he may be entitled under the provision of Sections 11785, 11787 and 11788 or of any other statute, ********** Such clerk shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, ***** ********** upon the filing of said report to forthwith pay over to the county treasurer all monies collected by him during the month *********."

Section 11816 R. S. Mo. 1929, provides a penalty for failure of the clerk to pay into the county treasury the money collected by him as fees from said office.

Section 11850 R. S. Mo. 1929, is the repealing clause brought forward into this statute from the laws of 1915, pp. 378 and following, which was the original Act changing the method for payment of salary of circuit clerks from a sum dependent upon the amount of fees collected by them in their respective offices to that of an annual salary irrespective of such collected fees.

By reference to the repealing clause in the Session Act 191[illegible], p. 380, it will be seen that the intention of the Legislature was to repeal so much of the law then in existence as was in conflict or inconsistent with said new act. The law in force at that time, with reference to the compensation of circuit clerks, was Section 10732 R. S. Mo. 1909, and amendments thereto in the Session Act 1911, p. 384, and the Session Act 1913, p. 702, which provided as has been stated that the circuit clerk should retain the fees collected by him up to a given amount, dependent upon the county population, and, among other provisions, said section and amendments thereto contained the following:

> "Provided, that the clerks of circuit courts shall be allowed to retain, in addition to the fees and deputy hire allowed under this section, all fees earned by them in cases of change of venue from other counties;"

Section 11815 R. S. Mo. 1929, being a part of Section 10732 R. S. Mo. 1909, contains the same provision as herein above set out with reference to change of venue fees.

Section 10732 R. S. Mo. 1909, was specifically named in the repealing clause of the 1915 act and said section being inconsistent with the laws of 1915 with reference to the payment of circuit clerks, was thereby repealed as to all counties to which the act was made applicable.

In the Session Act of 1921, p. 606, the Act of 1915 was sought to be amended. The act of 1921, however, by reason of the defective title thereto, was declared by the court in the case of State ex rel Summers v. Hamilton 312 Mo. 157, to be inoperative. In the Session act of 1931, p. 189, the attempted amendment of 1921 was repealed.

From the above and foregoing it is the opinion of this department that Section 11876 R. S. Mo. 1929, fixes the full compensation of all clerks of the circuit court to which said

section is made applicable, and that such clerks are not entitled in addition thereto to the compens ation or fees mentioned in Section 11815, supra, but, to the contrary, all fees accruing to said office and so collected by said clerk, must be turned over to the county treasurer in accordance with the statutory provision as hereinabove set out, and he shall receive his salary upon a warrant issued upon the treasurer. Said salary, as we interpret the statute, is in lieu of all fees, including those in change of venue cases.

Yours very truly,

CARL C. ARINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:EG

CRIMINAL COST: MEDICAL ATTENTION: Sections 8534, 8554, 3825 and 3840, R. S. Mo. 1929.

February 28, 1933

OPINION NO. 3

FILED
3

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Your request for an opinion from this department on the subject of Criminal Cost -- Medical Attention, has been referred to the undersigned for attention. In connection with your request you submit the following:

> "Where a defendant is convicted and sent to the penitentiary, is the State liable for medical attention furnished such prisoner while in the county jail?
>
> For the reasons set out further in this letter, this office has thus far taken the position that such an expense is a "defendant's cost", and under Section 3825, R. S. Mo. 1929, not taxable against the State.
>
> The only law, which we find applicable to this situation, is that contained in the following statutes:
>
> > Section 8533, R. S. Mo. 1929: Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention

> are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation.
>
> Sec. 8534. The expenses of imprisonment of any cirminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings.
>
> Sec. 8554. In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid.

Article 19 of Chapter 29, R. S. Mo. 1929, is the general law pertaining to criminal cost, Sec. 3825 being the one applicable here, we believe. It provides:

> Sec. 3825. Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state, or county.

The real question here, it seems, is whether this medical expense is a "defendant's cost". If it is, then under Sec. 3825 above, the State is clearly not liable for its payment. By this section, the Legislature has expressly recognized that a "board bill" is a cost incurred on defendant's part. We have taken the view that medical costs is as much a defendant's cost as is his board bill of the per diem or mileage of his witnesses.

In controversies arising out of our past position on this question, our attention has been frequently called to the injustice resulting from the non-payment of the physician, but as to this, we can see no alternative for any executive officer, but to follow the wording of the Statutes, and their interpretation by the courts.

> Liability for the payment of costs in criminal cases is strictly a statutory liability, and the question of justice or injustice to the parties claiming cost is not a matter for consideration here.
>
> State ex rel v. Oliver, 116 Mo. 188;
> Bright v. Pike County, 69 Mo. 519;
> Person v. Ozark County, 82 Mo. 491.
>
> No one is entitled to fees of any kind unless he can point to a statute expressly allowing the same. The law conferring such right must be strictly construed because of statutory origin.
>
> State vs. Wofford, 116 Mo. 220;
> State vs. Union Trust Co., 70 Mo. App. 311.
>
> The right of costs is entirely conferred by statute. It is contrary to the policy of the law to enlarge such statutes by loose construction so as to build up constructive fees, since, as experience shows, the practice of taking these fees has a tendency to grow insensibly, even where the courts construe the statutes granting them strictly.
>
> Bank v. Glaser, 40 A. 371."

The sections of the statute to which you refer, appear to be the only statutory provision touching upon the subject of your inquiry. After a reading of these sections, together with the cases mentioned in your brief, it is the opinion of this

department that the State is not liable for medical attention furnished a prisoner while incarcerated in the county jail where defendant is thereafter convicted and sent to the penitentiary. While the statute provides that the cost of medicine and medical attention shall be taxed as cost and paid as other criminal cost, it does not provide that it shall be taxed as state cost and paid as other state costs. Such construction, in our opinion could not be placed upon this provision by implication. Unless the prisoner is financially able to make payment for this service, it would appear that the county court should make provision to take care of such contingency under the authority granted to it by Section 8554, supra, or by Section 3840, R. S. Mo. 1929, which provides,

> "The county court of any county in which a prisoner may be confined, whenever satisfied of the necessity of so doing, may make an allowance for ironing such prisoner, and may allow a moderate compensation for medical services, and extra bedding or menial attendance furnished any sick prisoner, which shall be paid out of the treasury of the county in which the cause originated."

Very truly yours,

CARL C. ABINGTON
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General

CCA:EG

IN RE: Violation of Section 4097 R. S. Mo. 1929 by circulating script designed as use for currency.

FILED
3

March 1, 1933

Hon. C. Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri.

Dear Sir:-

In your two letters to me you state the instrument (a copy of which you enclose) is designed to be used as a currency among the Members of the Chamber of Commerce.

The copy of the instrument you enclose is as follows:

> " There has been deposited with the Treasurer of the Overland Chamber of Commerce One Dollar ($1.00) for the redemption of this Certificate when twenty-five booster stamps have been affixed on the reverse side."
>
> (May use 3 or 4 booster stamps, instead of 25)

Section 4097, R. S. of Mo. of 1929 provides as follows:

> "Illegal Currency.--Any person not authorized by law who shall put in circulation as a circulating medium any note, bill, check, ticket, or other instrument of writing, purporting or evidencing that any money will be paid to the receiver, bearer or holder thereof, or to any person by any name or description whatsoever, or that it will be received in payment of debts, or be used as a currency or medium of trade, in lieu of money, or who shall vend, pass, receive or offer in payment any such note, bill, check, ticket, or other such currency, shall upon conviction be adjudged guilty of a misdemeanor."

I have been unable to find any statute repealing, modifying, or in any way altering the full force and legal effect of this enactment and if such a statute exists and modifies or alters Section 4097 of course this opinion would have to be changed so as to follow such modifying Legislative Act.

This statute is an old one appearing in the Laws of Missouri as early as the Statutes of 1825 and it is in substantially the same form that it was when it appeared in the 1825 code of Missouri. There have been some changes but such as do not effect the question

submitted by you. The object of this statute of course, is to prevent the circulation by any unauthorized person or corporation or company or association of something that shall take the place of currency.

The earliest decision I find on this statute is the case of Downing vs. State of Mo., 4 Mo. 336.

In the Downing case it was proved that Downing was secretary or cashier of a certain private banking establishment and resided in Wisconsin Territory, and signed the notes of said concern as such cashier; that the president whose signature was also attached to the note resided in St. Louis, and kept a broker's office; that the president had exchanged two of said notes for two notes on an Illinois Bank at the request of witness; that said notes were seen in circulation in the City of St. Louis and had been redeemed at the office of the president.

The charge was of circulating the notes and the currency. The indictment described the note as purporting to be payable to the holder, when on its face it purported to be payable to bearer. The defense made the point that an indictment describing the note as payable to holder when on its face it was payable to bearer was bad and the Court sustained this point and reversed the judgment of the Circuit Court.

In the course of the opinion, the Court said:

> "In the case before this court, the indictment charges that Downing put in circulation, etc., a certain note purporting that five dollars will be paid to the holder thereof and the note offered in evidence purported that five dollars would be paid to the bearer thereof. This is clearly a wrong description of the note, and for this reason, the judgment ought, in my opinion, to have been arrested."

And in another part of the opinion, 4 Mo. 575, the Court said:

> "The indictment charges that Downing did, etc., put in circulation as a circulating medium, a certain note, purporting that five dollars will be paid to the holder thereof. The note given in evidence purported to be payable to bearer. It is certain that the legal effect of the note as set out in the indictment, and as it is proved, is the same. But as it was attempted to describe the note, not according to its legal effect, but as it existed, it should have been so done. That such is the true meaning of the word "purport" is sufficiently established by authority * * *."

The indictment in this case was under the first part of Sec. 4097 which provides

> "Any person not authorized by law who shall put in circulation as a circulating medium any note, bill, check, ticket or other instrument of writing purporting or evidencing that any money will be paid to the receiver, bearer or holder thereof * *."

The only thing decided in the above case is that a description in the indictment did not conform to the facts proven because the indictment charged the note was payable to holder and the note offered in evidence showed on its face it was payable to bearer.

The next case that I find is that of State vs. Page and Bacon, 19 Mo. p. 213. Indictment in this case charged that the defendants

> "* *put in circulation, as a circulating medium, divers notes, bills, checks and tickets, purporting that money will be paid to the receiver, holder and bearer thereof, said notes, bills, checks and tickets to be then and there used as currency and as a medium of trade in lieu of money, and that said notes, bills, checks, and tickets will be received in payment of debts, * * *.

The defendants were tried and convicted and appealed. The instruments offered in evidence were in the following form.

> "(Vignette) (Vignette)
> St. Louis, January 1, 1852
> This certifies, that Thos. Brown has deposited in this office, five dollars, payable to bearer, at the (Vignette.) banking house of Flagg & Savage, Quincy Ill. "

Objection was made to the introduction in evidence of the above certificate and was overruled and certificate was admitted in evidence and defendants excepted.

It will be noticed that the indictment in this case charged that

> "money will be paid to the receiver, holder and bearer, thereof."

It will be noticed that the note offered in evidence is payable to bearer only.

In the course of the opinion, the court said,

"It is clear that, where an instrument is to be set forth, the description that it purports a particular fact, necessarily means that what is stated as a purport of the instrument, appears on the face of the instrument. * * * 'Old cases have given rise to much learning and argument on the words "purport" and "tenor" and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments, where written instruments are to be stated: Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it; tenor means an exact copy of it.' * * * The Court in the opinion delievered, remarked that it is certain that the legal effect of the note, as set out in the indictment, and as it is proved, is the same, but as it was attempted to describe the note, not according to its legal effect but to describe it as it existed it should have been so done; that such is the meaning of the word purport, is sufficiently established by authority."

Accordingly the Court reversed the case.

In this case, Judge Gamble, who concurred with Judge Ryland also delivered an opinion of the Court in which this section of the statute was further construed and in which it was held that the word purport did not apply to the last clause of the section and the Court said:

"It has been said that a person cannot be punished under this act for making and circulating any paper that on its face has not the purport mentioned in the statute, if the word "purport" is to have the signification usually given to it in the decisions of courts. This, as I apprehend, is a misconstruction of the section. The section prohibits the creation or putting in circulation of paper purporting that money will beppaid to the receiver or holder, or purporting that it will be received in payment of debts. This is as far as the word "purporting" applies to the acts prohibited. The next and last clause in the section, 'or to be used as currency, or medium of trade in lieu of money,' is entirely distinct from those to which the word "purporting" applies, and embraces all cases in which any person creates or puts in circulation, as a circulating medium, 'any note, bill, check or ticket to be used as a currency or medium of trade in lieu of money,' whatever may be its purport. It is evident

> that this last clause of the section would be made non-sensical by applying the word "purporting" to it so as to read, 'or purporting to be used as a currency or medium of trade in lieu of money.' The section then, prohibits,most distinctly, the issuing of paper designd to be used as a currency without regard to the form in which it may be made, and under this section, there is no necessity for stating that the purport of the paper issued,is, that money will be paid to the holder or that it will be received in paymant of debts, if it is created or issued to be used as a currency or medium of trade in lieu of money. The prohibition is effectual, when the intention of the party is to make an unauthorized currency whatever ingenuity may be employed in devising the form of paper to be issued."

In this view of the statute, Judge Ryland concurs.

We see, therefore that in this case the Supreme Court holds that the word purport does not apply to the latter clause of the statute and that the statute distinctly prohibits the issuing of paper designed to be used as currency without regard to the form in which it may be made and there is no necessity, in an indictment, for stating that the purport of the paper issued is that money will be paid to the holder or that it will be used in payment of debts, if it is created or issued to be used as a currency or medium of trade in lieu of money.

Applying this decision in the 19 Mo. Reports, p. 213 to the instrument, copy of which has been submitted,I beg to say that if the facts are as you state that the Overland Chamber of Commerce desires to and does use this instrument as a currency or medium of trade in lieu of money, the statute is being violated.

Yours very truly,

EDWARD C. CROW

ECC/mh

SCHOOLS: State funds transferred by deficiency bill, State Auditor not required to set apart any part to the school fund.

Senate Laws 33
Article IX, §3(b) ✓

March 3, 1933

FILED
3

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Receipt of your letter dated February 28, 1933, is acknowledged, in which you state and inquire as follows:

"I am enclosing Senate Bill 225, which transfers the balances from various funds to the state revenue fund.

I would like an opinion from you as to whether one third of the total of these funds should be set aside to the public school moneys as provided in Section 7, Article 11, of the Constitution of Missouri."

Article IX, §3(b)

Section 7, of Article 11, of the Constitution of the State of Missouri, in substance provides and means that if the fund provided and set apart by law for the maintenance or operation of public schools, be not sufficient in amount to maintain and operate a free school for a period of at least four months in each year and in each school district in the state, then and in that event the General Assembly has the authority to provide sufficient funds for the maintenance and operation of such schools for the above designated period of time. The provision for such deficiency to be made in accordance with Section 11 of the Article on revenue and taxation, which we take it refers to Section 11 of Article 10 of the Constitution of the State of Missouri, being the Article in that Constitution dealing with revenue. Section 7, of Article 11, further providing that in no case shall there be set apart less than twenty-five per cent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the public schools. We think the words "in no case" have reference to the providing and setting apart of a public school fund as mentioned in the first part of Section 7 and does not have reference to such a transfer of general revenue as is contained in Senate Bill Number 225.

now 8 months

We are of the opinion that Section 7, of Article 11, above referred to, has reference only to legislative provisions touching public school funds only and that under such Section and Article, none of the funds transferred by Senate Bill Number 225 should be set aside to the public school moneys of the State of Missouri.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

_____

Attorney General.

GL:LC

Income tax- incomes received from royalties on patents and copyrights.

March 22, 1933.

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

You have written me as follows:

"I have been informed that there are several large taxpayers in Missouri who are not paying income tax on royalties received on patents or copyrights, based on the U.S. Supreme Court decision decided May 14, 1928 in Long, Commissioner vs. Rockwood, as shown in Court decision Volume 277, U.S. Reporter, page 142, wherein it is stated that a State may not tax the income received, by its citizens, on royalties for the use of patents issued to him by the United States.

During 1932 it appears that the previous decision of the United States Supreme Court was overruled. In the case of the Fox Film Corporation vs. Doyal, Volume 286, page 123, U.S. Reporter, it appears that the State may tax income received by citizens on royalties from these patents.

The question that arises is whether this 1932 decision now permits the State of Missouri to go ahead and tax, for income tax purposes, royalties received by citizens for the use of patents, and if so, is this last Supreme decision retroactive back for the years 1929-30-31 as well as 1932?"

In reply to your inquiry, permit me to say that the case of Fox Film Corp. v. Doyal, 286 U.S. p. 123, decided May 16, 1932, held:

> "Copyrights are not federal instrumentalities and income derived from them is not immune from state taxation. Long v. Rockwood, 277 U.S. 142, (holding otherwise as to patents) is overruled. PP. 128, 131.
>
> The principle of immunity of federal instrumentalities from state taxation and of state instrumentalities from federal taxation is confined to the protection of operations of government. P. 128.
>
> The mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption. Nor does the fact that the grant is made in furtherance of a governmental policy of the

> United States, and because of the benefits which are deemed to accrue to the public in the execution of that policy, furnish ground for immunity. P. 128."

And same volume, l.c. p. 131, the Court expressly overruled the case of Long v. Rockwood, 277 U.S., 142, in the following language:

> "The affirmance of the judgment in the instant case cannot be reconciled with the decision in Long v. Rockwood, 277 U.S. 142, upon which appellant relies, and in view of the conclusions now reached upon a re-examination of the question, that case is definitely overruled."

Under this decision of the Federal Supreme Court the State of Missouri can tax for income tax purposes royalties received by citizens for the use of patents.

You asked the further question, if the income tax can be collected for the years 1929, 1930 and 1931, as well as 1932. The case of Long v. Rockwood, 277 U.S. 142, was decided May 14, 1928. I assume from that date on the State collected no income taxes on income received by citizens for the use of patents.

Section 15 of Article II of the Constitution of Missouri of 1875 reads as follows:

> "EX POST FACTO LAWS, ETC., PROHIBITED--That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

The income tax law of this state existed prior to the decision in the Long v. Rockwood case. The effect of the decision in this case by the Federal Court was in my judgment simply to suspend the operation of the income tax law of this state in so far as same applied to income received by citizens of Missouri from the use of patents or copyrights.

When the Federal Supreme Court in the case of Fox Film Corporation v. Doyal overruled the case of Long v. Rockwood, the legal effect was to make operative the income tax law of Missouri upon income of citizens of our state received from the use of patents. Therefore, it is apparent that no law would have to be enacted by this state in order to tax incomes received from patents after the date of the decision in Fox Film Corporation v. Doyal. The language of the constitutional provision quoted above is:

> "That *** no law *** retrospective in its operation *** can be passed by the General Assembly."

The rule seems to be that a statute cannot impose retroactive taxation for previous years upon a class of property not then subject to taxation at all.

Cooly on Taxation, Vol. II, 4th Ed. p. 1155, Sec. 520

Cooley's Constitutional Limitation, 8th Ed. Vol. II, p. 772, says:

> "There is no doubt of the right of the Legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden Eo Nomine by the state constitution, and provided further that no other objection exists to them."

The question confronting me is: Does the existing income tax law passed before the decision in the Fox Film Corporation and Long v. Rockwood cases by Federal Supreme Court operate to tax incomes for 1929, 1930, 1931 and 1932? To so hold is to give the income law of our state a retrospective operation--to relate back and effect transactions already past.

A sound rule of construction is that a statute should have a prospective operation only unless its terms show clearly a legislative intention that it should operate retrospectively.

Our constitution forbids retrospective legislation and equally forbids a construction of a statute to make it operate retrospectively unless a clear intent so to do is expressed in the statute, and then such a construction would be wrong if it imposed a new obligation on the one affected thereby.

The income law of Missouri did not tax the income from patents or copyrights between the date of the decision of the Long v. Rockwood case and the decision of the Fox Film Corporation. If our income statute is construed to now reach back and tax income during the years past when under the Federal Court it could not be taxed, it would be taxing a class of property for previous years not then liable to taxation. This cannot be done under our Constitution, in my opinion. In

Smith v. Dirckx, 283 Mo., 188

the court, quoted Justice Story's definition, saying:

> "Every statute *** which creates a new obligation *** in respect to transactions *** already past, must be deemed retrospective."

The Federal Supreme Court has held where no statute existed taxing bank shares at time an Act was passed taxing same for years prior thereto, such legislation was illegal.

Citizens Bank v. Kentucky, 217 U.S., 343.

I am of opinion income taxes cannot be levied under our statute on incomes arising from use of patents or copyrights for years 1929, 1930, 1931 and 1932.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AW

TAXATION--Salaries, interests, costs and charges relating to collection of delinquent taxes --Effect of Senate Bill No. 80 with relationship thereto.

April 11, 1933.

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Your letter directed to the Attorney-General has been handed to the undersigned for attention. We will set forth your letter and undertake to make answer to your separate inquiries in the order presented.

"Since the passage of Senate Bill No. 80, countless inquiries have come to this office relative to the application of the provisions of this new statute, I am, therefore, your ruling on the following points:

Does this apply to counties under township organization?

Is this applicable to the taxes for year 1932, as well as all prior years?

Is the county collector entitled to the extra 4% or 5%, as the case may be, allowed for the collection of delinquent taxes, or only to the regular commission allowed for the collection of current taxes?

Is the county clerk entitled to his fees for compiling the back tax books?

Is the collector authorized to make any refund of penalties, interest, etc. on taxes collected prior to the enactment of this law?

Is this law applicable to taxes levied for drainage or levee purposes?

If suit has been filed for delinquent taxes or judgment rendered, is the tax-payer entitled to any remission of costs and penalties by this act?

Is this applicable to the City of St.Louis?"

We assume that your inquiries are made with a view of ascertaining the effect Senate Bill No. 80 will have upon the subject of tax collections and what was intended to be included in the remissions provided for in said bill. As a matter of convenience, we will here insert the bill as finally passed and approved by the Governor:

> "Sec. 1. In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for the year 1932, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; Provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1933; if paid after June 30, 1933, and not later than August 31st, 1933, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31st, 1933, and not later than October 31, 1933, such remission shall be 50 per cent of such penalties, interest and cost; if paid after Oct. 31, 1933 and not later than Dec. 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs: Provided, further, that after Dec. 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed.
>
> Sec. 2. The provisions of this act shall cease and be of no effect after January 1, 1934.
>
> Sec. 3. As the expeditious collection of such taxes and lists is necessary for the maintenance of the State Institutions and for the support of Public Schools, an emergency exists within the meaning of Section 57 of Article 4 of the Constitution of this state and also an emergency exists within the meaning of Section 36 of Article 4 of the Constitution of this state, and this act shall be in force and take effect from and after its passage and approval by the Governor."

This bill in its amended form answers your first and second inquiries. It will be observed that its provisions are applicable to the collectors of the revenue of the counties and cities of this state, whether the county be under the regular county organization or under township organization, and that the bill specifically includes the year 1932.

This act is mandatory in that it requires the remission of penalties, interest and costs, and directs the acceptance of the original amount of the tax if paid not later than June 30, 1933. In other words, if paid on or before that date it shall be free from all penalties, interest, costs and charges. If paid at a later date the remission is graduated in accordance with the date of payment. It is important that penalties, interest, costs and charges be classified insofar as the same relates to the item of tax. It would appear from the authorities, which we will hereinafter refer to, that the penalties which have accrued under statutory provisions prior to the passage of Senate Bill No. 80, are not a part of the tax.

It is stated in Cooley on Taxation, Sec. 1821, that,

> "Money derived from penalty and forfeiture where taxes are delinquent are not a part of the tax and where imposed by the Legislature it has a right to dispose of such funds as it likes, * * *."

Upon this same subject we find the law declared in the case of State ex rel. Pierce v. Coos County, 237 Pac. 678 l.c. 679, as follows:

> "We have heretofore held that the increased percentage and other burdens prescribed by the Legislature for non-payment of taxes are in the nature of penalties and not part of the tax * * * they may have been prescribed as a means of inducing the taxpayer to pay promptly, but they are distinctive from the tax itself. Taxes are a contribution prescribed by the statute and levied by the authorities for the support of the government; * * ."

The Texas courts, defining "tax penalties" in the case of State v. Galveston, 100 Texas 153; 97 S. W. 71, had this to say,

> "The penalties are somewhat in the nature of a fine upon a delinquent taxpayer for his delay in paying his taxes they are not levied by the counties as a part of the tax and are creatures of the statute, and what the statute can impose by way of penalty, the statute can remit."

The Oregon court in an earlier case than the one hereinabove cited, treating this same subject matter, in Colby v. City of Medford, 85 Ore. 485; 167 Pac. 487, says,

> "In passing, it may be noted that when interest is charged on a delinquent tax, it is not regarded as interest in the sense that it is a consideration for the forbearance of money, but it is deemed to be a penalty; and when interest, so called, is charged, it is sustained on the theory that it is a means to insure prompt payment of the tax, and is not a part of the tax."

We have heretofore stated this act is mandatory. It directs the collectors " to accept the original amount of said taxes as charged against any person or real estate relieved of the penalties, interest and costs accrued upon the same". It is intended to be in full discharge of the taxpayer's obligation. This would not permit of the adding of any fees or commissions of any kind to the original tax bill and the statutory provisions providing for such fees and charges would be inoperative insofar as they are in conflict with this latest enactment. If this four or five per cent commission, referred to in your communication, is to be termed either as penalty or as costs, the bill specifically provides for its remission and the collectors are directed to accept the tax relieved of the penalties, interest and costs accrued upon the same.

Approaching this subject from another angle: - If this percentage charge is to be construed or treated as compensation to the collectors, the Legislature, under the construction of the law as hereinafter noted, would have power to fully and completely extinguish such compensation.

We find this declaration or principle of law in 61 Corpus Juris, p. 1519, Sec. 2231:

> "Where a statute provides that the tax collector shall be allowed ten per cent on all taxes collected after a designated date, by distress or otherwise, the ten per-cent is not in the nature of a penalty but is allowed as compensation as additional services to be performed by the collector, * * *"

Following this principle of law, we are then confronted with the problem as to whether or not the collector has any vested interest in these statutory commissions. All of our statutes in respect to this additional compensation read that the commission is to be added to the face of the tax bill and is to be collected from the taxpayer when the payment of tax is made, and provides that in no event shall the county, state or municipality be liable therefor.

According to the weight of authority in this state, the collector has no vested interest in this compensation and such compensation is subject to be cancelled or withdrawn at and by the will of the Legislature.

Our Supreme Court in the case of Givens v. Daviess County, 107 Mo. l.c. 608, 609, passing upon this proposition says:

> "A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of the law, and as an incident to the office. Dammon v. Lafayette County, 76 Mo. 675; Koontz v. Franklin County 76 Pa. State 154; Fitzsimmons v. Brooklyn 102 N. Y. 536, * * * * * * * * * * * In the absence of

> constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of its payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158. * * * *"

The above opinion of the court has been quoted many times in more recent decisions and approved as a law of this state on that question. Insofar as the constitutional restrictions are concerned, there are none which would bar an increase or diminution of the collector's salary. Accordingly, it being the evident intention of the Legislature to remit any charges or fees or commissions of any kind in addition to the original amount of the tax, and it further appearing that these penalties and charges and commissions may be legally and lawfully remitted and removed from the tax bill by the Legislature, it is the opinion of this office that if a tender of the original amount of the tax is made before June 30, 1933, the entire commission, penalty, interest and cost should be remitted and such amount accepted in full payment of the tax. If paid at later dates, the remission thereof should be made in accordance with the graduated scale as in said bill provided.

What we have said respecting the four and five per cent commission to which the county collector would be entitled, absent the enactment of Senate Bill No. 80, applies with equal force in regard to the fees and charges of the county clerk for the making up of the back-tax book. This act undoubtedly relieves the taxpayer from the payment of this collector-commission and upon the same theory and reasoning likewise relieves him from the payment of the clerk's fee, it being a part of the cost.

In answer to your fifth inquiry, to-wit, whether or not the collector is authorized to make any refund of penalties, interest, etc., on taxes already collected, we beg to advise that there is no authority in the bill for the refund of any such penalties, interests or costs, which may, prior to the passage of the bill, have been collected.

The bill applies only to those who on the date of the passage of the act were indebted for delinquent taxes, and it thereby placed all such persons in one class to be governed by the provisions of this bill. Upon the right of the Legislature to make such classification and to the reasonableness of such provision, we call your attention to the case hereinabove cited, State ex rel. Pierce v. Coos County 237 Pac. l.c. 679, wherein the court said:

> "It is urged that the act is unconstitutional because of the lack of uniformity, and that it is discriminatory in character. But it is not discriminatory because it applies to all persons in a particular class, to-wit, taxpayers who paid their taxes prior to May 1st, 1925,

> as a class. Such a provision would not seem to be unreasonable as urged by counsel, because others who have previously paid their taxes, together with interest and penalties, are not included."

The pertinent parts of the statute under consideration by the Oregon Court when it made the above statement, reads as follows:

> "Sec. 1. The county courts of the several counties of the state may and are hereby authorized to remit all interest, penalties and costs which have been or may be incurred on all taxes levied in their respective counties on the tax rolls for the years 1921, 1922, and 1923, to all taxpayers who prior to May 1st, 1925, * * * may have paid the original amount of such delinquent taxes on the property affected."

In other words, the Oregon Court held that those delinquent taxpayers who paid their taxes under that act prior to May 1st, 1925, constituted a class, that being the class affected by the act, and that such classification was not discriminatory or unreasonable.

In answer to your sixth inquiry, to-wit, is this Senate Bill applicable to taxes levied for drainage or levee purposes, be advised that it is the opinion of this office that this bill applies to such taxes. It is by legislative enactment that these taxes bear a penalty, and if a penalty happens to go to the drainage or levee district it is by virtue of the statute so providing. If the Legislature can provide that the district can have the benefit of penalties, so it may deprive the district of penalties. See Cooley on Taxation, 4th Ed., p. 3573:

> "Penalties for delinquent taxes generally follow the tax and go to the district entitled to the tax unless it is otherwise provided by statute. On the other hand, if the penalties are imposed by the Legislature their disposition rests in its discretion."

Upon this proposition we also call your attention to Livesey v. De Armond et al, 284 Pac. 166. In this case a statute very similar to Senate Bill No. 80 is considered and construed by the court. That act was found in Chapter 82, Session Laws of 1929, of the State of Oregon, which reads as follows:

> "The county court or board of county commissioners of any county may at its discretion, waive or reduce the penalty or interest, or both, imposed for the failure to pay taxes within the time provided by law, for any year or years prior to and including 1927, if, in its opinion, such action would facilitate the collection of such taxes."

It appears that the complainant was a taxpayer of Deschutes county, who was not delinquent in the payment of his taxes and was bringing action against the county court, complaining that their order in accepting taxes and issuing receipts in full therefor without the

payment of delinquent penalties and interest, was unlawful. Complainant was also a taxpayer in the Central Oregon Irrigation District and was the owner of a bond issued by the Iroquois-Creek Irrigation District. Dealing with the question as to whether or not the act was applicable to the irrigation districts, the court held as follows:

> "While we are aware of the fact that the Legislature has at times provided that the penalties and interest accruing upon the portion of the tax due to an irrigation district shall be paid to the districts, we believe that this circumstance does not prevent the county board from waiving or reducing this portion of these charges as well as the remainder of the penalty and interest."

The Supreme Court of Texas had occasion to pass upon a like statute in the case of Jones v. Williams, 45 S.W.(2d) l.c. 139. We quote from the opinion:

> "The act before us not only releases all accrued 'interest and penalties' on delinquent state taxes, but makes the remission apply to named districts and subdivisions of the state. This does not affect the validity of the act. The districts named are merely subdivisions of the state, and the Legislature has the same power to provide or change the remedies for the collection of taxes, including the remission of penalties, due its subdivisions as it has for the state at large."

The courts of Oklahoma, North Dakota, Washington, Kansas, Maryland and Maine have held in accordance with the foregoing declaration of law. While Senate Bill No. 80, does not specifically set out political subdivisions to which the act is applicable, it particularly states that it shall affect all persons whose names appear "upon the personal delinquent list and taxes assessed against real estate which appears upon the list of delinquent back-taxes". Accordingly, any taxes upon the lists above mentioned would be affected by the act just as clearly and certainly as though the political subdivisions had been named one by one.

In accordance with the foregoing, it is the opinion of this office that this act applies to the City of St. Louis for the reasons stated above.

In reply to your last inquiry, to-wit, whether or not the taxpayer is entitled to any remission of costs, penalties and charges after judgment, we find that under the common law such was not the case. See 25 Corpus Juris, p. 1213:

> "The English authorities are uniform to the effect that the King may discharge his own share in a penalty as well after as before a judgment, but that after judgment he cannot remit the share of an informer, because

> the share of an informer is by the judgment vested in him."

The Supreme Court of the United States in the case of North v. Crocker, 14 Law Ed. l.c. 214, has followed this ruling, to-wit, that prior to judgment there is no vested interest in a penalty. In this case the court stated as follows:

> "The suits were pending below when the act of September 18, 1850 was passed, and was for the penalty of Five Hundred Dollars, * * * * * as the plaintiff's right to recovery depended entirely on the statutes, its repeal deprived the court of jurisdiction of the subject matter. And in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law."

And the same court in the case of United States v. Tynen, 20 Law Ed. l.c. 55, stated as follows:

> "The repeal of the law imposing the penalty is of itself a remission."

The Supreme Court in the State of Texas in a recent decision heretofore referred to, has gone farther and held as follows in the case of Jones v. Williams, supra:

> "The statutes from time to time have contained provisions for the collection of delinquent taxes by attorneys or others by contract for a percentage of the tax, or taxes, interest, and penalties collected. * * * * * The power to make contracts under these statutes is subordinate to the general legislative power to impose, increase, diminish, or remit penalties for tax delinquencies and the existence of such contracts, where taxes have neither been paid nor reduced to judgment, does not prevent the remission statute from being effective, and the delinquent taxpayer has the same right to pay his taxes without paying penalties and interest (so called) that he would have, had such contracts never been made. The remission statute applies unless prior to the effective date of the statute, the taxes had actually been collected or reduced to final judgment."

It is interesting to note that in the foregoing case the Texas court held the remission statute applied to contingent fees with lawyers employed to obtain payment of delinquent taxes under contract with the collector, as such contracts are at all times subject to the legislative will. It is, accordingly, the opinion of this office that the penalty, interest, costs and charges on delinquent taxes, which have not been reduced to judgment, are subject to the effect of this act and are accordingly remitted,

providing the tax is paid in the time required by the Senate Bill under consideration.

Respectfully submitted,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:EG

IN RE: Taxpayer voluntarily filing joint individual income tax return for the whole year 1931 for himself and wife and paying the tax thereon in absence of a statute or regulation of State Auditor's office allowing him so to do, has not the right in 1933 to file an amended return for the year 1931 of himself and wife covering income from January 1, 1931 to September 13, 1931, and from September 14, 1931 to December 31, 1931 under the Act of the Missouri General Assembly approved April 16, 1931, and by the amended return become entitled to a credit of $68.80 on future income taxes.

April 17, 1933.

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

Your letter states as follows:

"Mr. T.J. Brodnax, 3526 Walnut Street, Kansas City, Missouri, filed his joint individual Missouri Income Tax Return for the year 1931, of himself and wife, on our regular return for said year and has paid a tax thereon of $332.36.

Mr. Brodnax now submits an amended return for the year 1931, of himself and wife, on the special form as provided here in some instances where an individual could segregate his income covering from January 1, 1931 to September 13, 1931 (the old law) and from September 14, 1931 to December 31, 1931 (the new law) and said amended return discloses a tax on this special form of $263.56.

Mr. Brodnax has filed a claim for credit of $68.80 covering this amended return and desires to apply this against his 1932 tax, and as he is required to file his 1932 return before the first of April, he is very anxious to be advised if this is permissible under the law.

This is my first case of this kind and not feeling in a position to advise him in this matter without an opinion of your office, I am writing this letter to you and would appreciate it if you will advise me as promptly as possible if it is permissible to file amended return on this special form for the year 1931 and redetermine the tax and then make claim for credit to be applied against future year."

The Missouri General Assembly by an Act approved April 16, 1931, increased the rate of income taxes and amended Sec. 10115 R.S. of Mo., 1929, and among other things, provided as follows:

"For the portion of the year 1931 after June 30, 1931 remaining after this Act becomes effective and for the whole of each succeeding year thereafter *** a tax shall be levied *** upon net income ***"

This enactment divided the year 1931 into two tax periods with different rates for each period of time. The Legislature may provide for collection of income prescribed by existing law for part of the year and expired part of the year at time Act is effective and at different rate for remainder of year.

State ex rel Koelin v. S.W. Bell Telephone Co.,
312 Mo., p. 1008

Apparently, the amendments of 1931 to the Income Tax Law (See Session Laws of Mo., 1931, pp. 365-375) were made in form to meet the decision of our Supreme Court in

Smith v. Diercx, 283 Mo., 188

wherein it was held so much of the amendment of 1919 income tax as undertook to assess tax of one per cent on that part of net income for the year 1918 received by the tax payer prior to the time the amendment went into effect August 7, 1919 was violative of Art. II, Sec. 15, Missouri Constitution, declaring no law "retrospective in its operation" can be passed by the General Assembly.

I assume for purposes of my opinion Mr. Brodnax is claiming the benefit of two different income tax rates for year 1931 on account of the amendment of 1931, of income tax law by the General Assembly. I have examined the regulation of the Auditor's Office as published in the printed pamphlet you sent me and I fail to find therein any rule or regulation providing for filing an amended tax return and changing the form thereof; I may have overlooked such a regulation in the pamphlet. I have examined our Missouri Statutes and I fail to find any enactment authorizing the filing of an amended tax return such as Mr. Brodnax has filed. Sec. 10135 R.S. of Mo., 1929, relating to income taxation provides as follows:

> "At any time within forty-five days after assessment or additional assessment of income has been certified by the assessor to the county clerk, the taxpayer shall have the right to apply for abatement or correction of same to the county court of the county in which such assessment is made except in the city of St. Louis, and to the circuit court in such city."

Other parts of said section authorizes county courts in the counties and the circuit court in the city of St. Louis to adjust any errors in the assessment of the income tax on application therefor within 45 days from assessment thereof and allows appeals to be carried to Circuit and Supreme Courts from decisions made by county courts and St. Louis City Circuit Courts.

There is nothing in your letter to indicate Mr. Brodnax paid the taxes in 1931 under duress or threats, nor that he made the return in the form in which he made same under any duress or threats from

the state or county tax officials. Therefore, I will assume that first - Mr. Brodnax voluntarily selected the form in 1932 in which he would make his income tax return for his income for the year 1931; second - that Mr. Brodnax voluntarily and without compulsion paid the tax on his income for the year 1931. Can Mr. Brodnax file an amended return in 1933 of himself and wife for the year 1931 and obtain a credit on 1933 tax?

There are no decisions on this question in Missouri in so far as I have ascertained. The statutes of Missouri do not provide specifically for filing such a return. The rules and regulations of the Auditor's office might provide for filing such an amended return and such regulation would be valid. The Federal statute does not, so far as I have been able to learn, provide for filing an amended return. The rules governing amended returns as to Federal incomes have their sources in either regulations or other departmental rulings.

The first return of Mr. Brodnax was filed or could have been filed about six months after the Act of 1931 providing for two separate tax periods in the year 1931 became operative. Mr. Brodnax selected a form of making a return and a basis therefor and voluntarily paid the tax on the basis of his own computation. I assume he claims now he had a right to make his return at the time he did make it in 1932, and divide his income for 1931 into two tax periods of time, having different rates of taxation.

The Federal Board of Tax Appeals in Butolph v. Commissioner of Internal Revenue, 7 B.T.A. 310, held where husband and wife made a joint return, they could not thereafter make separate returns on the theory that if a taxpayer has selected one of two approved bases for reporting his income, he cannot subsequently file an amended return upon another basis. I do not understand Mr. Brodnax and his wife filed separate returns in the amended return, but they changed the basis of their return.

I do not believe Mr. Brodnax is entitled to file the amended income tax return for 1931, which he has submitted in 1933, and I base my opinion on the ground Mr. Brodnax voluntarily made the original joint return for himself and wife and he had a right to make it in that manner, and he voluntarily paid the tax, and the statute nor the regulations of the Auditor's office provide a method for his filing an amended return.

I am of the opinion Mr. Brodnax could not maintain an action against the collector nor other officials to recover any over-payment he may have made because the payment was voluntary on his part. The Missouri Supreme Court in

Robins v. Latham, 134 Mo., 466

said:

> "A taxpayer is not entitled to have taxes voluntarily paid by him returned and the allegation that he paid them under protest is insufficient; he must show a seizure of his property or a threat to do so and that it could only be escaped by payment."

It is true Sec. 10132 R.S. of Mo. 1929 provides at any time within three years after any return shall have been filed, the Auditor has a right to examine, during business hours, the records and books of a taxpayer, and if more tax has been paid than was due, the Auditor can issue a credit slip which shall be taken as a deduction on taxpayer's succeeding taxes, and if Auditor finds a deficiency in amount paid, he shall certify same to the assessor who shall make an additional assessment; but this section does not, in my opinion, authorize the filing of an amended return.

As I have indicated above, the provisions of Sec. 10135, R.S. of Mo. 1929 provide a method whereby Mr. Brodnax could within 45 days from the time he filed in 1932 the return for 1931 income, have had his over-payment, if any, of taxes adjusted by the county court of Jackson County, but he neglected to use the remedy the law gave him.

Yours very truly,

EDWARD C. CROW.

APPROVED:

Attorney General

ECC:AH

RE: General appropriation bills need no emergency clause to become operative immediately when signed by the Governor. Section 659, RSMo 1929.

Filed: #3

April 27, 1933.

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

Your letter of April 26 reads as follows:

"Appropriation bills Nos. 649 - 650 - 657 and 661 passed without an emergency clause.

Will you please advise this office if an emergency clause is needed on these appropriations, and if I have authority under the Joint and Concurrent Resolution passed by both branches of the General Assembly to pay salaries for the month of April to all departments of the State Government?"

Appropriation Bills Nos. 649, 650, 657 and 661 are general appropriation bills. Section 36, Article IV of the Constitution of 1875 provides:

"No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

Section 659 Revised Statutes of Missouri of 1929 reads as follows:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

> (a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the Governor; which hour and minute may be endorsed by the Governor on the bill at the time of its approval.
>
> (b) In case the general assembly, as to a law not of the character hereinbefore specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days hereinbefore mentioned, said law shall take effect on the date thus fixed by the general assembly.
>
> (c) Laws not of the nature hereinbefore specified enacted by the general assembly at its regular session in 1929 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1929 and each ten-year period thereafter, shall take effect on the first day of November in the year of their enactment or authorization: provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding courts shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

Section 36, Article IV of the Constitution above quoted expressly provides all laws passed by the General Assembly shall not take effect until ninety days after the adjournment of the session at which same were enacted. Said section 36 of Article IV also expressly provides general appropriation bills are not subject to the rule that all laws shall take effect ninety days after adjournment of the session.

Does this legal situation make general appropriation bills without an emergency clause operative immediately when signed by the Governor? The answer is that it does. The four bills, Nos. 649, 650, 657 and 661 are general appropriation bills without an emergency clause and will be operative the moment the Governor signs same.

Setting aside completely Section 659, Revised Statutes of Missouri above quoted and not considering same, the four said above general appropriation bills without emergency clauses will under the provision of Section 36, Article IV of the State Constitution be operative at once when same are signed by the Governor.

I have been unable to find any decision of our Missouri Supreme Court deciding this exact question and find only one case in the entire forty-eight states of the Union deciding this precise point, and that is the case of the State of Washington on the relation of the Attorney General v. The State Capitol Commission, reported in 24 Washington R.P. 417.

The petition of the Attorney General in that case alleged the Capitol Commission had met and sold state warrants in the sum of $350, 000 drawn on the capitol building fund pursuant to an appropriation made by law and that the Appropriation Act contained no emergency clause and therefore was not in force until ninety days after the adjournment of the Legislature and he prayed the court to prohibit the appropriation being used until the ninety days had expired. The court held under the Constitution of the State of Washington no emergency clause was needed and the Appropriation Act was operative immediately, and in the course of the opinion the court said (l.c. 419-20-21):

> "The controversy requires construction of Sec. 31, Art. 2, of the constitution, which declares: "No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session .... unless in case of an emergency ... the legislature shall otherwise direct." In the arguments presented by counsel it is conceded that little judicial construction exists which is authority upon the point involved here. It seems a number of states have constitutions similar to the provision in ours; that is, specifying the time within which all acts of the legislature go into effect. In only a few of the states having such a prescription of time are there exceptions where any law has immediate effect from its approval but some four of the state constitutions have been called to our attention which contain exceptions. That of Louisiana (art. 40) declares: "No law passed by the general assembly, except the general appropriation act, or act appropriating money for the expenses of the general assembly, shall take effect until promulgated." Missouri (Sec. 36, Art. 4): "No law passed by the general assembly, except the general appropriation act, shall take effect." Kentucky (Sec. 55): "No act, except general appropriation bills." Texas (Sec. 39, art. 3): "No law passed by the legislature, except the general appropriation act." These constitutions are older

> than ours, and it is therefore fair to assume that in framing the constitution of Washington the limitation, "general appropriation bills," was intentionally omitted. At any rate the Court would not be authorized to insert the word "general" in the constitution. The words must be accepted in their ordinary and common meaning here. It has been urged by relator that, if an unrestricted meaning be given to the word "appropriation", all bills providing for the appropriation of money, however incidental, are appropriation bills. But this may not necessarily be conceded. It is true that all general appropriation bills provide money for certain purposes, ordinarily for the expenses of the government and public institutions, and incidentally may provide for the application of the appropriation and specify the purchase of materials required in running the same, and how it shall be done; yet such incidental specifications do not deprive the appropriation bill of its nature as general. In the act under consideration the existing capitol commission, with matured powers to fully proceed to the erection of the capitol, has some different and additional duties imposed upon it. The original appropriation made for the capitol building fund created in 1893 upon the faith of the land granted to the state for the erection of public buildings is reduced from the unexpended portion of $930,000 to the sum of $350,000, and the interest on this sum is guaranteed until the payment of the principal out of the capitol building fund when the interest so expended from the general fund shall be returned to the state. We think a fair construction of the act shows it to be substantially an appropriation bill, and that it comes within the exception mentioned in art. 2, supra, of the Constitution."

This case decides the exact question you present under a constitutional provision identical with our own state constitution; and it will be observed the court holds no emergency clause is necessary and the appropriation bill is operative at once when signed by the Governor.

The Supreme Court of Washington holds the language used in Section 36, Article IV of the Missouri Constitution that "No law passed by the General Assembly, except the general appropriation act shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted unless in case of an emergency the General Assembly shall by a vote of

(Hon. Forrest Smith)

two-thirds of all the members elected to each House, otherwise direct", makes general appropriation bills without an emergency clause operative immediately when signed by the Governor.

My answer to your first question renders unnecessary passing upon the second question.

Very respectfully yours,

EDWARD C. CROW

APPROVED:

_____

Attorney General

IN RE: Method to be followed by State Auditor to Determine the rate of percentage of commission on taxes collected to be allowed County Collectors in Annual Settlement with Auditor.

Sec 9935-69. RSMo 1929

May 8, 1933.

FILED
3

Mr. Forrest Smith
State Auditor
Jefferson City, Mo.

Dear Sir:

Your letter reads as follows:

"We are handing you herewith the annual settlement as returned by the Collector of Oregon County, and request that you interpret the meaning of Section 9935 regarding the amount of tax assessed and levied for any one year; whether we should use the total of item 1, or the combined totals of items 1 and 2. In this particular case, the charge established by item 1 would establish the collector's commission under class 8; the total of items 1 and 2 would put him in class 10."

Section 9935 R. S. of Mo. 1929, fixes full compensation of county collector for collecting the Revenue except back tax, which compensation for collecting back taxes is jointly fixed by Sections 9935 and 9969.

Section 9935 provides that, "the collector shall receive as full compensation for his services in collecting the Revenue, except back taxes, the following commissions and no more."

Then follows fifteen subdivisions fixing the per cent of commissions allowed collectors on Taxes collected and which per cent of collectors' commissions is, by Sec. 9935, determined by the whole amount of all Taxes and Licenses Levied in the county or city, for a year, -- that is by the amount of Taxes and Licenses ordered or required to be raised and not by the amount actually collected.

To illustrate, Subdivisions I. and II. respectively provide as follows:

"I. In each county in this state wherein the

whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to five thousand dollars or less, a commission of ten per cent, on the amount collected.

"II. In all counties wherein the total amount of all such taxes and licenses levied for any one year is over five thousand dollars, a commission of ten per cent. on the first five thousand dollars collected and six per cent. on whatever amount may be collected over five thousand dollars."

The remaining thirteen subdivisions of Sec. 9935 are couched in same terms with the per cent. of rate of commission decreasing progressively as whole amount of Taxes levied increases in each of the respective classes of counties and cities.

Turning now to your Revenue form No. 6, showing Annual Settlement as returned of Oregon County Collector with State Auditor to which you ask me to apply the above set forth provisions of Sec. 9935, permit me to say I find in said return of Oregon County Collector the following facts: "you have according to the collector's return, upon which he makes his Annual Settlement, debits or charges against the collector divided into three items:

"Item No. 1, showing the charges for current Taxes, the total of which is Ninety-three Thousand Four Hundred and Seventy-Seven Dollars and Sixty-Seven Cents, ($93,477.67), and which total does not include Railroad Drainage and Levee Taxes.

"Item No. 2, shows the amount of Back Taxes prior to the current year with which collector is charged and the total of which is Ninety-two Thousand, Six Hundred and Thirty-three Dollars and Thirty-five Cents (92,633.35.).

"Item No. 3, showing the charge against the collector for Railroad, Telegraph, Telephone, Drainage and Levee Taxes totaling Fourteen Thousand and Seventy-seven Dollars and Ninety-seven Cents ($14,077.97) but which item No. 3 I will not consider herein further because the Statute definitely fixes the collector's commission for item No. 3."

You wish an interpretation of Sec. 9935,

informing you what amount of money in shape of commissions the Oregon County Collector is legally entitled to, under his Annual Settlement above referred to and how you should determine the amount of commissions due the Collector.

The Statute, Sec. 9935, classifies the counties and cities of the State according to the total amount of State, County, Bridge, Road, School and all other local taxes including Merchants and Dramshop Licenses assessed and levied for any one year and then arbitrarily fixes a named percentage of all that part of said above assessed and levied taxes which at Date of Collector's Annual Settlement have been collected as the commission the collector shall receive.

Now apply that rule to the facts shown in Revenue form No. 6 as returned by the Collector of Oregon County for his Annual Settlement with the Auditor.

We find the fact to be that Item No. 1,in said return of said collector shows there is a Debit or Charge against the Collector of $93,477.67 for the current taxes (Except Railroad, Drainage and Levee Taxes) and item No. 2. shows $92,633.35 against the collector for back tax prior to the current year. Both these two amounts of Taxes represented by items 1. and 2. were of course Assessed and Levied in Oregon County as State, County, Bridge, Road, School and all other local Taxes including Merchants and other Licenses and the two items, numbers One and Two represent the whole of the Taxes of the above named classes.

Add together the items One and Two, being respectively $93,477.67 and $92,633.35, making a Total of the whole amount of Taxes levied of $186,111.02.

Now in what class does a total Tax Levy of $186,111.02, under Section 9935, of the Statute, place Oregon County? Turning now to the Classified Subdivisions of Sec. 9935, we find Subdivision 10, reads as follows:

> "X. In all counties wherein the total amount of all such taxes and licenses levied for any one year exceeds one hundred and fifty thousand dollars and is less than two hundred thousand dollars, a commission of two and one-fourth per cent on the first one hundred and fifty thousand dollars collected and one-fourth of one per cent. on whatever amount may be col-

> lected over one hundred and fifty thousand dollars."

We observe that the class of counties in Subdivision Ten are those wherein the Total Taxes and Licenses Levied for any one year exceeds $150,000.00, and is less than $200,000.00, and as Oregon County's Total Tax Levy was $186,111.02, that county falls in Class No. Ten. The percentage allowed the collector, as his commission, by Sec. 9935 on Taxes collected in counties falling in class Ten is Two and One-fourth (2¼%) per cent.on the first One Hundred and Fifty Thousand Dollars collected and One-Fourth (¼) of One (1) per cent. on whatever amount may be collected over One Hundred and Fifty Thousand Dollars, The Total Taxes Levied in Oregon County is $186,111.02.

Take the net amount now collected by the collector of the Total amount of $186,111.02 Levied (your books disclose what this amount is, I assume) and figure 2 1/4th per cent. on the first $150,000.00 the collector has now collected and 1/4th of one per cent on any amount over One Hundred and Fifty Thousand Dollars the collector has now collected and the Total of the amounts of the Two Percentages is the amount of the collector's commission.

Our Supreme Court has approved this construction of Sec. 9935, as the proper Method of fixing the amount of the collector's commissions in the case of State ex rel. Scotland County vs. Ewing Collector et al, in which the Supreme Court said in 116, Mo. 1. c. 134:

> "It is manifest from a reading of the foregoing provisions that the per cent. of the commissions should have been determined by the amount of all such Taxes Levied, that is by the amount ordered and required to be raised and not by the amount actually collected."

(The 'Foregoing Provisions' referred to by the court in the above quatation from the Courts opinion are the Provisions of Section 7640, R. S. of Mo. of 1889, which are the same as the Provisions of Sec. 9935, R. S. of Mo. of 1929, which we have been considering.)

And the Court further said in the same opinion (116, Mo. 1. c. 134):

> "Section 7640 provides that the collector shall receive as full compensation for his services in

collecting the Revenue, excepting back Taxes, commissions to be determined upon the whole State, County, Bridge, Road, School and all other local Taxes, including Merchants' and Dramshop Licenses, assessed for any one year, the per cent. to be estimated on the amount collected."

You will notice each one of the Subdivisions of Sec. 9935, R. S. Mo.,1929, expressly provides the amount of the commissions shall be a certain designated per cent. of the Taxes collected.

I return you herewith the Annual Settlement of the Oregon County collector with the county court of said county for the year ending February 28th, 1933, and also your correspondence with the Oregon County Collector.

Very respectfully,

Edw. C. Crow

APPROVED:

ROY McKITTRICK
Attorney-General

ECC:AJ

APPROPRIATION: House Bill No. 659, 57th General Assembly, affecting the Commission for the Blind discussed.

May 22, 1933.

Hon. Forrest Smith,
State Auditor
Jefferson City, Mo.

Dear Sir:

On May 17, 1933 your office requested an opinion from this department as follows:

> "In H.B. 659, Sec. A 2, there is created for the Commission of the Blind an Industrial Fund and in Sec. A 3 there is appropriated from the State Treasury chargeable to this fund $350,000 for the payment of wages, etc.
>
> Have we authority to transfer funds from the Blind Pension Fund to the Industrial Fund?
>
> In Sec. A 4 there is created a Revolving Fund.
>
> Would the Commission be allowed to pay wages at their Plant from this Fund, or is the Revolving Fund limited to purchase of raw materials alone?"

In answer to your first inquiry, it is the opinion of this department that you do not have authority to transfer funds from the Blind Pension Fund to the Industrial Fund, because House Bill No. 659 provides:

> "Section A2. There is hereby created a fund to be known as the Commission for the Blind Industrial Fund and there shall be paid into the state treasury to the credit of such fund all money received by the Commission for the Blind in the way of donations and contributions from all sources."
>
> "Section A3. There is hereby appropriated out of the state treasury, chargeable to the Commission for the Blind Industrial Fund, for the payment of wages and commissions of blind workers, salaries of sighted superintendents, operators and assistants and miscellaneous operative expense for the years 1933 and 1934 the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00)."

In Section A2 of said House Bill quoted above the Legislature created a fund known as the Commission for the Blind Industrial Fund, and provided that it should be composed of all moneys received by the Commission for the Blind in the way of donations and contributions. That section is not ambiguous and nothing therein contained would warrant the assumption that the Legislature intended a transfer of funds from the Blind Pension Fund to the Industrial Fund.

Section A3 uses language customarily used by the Legislature in the appropriation of moneys out of a certain fund. Perhaps this language is not as clear as it could be, but it is language that has been used by legislators for many years, and its meaning by reason of such constant and universal usage is definite. Section A3 means that the Legislature appropriates out of the Commission for the Blind Industrial Fund in the State Treasury $350,000 for the payment of wages, of blind workers, salaries of sighted superintendents, operators and assistants and for miscellaneous operative expenses; there is nothing, therefore, in said section, from the language used, that would warrant an assumption that the Legislature intended that the fund there mentioned or referred to was to be augmented by moneys to be taken from the Blind Pension Fund.

Although in your letter you have not stated the fact to be, yet we understand from your Blind Pension Clerk that the fact is that the Commission for the Blind Industrial Fund referred to in said House Bill No. 659 is grossly inadequate and will continue to be grossly inadequate to furnish any such amount as $350,000. It is our opinion that such extrinsic fact makes no material difference in the answer heretofore given for the reason that under Sec. 19 of Article X of the Constitution of Missouri it is provided:

> "No moneys shall ever be paid out of the treasury of this state or any of the funds under its management except in pursuance of an appropriation by law;***"

It is therefore our duty to construe the appropriation bill from the words of the statute itself, without the aid of extrinsic evidence, unless the statute is ambiguous and we do not find in the language of the statute here under consideration any ambiguity.

It might be argued possibly that a latent ambiguity exists in that the Legislature is not presumed to have made a useless appropriation and from extrinsic facts we are able to ascertain that the appropriation made in Section A3 is useless in view of the fact that no moneys are available through donations and contributions, but this argument must fail in that the Legislature could have very readily anticipated that certain cities of the State of Missouri might contribute moneys to such fund, as well as individuals, and meant as the language itself says: that if such amount of money as $350,000 was donated, then in that event, such amount could be used for the purposes there named.

Furthermore, by no method of construction could it be ascertained that the Legislature intended the $350,000 mentioned in Section A3 to be taken from the Blind Pension Fund, since the Blind Pension Fund is not mentioned in said sections, and it would be just as plausible to assume that the Legislature intended to take $350,000 from the General Revenue Fund or any other fund as to assume that it intended such moneys to be obtained from the Blind Pension Fund.

In answer to your inquiry #2, it is our opinion that the Revolving Fund mentioned in Section A4 of said House Bill is limited to purchases of raw materials alone. Section A4 provides:

> "There is hereby appropriated out of the state treasury, chargeable to the Blind Pension Fund the sum of One Hundred Thousand Dollars ($100,000.00) for the purpose of creating a fixed capital for a revolving fund, to be known as the Commission for the Blind Revolving Fund, out of which shall be purchased raw materials to be used to make various and sundry articles and products to be sold and the proceeds therefrom as and when collected to be deposited in the state treasury to the credit of such Commission for the Blind Revolving Fund."

Again we have a section which so far as the purposes of the Revolving Fund is concerned, is unambiguous. The section clearly states that the Revolving Fund shall be used for the purchase of raw materials to be used to make various and sundry articles and products to be sold, and to permit said fund to be used for any other purpose would be in direct contravention of the section of the Constitution heretofore referred to (Sec. 19, Art. X of the Missouri State Constitution), but there is a valid question relative to the meaning of the word "proceeds" as used in Section A4. In other words, although it is clear that the $100,000 Revolving Fund can only be used to purchase raw materials, yet is it clear that the total moneys collected from the articles and products to be sold after said raw materials are made into completed articles and products are to be deposited in the State Treasury back to the credit of the Commission for the Blind Revolving Fund? That is to say, does the word "proceeds" mean total proceeds, or net proceeds, after labor has been deducted therefrom?

In order to answer this interrogatory it is necessary to look at the entire bill. Section 1 appropriates $137,854 out of the Blind Pension Fund for certain specific purposes, none of them being for labor of blind persons working on the raw materials mentioned in Section A4. Section A1 appropriates a certain amount of money for the benefit of a person named therein, and this, of course, does not provide any money for the payment of the services of the blind persons who make the completed articles from the raw materials purchased from the Revolving Fund mentioned in Section A4. Section A2 has hitherto been discussed and it in no way provides for wages of such blind persons before mentioned. Section A3 has been discussed and from the information obtained from your office, it is clearly shown that there will be no money available under Section A3 to pay any blind workers.

Under the above circumstances the appropriation of $100,000 for the purchase of raw materials would be a futile and useless appropriation had not the Legislature intended that the blind persons making the completed articles should be paid for their labor. So then in order to carry out that intention of the Legislature, we construe the word "proceeds" to mean net proceeds after deducting the cost of labor therefrom.

In other words assume that $5,000 was taken out of the Revolving Fund for the purchase of $5,000 worth of materials to be used by blind workers in the construction of articles, etc. to be sold---when those articles are sold, the amount of $5,000 should be returned to the Revolving Fund and from the difference between the $5,000 and the amount that the completed articles are sold for the blind workers should be paid, and if any profits remain, such profits, if any, should be deposited in the state treasury to the credit of the Revolving Fund.

While it is true that the above construction is not made in pursuance to the strict letter of the language used, yet it is made in pursuance to the object of the bill itself and is in line with the following authorities that hold that a legislative enactment should be construed in the light of its spirit and purpose and so as not to make any provision of it absurd or useless.

Fanny v. State, 6 Mo. 122;
E.R. Darlington Lumber Co. v. Mo. Pac. Ry. Co., 116 S.W. 530, 216 Mo. 658;
Rutter v. Carothers, 122 S.W. 1056, 223 Mo. 631;
Stack v. General Baking Co., 223 S.W. 89, 283 Mo. 396.

Yours very truly,

POWELL B. McHANEY,
Assistant Attorney General

APPROVED:

_____
Attorney General

PBM:AH

COLLECTORS FEES: Formula for paying into the city, county and state treasuries excess fees collected.

{Secs. 6584-9935 R.S. Mo. 1929

May 22, 1933

FILED 3

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

Your office requested an opinion from this department as follows:

> '"Section 9935, R. S. Mo. 1929, relating to the commission of the various County Collectors of the State sets out in Division 15 a proviso as follows:
>
> > 'Provided, that no collector shall be allowed to retain over nine thousand dollars of commissions and fees in any one year except as provided in subdivision fourteen herein; and all fees and commissions coming into the hands of any collector from any source whatever in excess of nine thousand dollars, except as provided in subdivision fourteen, shall be paid into the city, county and state treasuries in proportion to the amount received on taxes collected for each'
>
> In making the annual settlements as of March 1 with the various collectors, some of them have collected commissions in excess of the nine thousand dollars as provided in the article and the question has arisen as to the proper distribution of the excess commission refunded.
>
> We would appreciate an opinion from your office advising us whom this refund should go to and the basis upon which the proportionate division should be established."'

It is the opinion of this department that the refund, if any, occasioned by fees collected by a collector in excess of $9,000, as referred to in Division 15 of Section 9935 R. S. Mo. 1929 should be transmitted to the official in charge of the various treasuries therein named, i.e., the city treasury, the county treasury and the

state treasury. There may be some doubt as to the proper person in the case of the cities affected but this can be ascertained by a glance at the statutes affecting cities of the first, second, third, and fourth classes, and finding therein the officer whose duty it is to take charge of the city treasury. (From our perusal of the statutes, the proper officer in cities of the first, third and fourth classes is named City Treasurer, and the officer in charge of the treasury in cities of the second class is named the Commissioner of Revenue, who is the ex-officio treasurer of the city - See Sec. 6584 R.S. 1929.

It is the opinion of this department that such refund as mentioned in your letter referred to above is to be computed as follows: by adding the total amount of taxes collected for each of said divisions of government, i.e., city, county and state, and paying to each of said divisions (through the treasurer or corresponding officer as aforesaid) that portion of the total refund, i.e., the total amount of fees collected above the $9,000 which is represented by the proportion that the tax collected for each of said divisions of government (city, county and state) bears to the total amount of tax collected for all of said divisions.

In other words, if the collector collected $100 for a city, $200 for a county, and $100 for the state, the total collected for all of said divisions would be $400 and the proportion of the excess payments, or the excess fees, which each would be entitled to would be the amount that the tax collected for each bears to said total, i.e., for the city one-fourth, for the county, one-half, and for the state one-fourth.

We have assumed in the above opinion that your question does not refer in any manner to sub-division 14 mentioned in Sec. 9935, Division 15, heretofore quoted, and we believe that the above opinion answers in full your questions. However, in the event that some particular question is troubling you, please direct our attention to it in particular and an opinion from this office will be forthcoming.

Yours very truly,

POWELL B. McHANEY
Assistant Attorney General

APPROVED:

_____
Attorney General

PBM:AH

BLIND PENSIONS: Is claimant entitled to payment of blind pension as of date of court decision, or as of date of his application to Probate Judge or Blind Pension Commission?

Is State Auditor authorized to pay claimant out of the 1933-34 appropriation for that part of pension due during 1932-33?

L. 1896-87

May 26, 1933.

FILED 3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

We have received your letter of May 19, 1933 requesting an opinion from this department, said letter being as follows:

'"This office hereby requests an opinion in the case of David Bolick v. Missouri Commission for the Blind et al along the lines contained in the attached copy of court order.

The order sets out that "plaintiff herein has a right to have his name certified to the State Auditor by the defendants, and entered upon the pension roll of blind persons in the office of the State Auditor; that the defendants so certify the name of the said plaintiff and cause the same to be enrolled on said pension roll of the resident blind persons of Missouri; and that a copy hereof duly certified by the clerk of this court be, without delay, mailed to the Missouri Commission for the Blind at its office in St. Louis, Missouri.'

This court order was made January 30, 1933, whereas the plaintiff applied for pension February 1, 1932. His case was decided adversely by the Missouri Commission for the Blind, and suit was instituted resulting in the enclosed court order. This office is forced to accept the order as to enrolling the plaintiff on the blind pension roll, but desires the opinion of the Attorney-General as to the following:

1. Should the State Auditor enroll David Bolick as of date of court decision or as of date of his application to the Probate Judge for blind pension?

2. Is the State Auditor authorized to pay David Bolick from February 1, 1932 or from the beginning of the 1933 - '34 biennium, January 1, 1933'"?

It is the opinion of this department that the answer to your first query is found in Sec. 8900 of the R.S. 1929, which is as follows:

> '"The State Auditor shall place the names of all persons certified to him for a pension under this article upon a record to be kept in his office to be known as the 'blind pension roll' which shall contain also the residence, postoffice address, date upon which the application for pension was filed with the judge of the Probate Court or Commission for the Blind, and the date the certificate was received by the State Auditor; and the name of any person appearing upon the said blind pension roll shall be prima facie evidence of the right of such person to the pension herein provided."'

The above section of the statutes of Missouri appears unambiguous and unless there is some particular question confronting you about some of the provisions therein, we will assume the object of Question 1 is found in our answer to Question 2.

In answer to your question numbered 2, it is the opinion of this department that David Bolick is entitled to receive payment from the date of his application in view of Sec. 8896 R.S. 1929, which has among its provisions the following:

> "All pensions payable under this article shall begin on the date of the filing of the application therefor before the Probate Judge, or the Commission, as may be."

And it is further the opinion of this department that the fact that Mr. Bolick's pension dates from a period during the past biennium instead of the present biennium is immaterial, and that payments should be made to Mr. Bolick from the appropriation made by the past Legislature for the biennial period of 1933-34.

The above opinion is predicated upon the case of State ex rel Smearing v. Thompson, Auditor, reported in 45 S.W. (2d) 1078. There,

the relatrix, an adult blind person, sought to compel the State Auditor to draw a warrant in her favor for $740.00, the amount of the pension to which she was entitled under the statute for the period intervening between April 1, 1926 and September 12, 1928. The respondent refused to issue the warrant on the ground that the appropriation for the payment of pensions made by the General Assembly for the biennial period beginning January 1, 1931 was not available for the payment of what he termed a "back pension". Judge Ragland in his opinion relative to facts, which so far as principle is concerned are the same as contained in the instant case, said:

> "The only question here is whether the payment which relatrix seeks to have made out of the state treasury is within the 'object' to which the appropriation under the act just set out is to be applied. If it is a 'pension to the deserving blind as provided for in chapter 51, Revised Statutes, 1929', it is. The language in the title of the Appropriation Act, 'for the biennial period beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1932,' if read into the act itself, merely limits the period within which the appropriation made shall be available, in conformity with said section 19 of the Constitution; it has no reference to the time when the right to the pensions for the payment of which the appropriation is made should accrue or had accrued, nor to the period for which such pensions are payable.
>
> Section 8893 (Revision of 1929) provides that an adult blind person having the qualifications therein prescribed 'shall be entitled to receive, when enrolled under the provision of this article, an annual pension,' etc. One is 'enrolled under the provision of this article' when his name is placed on the blind pension roll by the state auditor. Section 8900. When enrolled the pensioner is entitled to a pension from the date of the filing of his application with the probate court. An applicant's name is placed on the blind pension roll upon certification by the commission for the blind; it is stricken from the roll upon a like certification when the commission, after notice and hearing, determines that the pensioner is no longer qualified to receive a pension. Section 8896.
>
> From the provisions of the statute referred to in the preceding paragraph, it appears that relatrix was 'entitled' to receive a pension only while her name

remained on the pension roll. She was not therefore entitled to a pension after April 1, 1926, until her name was restored to the roll; but when restored her right to receive a pension from the date of the filing of her application therefor with the probate court, in so far as the same had not been paid, was fully revived. The commission's reinstatement as of September 12, 1928, qualified for the purpose of depriving her of the right to a pension between that date, and April 1, 1926, was ineffectual for that purpose, and perhaps for any other. But its final order made on May 8, 1931, was in effect a rescission of its former erroneous order striking her name from the roll, thereby automatically reinstating her name thereon as of date April 1, 1926. Thereupon there inured to her for the first time a clear and undoubted right to receive a pension from and after April 1, 1926. As $740 of such pension remains unpaid, relatrix is entitled to the relief she seeks. A peremptory writ is awarded. All concur. "

Yours very truly,

POWELL B. McHANEY
Assistant Attorney General.

APPROVED:

_____
Attorney General

PBM:AH

SENATE BILL 80--Remission of penalties, etc. applies to railroad taxes.

FILED
3

May 27th, 1933

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion respecting the operation of Senate Bill 80 as to delinquent railroad taxes, said request reading as follows:

> "On April 11th, 1933 you were kind enough to render an opinion relative to Senate Bill 80 pertaining to the remission of penalties on delinquent taxes; however, there is one point which has now arisen that was omitted from that opinion, namely; 'Q. Does Senate Bill 80 remit the penalties on railroad taxes as set up on the railroad tax book provided for in Section 10030, R. S. Mo. 1929?' "

It is the opinion of this office that the above question must be answered in the affirmative, for the following reasons:

(1) It was unquestionably the intent of the Legislature to include these taxes. The intent and purpose of Senate Bill 80 as to expedite the collection of revenues so as to relieve the acute financial situation facing the State Institutions, Public Schools and the various other political subdivions of the State. Delinquent railroad taxes constituted a substantial amount of the delinquencies existing at the time of the passage of Senate Bill 80. To exclude them would be to defeat the purpose of the bill.

(2) As further evidence of the Legislature's intent to extend the operation of Senate Bill 80 to all delinquent taxes, we point to the fact that the General Assembly after confining the operation of the Bill to those delinquent taxes as set forth in Chapter 59 (which was an unintentional restriction) the General Assembly recalled the Bill in consideration of the Chief Executive and struck from the Bill the phrase which confined it to the delinquencies as set forth in Chapter 59. This is an indication that cannot be overlooked that the intent of the Legislature was to include all delinquencies coming within its term.

(3) Although Senate Bill 80 refers to the taxpayer as a "person", that term is sufficiently broad to include a railroad corporation as evidenced by the definition of the term "person" as used in the revenue laws of the State. This definition is set forth in Section 9977 R. S. Mo. 1929 which reads as follows:

> "* * * And the word 'person', as used in this Chapter, shall be held to mean and include person, firm, company, corporation or otherwise, whenever the case may so require its use or application."

The Chapter referred to in the above definition is Chapter 59 R. S. Mo. 1929; the Chapter referring to taxation and revenue.

(4) The term "list of delinquent back taxes" as used in Senate Bill 80 is sufficiently broad to include the list of delinquent railroad taxes. Section 10030 R. S. Mo. 1929 provides for a separate tax book to be known as the Railroad Tax Book which is prepared by the Clerk much in the same manner as other tax books. Section 10035 provides that any railroad taxes not paid on or before the 1st day of January next after the same shall have been levied, "shall be on and after that date, known and treated as delinquent railroad taxes". Accordingly, on the 1st day of January following the assessment of the tax, the separate railroad tax book becomes a delinquent railroad tax book for that year and the terms of Senate Bill 80 are sufficiently comprehensive to include this delinquent list within its term.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW/mh

IN RE: CONVICTS TO PENITENTIARY: INTERPRETATION OF SECTION 11791 R. S. Mo. 1939.

June 15, 1933.

FILED
3.

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your letter of June 14 in which you make the following request for an opinion from this office:

"We would be pleased to have an interpretation by your office upon the meaning of the following clause taken from Section 11791, R. S. Mo. 1929:

> 'When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners; ....'

"Following is the interpretation which this office has heretofore placed upon this part of the above statute:

A. "If a Sheriff brings three prisoners to the penitentiary, he may employ a guard to come with him, without securing a court order. (One only).

B. "If a Sheriff brings less than three prisoners (one or two), he may employ a guard to come with him, providing he first secure a court order. (One only).

C. "If a Sheriff bring four prisoners

he may employ one guard without an order, and, by securing an order, he may employ an additional guard. (Two in all).

D. 'If a Sheriff bring five prisoners he may employ one guard without an order, and, by securing an order, he may employ an additional guard. (Two in all).

E. 'If a Sheriff brings six prisoners, he may employ one guard without an order, and, by securing an order he may employ two additional guards. (Three in all)."

It is the opinion of this department that you are correct in your interpretation of the statute with respect to case A, case B, and case E.

However, we respectfully submit that, in case C and Case D, one guard only may be employed. Section 11791, R. S. Mo. 1929, provides in part: "*****and any additional guards employed by order of the judge, shall, in no event, exceed one for every three prisoners; *****. The statute allows a guard to be employed without order of the court when three or more convicts are being taken to the penitentiary at one time. However, before an additional guard may be employed, there must be at least three extra prisoners or six in all. If an additional guard were to be employed and there were only four or five prisoners in all, the provisions of the statute would then be violated in that there would be an additional guard and only one or two additional prisoners whereas the statute requires that there be three extra prisoners for each additional guard. The statute itself contemplates that one guard is sufficient for any number of prisoners from one to five in that it provides for one guard "when three or more convicts" are being taken to the penitentiary at the same time.

Therefore, in view of the foregoing it is the opinion of this office that, if there are one or two prisoners being taken to the penitentiary at one time, one guard may be employed if an order of the court to that effect is obtained; if there are three, four or five

prisoners, one guard only may be employed, no order of the court being necessary; if there are six prisoners, one additional guard may be employed providing an order of the court to that effect is obtained, making two guards in all.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH/AJ

SEARCHES AND SEIZURES) Section 10132 R. S. 1929, does not give right
STATE AUDITOR) to the State Auditor to inspect books of corporations or companies in which one may be a stockholder for purpose of ascertaining what has been paid in dividends.

June 17, 1933. 6-20

FILED
3
29

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter of June 14th, 1933, which letter is as follows:

> "It is requested that you advise this office as to whether or not in accordance with Section 10132, Revised Statutes of Missouri, 1931, the State Auditor has a right to have access to the books and records of Building and Loan Companies, for the purpose of determining the profit to individual stockholders on paid up stock and interest received on same after having been paid up.
>
> I will very much appreciate an opinion in the above matter at your earliest convenience."

In your letter you refer to Section 10132 R. S. Mo. 1931. We believe you mean the same section in the 1929 statutes. The 1931 Laws did not repeal, amend or change Section 10132 R. S. 1929, nor is such a section provided for in Laws of 1931.

The only question on which you desire an opinion is whether or not the above section (10132 R. S. 1929) gives the state auditor the right to inspect books and records of

building and loan companies for the purpose of determining profits paid to individual stockholders. We are of the opinion that this section does not give the state auditor the right of inspection of building and loan companies' books for such purpose.

Section 10132 R. S. 1929, provides in part as follows:

> "In case any taxpayer shall fail to make return as required by law, the state auditor shall have authority to estimate the amount of such taxpayer's income, from such source as he may be able to obtain including the business, records and books of any taxpayer, which business, records and books, the auditor is hereby given the right to examine during the usual business hours at any time within three years after the return of such taxpayer is required by law to be filed, etc. * * * * *"

It is noted that the auditor may estimate the amount of a taxpayer's income from any source he may be able to obtain the information, but said section does not give him the right to inspect the records or books of a company in which such taxpayer may be only a stockholder. However, it does give the state auditor the right to inspect the business, records and books of such taxpayer.

This opinion is rendered upon your request as submitted, namely, as to the applicability of Section 10132 R. S. 1929, to the question asked.

Yours very truly,

James L. HornBostel,
Assistant Attorney-General.

APPROVED
ROY McKITTRICK,
Attorney-General.

JLH:EG

CIRCUIT CLERKS; Fees in criminal cases for making transcript.

7-4

FILED
3

June 23rd, 1933

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

We received your letter of June 16th requesting an opinion upon the following matter:

> " We would be pleased to have the opinion of the Attorney General as to what charge a Circuit Clerk is entitled to make for preparing transcript to the Supreme Court where a defendant appeals as a poor person in a criminal case.
>
> Sec. 11787, R. S. Mo. 1929, which is the only statute authorizing Circuit Clerks to tax any fee in a criminal case for themselves, provides: 'For transcripts to the supreme court, for every hundred words . . . .10'. The question is as to the meaning of this word 'transcript'. Does it mean only the record proper or does it also include a copy of the bill of exceptions for which the Clerk may charge 10¢ per hundred words, even though he actually makes no copy of such bill of exceptions (the same being furnished to him gratuitously by the court stenographer)? "

In capital cases the granting of an appeal automatically stays the execution of the sentence. Section 3742. In all other cases where an appeal is taken, it is necessary for the Court to make an order staying the execution of the judgment, and in such cases the provisionsof Section 3757 R. S. 1929 govern the mode of procedure. This Section is as follows:

> "SEC. 3757. WHERE APPEAL DOES NOT OPERATE AS A STAY. When the appeal or writ of error does not operate as a stay of proceedings, such transcript shall be made out, certified and returned, on the application of the appellant or plaintiff in error, as in civil cases, except that the costs of the transcript shall not be required in advance."

Since the mode applicable in civil cases applies to such appeals, we will examine the statutes with reference thereto to ascertain what fees the clerk is entitled to charge.

Section 11785 R. S. 1929 provides that the circuit clerk is entitled to charge certain fees, namely 10¢ per hundred words for "making transcripts for the supreme court". Section 11722 specifically provides certain compensation in the way of fees to be paid to the court reporter for making a transcript of his notes in cases that are appealed. Section 1033 provides that when an appeal is granted, the clerk shall

> "without delay make out and send to the clerk of such appellate court a complete copy of the record entry of judgment or decree appealed from and the order granting the appeal, or in lieu thereof, if the appellant or plaintiff in error shall direct, a perfect transcript of the record and proceedings in the cause."

Section 1836 provides that the clerk shall cause the bill of exceptions to be written out at full length unless the same has previously been done. Section 1838 provides that in making out transcripts of records, except on writs of error, the bills of exceptions shall not be inserted unless specifically requested by the applicant therefor.

From the above and foregoing statutes, it is the opinion of this office that the term "transcript" as used in Section 11787, R. S. 1929 means that part of the record and proceedings in any case ~~made~~ by the circuit clerk, exclusive of the bill of exceptions. Where the court reporter has made out a bill of exceptions and filed a copy thereof in the office of the circuit clerk, the circuit clerk is not entitled to make any charge under the provisions of Section 11787 for the words and figures contained in this bill of exceptions as prepared by the court reporter.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

...CE OF PEACE) Justice of the peace is entitled to s ... c
FEES) fifty cents for entering his decision o...
CRIMINAL COSTS) record in a preliminary hearing.

June 26, 1933. 7-4

FILED
3
31

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department acknowledges receipt of your letter dated June 20th, 1933, as follows:

> "We would be pleased to have the opinion of your department upon the following questions regarding fees of Justices of the Peace incurred at a preliminary hearing of a criminal charge:
>
> 1. Can a Justice of the Peace charge 50¢ for a transcript of the preliminary preceeding?
>
> 2. Can such a Justice charge 50¢ for judgment?
>
> It has been the position of all previous Auditors that no such charge could be made and our position is set out in the attached brief sent to Mr. Jack Savage, Justice of the Peace of Rockport, Missouri.
>
> If it is convenient, our Mr. McGregor, who has charge of criminal costs, would be pleased to talk to the Assistant Attorney General to whom this question may be assigned."

Section 37 of Article VI of the Constitution of the State of Missouri provides that,

> "In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, his powers, duties and duration in office shall be regulated by law."

A justice of the peace, therefore, is a consitutional officer.

Among the duties of a justice of the peace, as prescribed by law, is the right to hold and conduct preliminary examinations in felony cases as provided in Article V of Chapter 29 of the Revised Statutes of Missouri, 1929.

Upon complaint being filed with the justice of the peace, setting forth that a felony has been committed and the name of the person accused thereof, it shall become the duty of the justice to issue a warrant directing the arrest of the accused. Under the provisions of Section 3473, when the accused is brought before the justice he is required to examine the complainant and witnesses produced in support of the prosecution on oath and in the presence of the prisoner in regard to the offense charged, and the witnesses may be examined as to other matters connected with such charge as in the judgment of the justice may be pertinent to the issue. By Section 3477 the justice is required to inform the prisoner there is a charge against him; read to him the complaint as required and allow the prisoner reasonable time to advise with counsel. By Section 3478 a justice may exclude from the place where the examination is being held all witnesses other than the one under examination. Under Section 3479 the hearing is to be conducted with respect to the introduction of evidence and the examination of witnesses in the same manner as in the trial of causes in courts of record so far as applicable. By Section 3480, in cases of homicide only, the evidence given by the witnesses shall be reduced to writing by the justice or under his direction. By Section 3481 the accused may present witnesses on his behalf and at his request he may be sworn as a witness. Under Section 3482, if, upon examination of the whole matter, issue and testimony, it appears to the justice either that no offense has been committed by any person or that there is no probable cause for charging the accused with such crime, if committed, the justice shall discharge the accused. By Section 3483, if it appears to the justice that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof, the

magistrate shall bind by recognizance the prosecutor and all material witnesses against such prisoner to appear and testify before the court having cognizance of the offense.

It necessarily follows, therefore, that if the justice finds that a crime has been committed and that there is probable cause to believe the accused guilty thereof, then, it is the duty of the justice to so find and make a record thereof.

By section 3489 the justice is required to certify to the clerk of the court having jurisdiction of the offense all examinations and recognizances taken in pursuance of the holding of the preliminary hearing.

That justices of the peace are courts of limited powers without common law jurisdiction, and that they can only do the things which the statutes prescribe they may do, cannot be doubted. It is apparent that the holding of the preliminary hearing is an important and solemn step in determining a charge against an accused, upon conviction of which he may be fined, imprisoned or his life taken, and in determining whether or not the finding of a justice of the peace on a preliminary hearing is a judgment within the meaning of Section 11778 R. S. Mo. 1929, we must keep in mind the kind and character of the hearing that is being held, the question at issue and the thing that is to be determined.

In Eppright v. Kauffman, 90 Mo. 25, the Supreme Court of this State at page 97, in defining what is meant by "judgment", said,

> "If the statute is not meaningless, then its provisions bring the allowed claim of the plaintiff fully within the definition of a judgment given by Mr. Freeman. He says: 'A judgment * * * is defined as being, 'the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record.'' Freeman on Judg., sec. 2. 'Every definite sentence or decision by which the merits of a cause are determined, although it be not technically a judgment, or although the proceedings are not capable of being technically enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law.' Ib., sec. 16. 'A large number of persons and

> tribunals not ordinarily spoken of as 'judges,' nor as 'courts,' are nevertheless authorized to investigate and determine certain questions. Their authority in this respect is judicial; and their determinations are conclusive unless set aside by some competent authority.' Ib., sec. 531."

With reference to preliminary hearings, 16 C. J. p. 333 with reference to the final decision of the justice on a preliminary hearing, states,

> "Such conclusion or opinion of the examining magistrate is a judicial determination, and is essential as a basis of the proceedings by information."

In State v. Beaverstav, 12 N. D. 527 - 530, discussing the effect of a decision of a justice of the peace upon a preliminary hearing said,

> "The function exercised by the magistrate in such examination is a judicial one, and the finding and determination made by him, if the statutory bounds and requirements have been observed and followed, is entitled to the same respect and is of the same binding force as against collateral attack by habeas corpus as is the judgment of a court of general jurisdiction."

Suppose the defendant in a felony case charged by information filed in the circuit court should file a plea in abatement on the ground that he had not been accorded the right of a preliminary hearing, whereupon the prosecuting attorney asserted the accused had had such a hearing and offered in evidence the files certified by the justice of the peace, it is evident that such evidence would not prove a preliminary hearing had been held but it would be necessary to go further and show the finding and decision of the justice of the peace, and that finding and decision could not be collaterally attacked.

We are of the opinion that the finding and decision of the justice of the peace upon a preliminary hearing held, is

a judgment within the meaning of Section 11778, R. S. Mo. 1929, and that a justice of the peace is entitled to be paid fifty cents for the entering of such judgment, where otherwise allowable.

Very truly yours,

GILBERT LAMB
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

GL:EG

...nt of $500.00 counsel for services of attorney in primary contest for nomination for Missouri House of Representatives on Resolution of House directing its Committee on Accounts to pay said sum held no authority thereof.

June 30, 1933 7-3

FILED
3

31

Mr. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

Your letter reads as follows:

"On April 20, the following Resolution was adopted by the House:

> "Be it Resolved, That the Committee on Accounts be directed to draw a warrant in favor of Jerry T. Dugan to pay in full payment for legal services rendered in election contest proceedings against the Honorable James Carroll, Harry H. Brake, Cornelius J. O'Brien, and Andrew F. Blong, members of the House of Representatives of the 57th General Assembly, in the sum of five hundred dollars ($500.00) and charge the same to the contingent fund of the House; said warrant to be delivered to the said Jerry T. Dugan only upon condition that he shall first receipt the above named members of the General Assembly, the State of Missouri, and all committees and persons whomsoever, directly or indirectly, interested in, or concerned with, the result of said election contest proceedings."

On April 21, I received the following letter signed by Representatives Maxey of Bates County, and Lay of Benton County:

> Dear Sir:
>
> Yesterday morning the House of Representatives, by a vote of thirty-nine for to thirty-seven against, with seventy-one members absent, adopted a resolution directing the Committee on Accounts to draw a warrant in favor of

J. T. Dugan in payment of alleged legal services rendered in election contest proceedings in St. Louis.

No contest was, or could have been, instituted in the House involving the nomination of candidates, and the alleged services were not rendered in connection with any contest in the House, but a suit in the Circuit Court in the City of St. Louis.

It was stated by the proponent of the resolution that the services were not rendered in an election contest, but that there was a contest arising from the primary and involving nominees for the General Assembly.

In our opinion, the House of Representatives exceeded its constitutional authority in directing the Committee on Accounts to draw such warrant, and that such an attempted expenditure of public funds is absolutely unconstitutional.

We hope that, before you audit the warrant, you will submit all of the information to the Attorney-General and secure a ruling from his office as to whether or not the House exceeded its constitutional powers in attempting, by this resolution, to so disburse public funds.

Sincerely yours,

(Signed) H. O. Maxey, Rep. Bates County

Henry Lay , Rep. Benton County

If any legal authority exists for payment from State Treasury of $500.00 counsel fee in primary election contest for a nomination in House of Representatives this department has been unable to find same.

It is the opinion of this department a special appropriation would be required even if the General Assembly had the power to make the payment.

Enclosed is copy of opinion on similar question written Hon. Richard R. Macy, State Treasurer, on April 21, 1933.

Very respectfully,

EDWARD C. CROW,

APPROVED:

Attorney General

ECC:hm

COUNTY HIGHWAY COMMISSION: Power and duties under Article 2, Chapter 42, R. S. of Mo. 1929

July 1st, 1933

FILED 3

Hon. Frank K. Ashby,
Prosecuting Attorney,
Charleston, Missouri.

My dear Mr. Ashby:

Your request of June 27th to General McKittrick for an opinion of this Office respecting the County Highway Commission and its powers and duties has been referred to me for reply. For the purposes of this opinion, I have consolidated your questions into the following form.

1. Is the actual construction of county highways, located, laid out and designated under the provisions of Article 2 of Chapter 42 of the Revised Statutes of Missouri 1929 under the supervision and control of the County Highway Commission subject to the approval of the State Highway Commission?

2. Does the Commission have a right to any money in said District derived either from bond issues or from any other source to spend on the proposed highway, such highways not exceeding one hundred miles as provided in said Article 2?

3. Is the refund money set up on the books of the Highway Department as a Refund Account, the sole fund of Mississippi County or do the special road districts or other political subdivisions have an interest therein?

4. Does the County Highway Commission have the right to let the contracts and supervise the spending of this money?

5. Can the County Highway Commission expend this refund money in building new roads which are not in the same part of the county or the same districts as were the roads which were taken over

by the State Highway Commission and were the consideration for the refund?.

6. Can the County Court of Mississippi County use the refund money to buy office furniture for the Court House or disinfectant for the jail?

7. Does the County Court have the power to use this refund money and supervise the building of other roads in the County to be taken over by the State Highway Commission under the provisions of Article 2 of Chapter 42?

8. If the County Court expects to use this refund money in the building of additional roads by day labor, is it required to follow Section 7946 R. S. Mo. 1929 in respect to the purchase of machinery and the drawing of plans, specifications and estimates of the cost of the new road?

9. If the County Court expects to use this refund money in the building of additional roads by contracts, are they required to follow Section 7947 of R. S. of Mo. 1929?

The powers and duties of the County Highway Commission are set out in Sections 7858 and 7863, portions of which read as follows:

> "SECTION 7858-Power and duty of County Highway Commission--It shall be the duty of the County Highway Commission and said Commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the State Highway Commission, a system of county highways not exceeding in the aggregate one hundred miles in any county, * * * "
>
> SECTION 7863-Commission empowered to employ technical and other help. The county highway commission is hereby authorized and empowered * * * to use and employ whatever means, methods, or power that may be necessary in the construction and maintenance of said county highways, * * * and is hereby empowered to employ such technical and other help as may be deemed necessary for the administration and enforcement of this Article."

From reading the foregoing portions of these Sections it seems that the County Highway Commission is given broad powers in performing its duties under this Article. At the time these Sections were enacted in 1927, the State Highway primary and secondary systems were already well under way and it was undoubtedly the intent to prepare for a further system of highways to be known as "County Highways" which would in reality supplement the primary and secondary state highway system. To insure that these highways be up to a high standard of quality and design, it was provided that the location, design and construction of these roads be done with the approval of the Highway Commission. Further Sections of this Article place certain requirements upon the width of the right-of-way and the design of the road so as to insure the building of first class highways.

As to the powers and duties of the County Highway Commission, the Supreme Court in the case of State ex rel. State Highway Commission vs. Huff et al, 51 S. W. (2d) 40 said:

> " The powers of that commission are found in an act passed by the Legislature in 1927, a year prior to the adoption of said section 44a. That act (now article 2, chapter 42, R. S. 1929 (section 7856 et seq.)) created and established in the several counties of the state a county highway commission. It empowered each such commission to locate, lay out, designate, construct, and maintain, subject to the approval of the state highway commission, a system of county highways, not exceeding in the aggregate 100 miles, so connecting the centers of population in the county with state highways that the inhabitants of the county generally should have and enjoy 'a system of highly improved farm-to-market roads'. The act provided that the 'roads constituting the county highway system shall be known and designated as 'county highways'.' It further provided that 'the county highway commission shall have absolute jurisdiction and control over all highways constituting a part of the county highway system.' "

While the "approval" of the State Highway Commission is a requirement of this Act, we do not interpret the approval to mean the power to build or to contract for the building of the highway. So bng as the location, design and methods of construction are such as are approved

by the State Highway Commission, the requirements of the Act are met. While it is apparent that the Act contemplates a transferring of these county highways to the State Highway Commission at some further date, the County Highways are not to be confused with the supplementary State Highways as the same are separate and distinct systems. See State ex rel. State Highway Commission vs. Huff, supra, l.c. 42.

> " In State ex rel. Russell v. State Highway Commission, supra, loc. cit. 199 of 42 S.W. (2d), the supplementary state highways provided for in said section 44a were referred to as 'being what are generally called 'farm-to-market' roads.' In so describing them, the court was merely making use of the nomenclature which had been employed in the press and on the hustings in the campaign to popularize and secure the adoption of the proposed constitutional amendment, then known as proposition No. 3. It certainly had no thought of identifying the 'supplementary state highways' provided for in the amendment with the 'county highways' constituting 'the county highway system', created and put under the jurisdiction of the county highway commission by said article 2."

In reply to your second inquiry, I beg to advise that the funds at the disposal of the County Highway Commission are provided for in Sections 7861, 7863 and 7864, R. S. of Mo. 1929.

Section 7861 provides that in the event any highways that are taken over by the County Highway System, which are laid through any special road district or in counties under township organization, through any township, the Commissioner of the Road District or the Treasurer of the Township shall pay to the County Highway Commission a proportion of the Special Road Tax levied and collected in the District of Township. Section 7863 authorizes the County Highway Commission to accept and expend any appropriation or donation from any municipal corporation, special road district, township or private individuals and Section 7864 authorizes the County to make such appropriations or contributions as the County Court in its judgment may deem necessary to attain the result contemplated by the Act. It is accordingly apparent that the Commission has no right to any refund money unless appropriated, donated or contributed under one of the foregoing Statutes. While the County Court does not have the actual supervision and control over the construction of the highways contemplated by this Article, it nevertheless holds the pursestrings. The County Highway Commission's sources of revenue are the foregoing Sections, and it has no interest in any refund except by virtue of the aforementioned laws.

In answer to the third interrogatory, we refer to the Section authorizing these refunds, which reads as follows:

> "SECTION 8127-State Highway Commission may reimburse counties or other civil subdivisions * * *. Counties or other civil subdivisions shall be reimbursed for work done in constructing such part of a road or roads including bridges, * * * which may become a part of the state highway system * * *. Where two or more counties or minor subdivisions or minor subdivisions in two or more counties have constructed a road which is taken over as a part of the state highway system and reimbursement is to be made under the provisions of this section, reimbursement shall be made to each county or minor subdivision in proportion to the funds contributed by each in the construction of the roads taken over, and those constructed therewith in each county or in the territory of the minor subdivision of each county.

It is therefore apparent that if both the County and the civil subdivisionsor special road district has contributed to the construction of a certain road taken over by the State Highway Commission, the refund granted under this Section shall be divided between the County and special road district or civil subdivision in proportion to the amount which was contributed by each toward the construction of such road. It is to be noted that this Section closely follows the provisions of Section 44a of Article IV of the Constitution and that both of these expressions provide that the refund shall be made to a county or civil subdivision which is entitled to receive the same.

The Supreme Court of this State has several times considered a similar proposition. The laws which provide for the levying of a special road and bridge tax, state that such levy shall be collected and paid into the County Treasury to the credit of the road district in which said tax was collected. At times County Courts have collected this special road and bridge tax and refused to pay the money to the road districts entitled thereto. Road districts have thereupon sued the County for the tax which it collected in the road district under this levy. The controlling case on this issue is that of Road District vs. Ross, reported in 270 Mo. p. 76. The Court in considering these Sections of the Statutes stated as follows on page 82:

> "It was not only declared in the section which authorized its levy that it be placed to the credit of the road district from which it was collected and paid to the overseer of such district on warrants of the county court and expended by the overseer, but also declared that it should constitute the road fund of the several road districts. In these provisions we can see no evidence of any intention that the county court might devote it at will to other uses."

And on page 84,

> "This particular fund (referring to the minimum ten cent tax for road and bridge purposes devoted to the special road districts) has plainly been removed from its control and entrusted to other hands to be expended by other agents, while leaving ample resources at its command for application to any road and bridge purpose, which may still remain within the range of its duties."

And accordingly the Court held that the statutory and constitutional provisions vested in the special road district the right to this tax money when collected.

It is the opinion of this Office that the constitutional and statutory provisions authorizing the refund to be made to the "counties or civil subdivisions" gives to the civil subdivision the right to receive its proportionate share of the refund when such refund is available.

In answer to the fourth inquiry, it is our opinion that the County Highway Commission has the right to let the contracts and supervise the location, construction and maintenance of the "county highways" provided for in Article 2. It is certain that the Act confers these powers on the Commission. The only question remaining is the power of the Legislature to divest the County Court of authority over these roads and place control in the Commission. The power of the Legislature in this matter is very exhaustively discussed in the case of Harris vs. Bond Co., 244 Mo. 664. The plaintiff in that case took the following position, l.c. 681, 682:

> " His contention is that under the Constitution and policy of Missouri, as expressed in the decisions of this court, the construction and maintenance of public roads is a proper function of the county; that taxes for public roads

> are taxes for county purposes, and consequently, under the Constitution as construed and applied by this court, the Legislature has no power or authority to deprive the county courts of their jurisdiction and control of the construction of public roads and highways in any part of the county and transfer the same to a body of commissioners representing a subdivision of the county, such as these special road districts."

The Supreme Court reiterated the well established doctrine that the Constitution is a restriction of powers and not a grant of powers and stated as follows on page 688:

> " The Legislature is vested with the whole power of the State in the absence of some such constitutional limitation; and may establish any public or municipal corporation it deems necessary or expedient in the public interest."

It was the holding of the Court that there was no constitutional restriction upon the power of the Legislature to delegate the construction and maintenance of the roads in a special district to road commissioners and that such an Act was unconstitutional.

In answer to the fifth interrogatory, it is the opinion of this Office that any part of the refund money which is donated or appropriated to the use of the County Highway Commission and any other funds that are to be used in the building of the one hundred miles of county highways, shall be used by the Commission to connect by the most practical route the several centers of population in the County, in such a manner as to afford a connection with any State Highway and as nearly as possible, to connect with other county highways, the centers of population of the County to the end that all parts of the County shall be connected with the State Highway System and that the inhabitants of the County generally shall have and enjoy a system of highly improved farm-to-market roads. It is therefore evident that the Commission is required to expend the money received by it, on the roads which will connect the various centers of population of the County with each other and with the State Highways. While it is possible that a special road district might make a contribution to this system, conditioned upon the contribution being expended upon a certain designated portion of the County Highway, there is no statutory requirement that the funds shall be expended in any particular district or township. It is the opinion of this Office that although the funds might arise from one part of the county, the Commission would be authorized to expend such funds wherever they were needed to complete the object of the act.

In considering the sixth interrogatory, we should refer to Sectionn 20 of Article X of the State Constitution, which provides as follows:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, * * * and not otherwise."

It should be kept in mind that the funds which were used to construct the highway which was later taken over by the State Highway Commission and formed the basis for the refund, were raised either by bonds issued for road and bridge purposes or by taxation for road and bridge purposes. The fact that the funds have been invested in the improvement which was the purpose of their creation, and have since been refunded or returned, solely because of the nature of the improvement, cannot be held to obliterate their identity. The refund was made for the reason road and bridge improvements had been made. These improvements were made possible by taxes levied on the property in the civil subdivision, Each taxpayer contributing his portion to this fund, whether as a current tax for construction and maintenance or as a tax for the purpose of retiring the bonds. As each of the taxpayers has so contributed his portion, he has a right to some day expect that the county roads will eventually reach him and so long as the county has road and bridge funds with which it can build these roads, it could hardly be stated that the road construction program was completed. Until that time, it would certainly not be proper for the county court to make any order transferring any of the funds of the road and bridge account to any other fund, This would be necessary before these funds could be used for the purchase of office furniture or disinfectant. It is therefore the opinion of this Office that the County Court would be without authority to use this refund money to purchase office furniture or disinfectant.

In respect to the seventh interrogatory, we advise that the jurisdiction of the County Court under the Constitution to conduct the business of the Count is sufficiently broad to include the power to construct and maintain and supervise the construction and maintenance of the county roads. However, this authority is in the absence of a legislative act conferring this power and authority upon any other agency. In the case of State ex rel. Maes vs. Wehmeyer, 25 S. W. (2d) 456, the Supreme Court stated as follows:

> "County Courts have general jurisdiction of the subject-matter of county roads and bridges and of county bond issues for such purposes. Whatever the jurisdiction of the county highway commission may be under the Act of April 6, 1927, until such commission is appointed and the county highway system contemplated by the act is designated, it cannot be said that the county court, in pursuing the activities

above mentioned, has exceeded its jurisdiction."

Accordingly had the County Court failed to appoint any County Highway Commission it would undoubtedly be within their jurisdiction to proceed to let contracts and supervise the building of the roads of the County. However, the Legislature in Article 2 has seen fit to create a Board of Commission known as the County Highway Commission whose specific object and purpose is the construction and maintenance of a system of county highways not to exceed one hundred miles which may later be taken over by the State Highway Commission. As heretofore bet out, the Legislature having the power to enact a law creating the County Highway Commission and giving to that Commission the supervision of certain county roads, it is the opinion of this office that upon the appointment of that Commission the County Court is divested of authority to proceed under Article 2 to build or contract for the building of the one hundred milessystem of county highways. This is not to be taken as to say or to mean that the County Court is divested of all authority in the construction and maintenance of county roads. By turning to the last Section of Article 2, we find that it was not the intent of the Legislature to divest the County Court of all authority over the county roads, as this Section leaves with the County the right to all taxes derived from levies authorized by Section 7890 R. S. of Mo. 1929 and appropriates said tax to the use of the County Court to be used at its discretion in the construction and maintenance of roads and bridges located within the confines of the county highway system, as well as all other roads and bridges in such county. Accordingly, it is the opinion of this Office that the County Court while having supervision over other county roads has no power to build or contract for the building of the one hundred mile system contemplated by Article 2, Chapter 42 of R. S. of Mo. 1929, after the appointment of the County Highway Commission.

The answers to interrogatories eight and nine must follow the foregoing conclusion, to-wit that as the County Court has no jurisdiction in the designation, location, construction or maintenance of the one hundred mile system provided for under Article 2, any roads built by the County Court must be done under their general authority to lay out, construct and maintain the county roads. Sections 7946 and 7947 R. S. of Mo. 1929 set out certain requirements which must be followed by the County Court in building the County roads, either by day labor or by contract. It should here be noted that the Supreme Court of this State has held that Section 7946 and Section 7947 are exclusive and not merely directional. In the case of Hillside Securities Co. vs. Minter, 254 S. W. 188, the Court was considering a suit to enjoin the payment of warrants issued by Clay County, Missouri for bridge work done by the Topeka Bridge Company under contract with the County Court, The statement of facts admitted that the bid of the

Topeka Company was not submitted upon the plans and specifications submitted by the County Engineer. The Supreme Court held that the requirements of Section 7947 must be complied with before any legal and binding contract can be entered into. The Court stated at page 190 as follows:

> "Section 10734 (now Section 7947) provides an exclusive method of letting contracts for the constructions of bridges by the County Court. It requires that all work let by contract of the estimated cost of over $500, shall be let, after due advertisement, upon bids made upon maps, plans, specifications, and profiles, previously prepared by the highway engineer. That the statute does not contemplate the letting of contracts upon plans other than those submitted by the highway engineer and approved in advance of advertising and acceptance of bids of contractors bidding upon such plans is clear. There accordingly can be no question that the acceptance of the bids made by the bridge company upon plans other than those prepared by the highway engineer was a failure to comply with the statute."

And on page 192 stated as follows:

> "Here the contract made by the County Court was void because it had no power whatever to enter into such contract except in compliance with express statutory provisions."

And on page 193 as follows:

> "Where the parties have not followed the prescribed procedure leading up to the making of the contract itself, the county court has no power to make such contract."

And the Supreme Court accordingly affirmed the judgment denying the bridge company payment of the warrant issued for work done under this void contract.

We trust that the foregoing opinion meets your requirements.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

HGW/mh

SHERIFF FEES: Fees of sheriff in transporting convicts to Penitentiary.

11791 R.S.Mo.1929

July 5, 1933 7-5

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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your letter of June 29th, in which you make the following request for an opinion from this office:

> "Section 11791 R. S. Mo. 1929, provides that sheriffs shall receive 5¢ per mile for the distance necessarily traveled in going to and returning from the Penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the Penitentiary.
>
> The method previously employed in this office for ascertaining the distance traveled by the sheriff in bringing prisoners to the Penitentiary, has been arrived at by railroad transportation; thus the sheriff from Carroll County has been allowed 125 miles less miles in bringing prisoners to the Penitentiary than the sheriff from Platte County.
>
> Please advise us as to the interpretation of the distance necessarily traveled in going to and returning from the Penitentiary, whether that can be interpreted the highway distance or the railroad distance."

Section 11791 R. S. Mo. 1929, in so far as it is applicable, provides:

> "For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary;" * * * * * *"

The decision in this case necessarily depends upon the construction to be placed upon the words "necessarily traveled" and "usually traveled".

The case of Pierce v. Delesdervier, 17 Maine 431, involved the allowance of fees to a sheriff for levying executions. The court said:

> 'The statute provides that the travel shall be computed 'by the usual way', and it is not material whether the sheriff traveled a more or less distant way to suit his own convenience. In this case he will be entitled to fees for such travel, and on the amount collected, and to nothing more."

In the case of Greene v. McGhee, 37 Alabama 164, a statute allowed compensation to sheriffs for the removal of convicts to the penitentiary at a specified rate for every twenty miles of the distance to the penitentiary and back "by the land route usually traveled." The court said:

> "* * *and the rules of construction, which we laid down at the outset of this opinion, require us to decide, that the sheriff has no authority to carry a prisoner through another State, and is not entitled to compensation for

> the increase of distance in consequence of his doing so, although he may go upon the usually traveled route. The land route usually traveled, over which he must pass, is the route within the State usually traveled.
>
> It is urged against the foregoing construction of the statute, that the sheriff is required to make affidavit of the number of miles 'on the land route usually traveled;' that there may arise cases, in which there is no usually traveled land route within the State;" * * * * * * * * * * In such cases, a route leading to the penitentiary, and the different parts of which are usually traveled, and which is in a reasonable direct course from point to point, is, within the meaning of the law, the land route usually traveled."

In Webster's New International Dictionary the word "usual" is defined as follows:

> "Such as is in common use; such as occurs in ordinary practice, or in the ordinary course of events; customary; ordinary; habitual; common."

The word "usually" has been defined by the court in the case of "Chi. Traction Co. v. Chugren, 110 Ill. App. 547" to mean "ordinarily".

In Webster's New International Dictionary the word "necessarily" is defined as follows:

> "In a necessary manner; by or of necessity; as a necessary consequence."

The word "necessary" as it is used in the above definition is defined as meaning:

> "Impossible to be otherwise or to be dispensed with without preventing the attainment of a desired result."

In your letter you desire an opinion as to whether the highway distance or the railroad distance should be used in determining the fees to which the sheriff or other officer is entitled. With the excellent road system in the State of Missouri, it is the opinion of this office that either the highway or the railroad could be said to be "the most usually traveled route". Therefore, the solution of our problem is dependent upon the words "necessarily traveled". Applying the definitions of the words necessary and necessarily traveled as given by Webster, it is the opinion of this office that the shortest possible route, whether that be by railroad or by highway is the proper gauge to be used in determining the fees to be allowed for the transportation of convicts from the place of departure to the penitentiary.

For example, let us assume that the highway distance between Jefferson City and Kansas City is fifty miles less than the railroad distance. Since we have already classified the highway and the railroad as being synonymous under the classification "most usually traveled route," the question then is what is the distance that must necessarily be traveled in order to reach Jefferson City from Kansas City. In our hypothetical case therefore the distance that must necessarily be traveled is the highway distance since that is fifty miles shorter than the railroad distance, it certainly not being necessary to travel by railroad which is fifty miles further in distance.

Now assuming that it is fifty miles further by highway to St.Louis from Jefferson City than it is by railroad, applying the above construction, the railroad being the shorter route should be used in the transportation of convicts from St.Louis to Kansas City.

In order that there may be no misunderstanding with reference to this opinion as it pertains to the shortest possible route, we expressly rule that in no event could an aeroplane be used since under no construction could transportation by aeroplane come within the definition of "the most usually traveled route."

In the case of "Scott v. Endicott," (Springfield Court of Appeals), 38 S. W. (2d) 67, the Court, in discussing the question of fees allowable to guards in the transportation of prisoners, said:

> "Some of the earlier cases held that the right of a public officer to fees is derived solely from the statute, and he is entitled to no fees for services, unless the statutes give it. Gammon v.

Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645." " "

To collect fees for services not rendered is contrary to public policy, if not actually fraudulent, and the contract providing for such a method of compensation is illegal and void, in our opinion, whether made with the sheriff or with any other person." " " " " " " " " "

Therefore, it is the opinion of this department that the fees allowable to sheriffs, county marshals or other officers for the transportation of convicts to the State Penitentiary shall be estimated by the shortest possible route from the place of departure to the penitentiary, whether that be by highway or by railroad since under this opinion both the highway and the railroad come within the provisions of the statute relating to "the most usually traveled route."

Respectfully submitted

JOHN W. HOFFMAN, JR.,
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney General.

JWH:HM

TAXATION: ✓

CONSTITUTION: ✓ Section 13870 violates Sections 6 and 7 of Article X of the Constitution of Missouri and is void.

7-8

FILED
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July 7, 1933

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated June 29, 1933, as follows:

> "Section 13870 R.S.Mo. 1929, provides that buildings leased by the state for military purposes shall be exempt from taxation for all purposes during the period of such ownership.
>
> Please advise me the constitutionality of this section, as there are a number of buildings over the state where one room is leased for military purposes and they are attempting to escape taxation on the entire building under this section".

Section 6 of Article X of the Constitution of the State of Missouri provides:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon,

> may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law".

Section 7 of Article X of the Constitution further provides:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void".

Section 13870 Revised Statutes Missouri 1929, is as follows:

> "All armories owned by this state or by any organization of the national guard and all buildings leased by the state for military purposes shall be exempt from taxation for all purposes during the period of such ownership".

It is clear of course that buildings leased to the state for military purposes are not included within the exemptions provided for in Section 6 of Article X of the Constitution of Missouri, and Section 7 of Article X of the Constitution unqualifiedly says that all laws exempting property from taxation, other than the property enumerated in Section 6 of Article X of the Constitution, shall be void.

Speaking of a prior constitution and of decisions of the court construing same in the case of Life Association of America v. Board of Assessors of St. Louis County, 49 Mo. 512, the court at page 519 of the opinion said:

> "Since these decisions, however, that discretion has been withdrawn from the legislature, and they are now expressly forbidden to exempt any property from taxation".

It is a significant fact that in State ex rel v. Fleming, 275 Mo. 509, involving a suit to collect taxes against certain lots in the City of Aurora, Missouri, where the building thereon had been leased to the state for military purposes and was used by the national guard of the State of Missouri, while the court upheld the tax yet it is mentioned that the constitutionality of the section was not raised, the unconstitutionality of Section 13870 doubtless occurring to and prompting the observation of the court.

Since buildings leased by the state for military purposes are not exempted from taxation by Section 6 of Article X of the Constitution, then the legislature was without power or authority to make the exemptions attempted to be made in Section 13870.

We are of the opinion that Section 13870 Revised Statutes Missouri 1929, violates Section 6 of Article X and Section 7 of Article X of the Constitution of the State of Missouri; that the same is void and of no effect and that taxes against buildings leased by the state for military purposes may be levied and collected as taxes against other like property, if otherwise taxable.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

CRIMINAL PROCEDURE: Continuances of indictments and information.

FILED
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July 27, 1933.

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Mr. Anderson:

This department acknowledges receipt of your letter of July 15, 1933 wherein you request an opinion as to the course of certain cases now on your docket. For convenience, your letter is quoted in full below:

> "We have a number of cases in the four divisions of our Circuit Court which were inherited from past administrations, in which the defendants were indicted or informed against and at the time were not apprehended and have not been since.
>
> These cases are carried on the docket as State vs. _____, and are called each term, and it appears in most cases that the defendants, because of the length of time that has elapsed, will never be arrested.
>
> Our thought is that a saving of this unnecessary labor might be effected if we obtained an order from each Division continuing the cases generally, with leave to reinstate on the application of the Prosecuting Attorney, and state in the memorandum that the defendant was a fugitive at the time of the return of the indictment or the filing of the information, and that he is still a fugitive.
>
> We would like the opinion of your office as to the legality of this action, with some authority, so that we may present the matter effectively to our Circuit Court Judges."

We note you are continuing these cases from term to term. No doubt, this is being done according to Sec. 3569 R.S. of Mo. 1929, which is as follows:

> "If any person indicted for a criminal offense abscond or flee from justice, or cannot be found to be served with process, or, being let to bail, shall not appear according to the condition of the recognizance, the cause may be continued from term to term, without issuing process on the indictment; and such process may be issued at any time on the application of the prosecuting attorney."

The case of State v. Sloan, 309 Mo., l.c. 507-508 bears on this question. Judge Blair in rendering his opinion, states as follows:

> '"The first assignment of error is that the indictment was not returned into court in compliance with Section 3884, Revised Statutes 1919. That section requires that indictments found by the grand jury shall be presented by the foreman in open court in the presence of the grand jurors. Defendant's contention is bottomed upon a record recital that, on November 15, 1923, and during the November term of court, the prosecuting attorney filed indictment No. C-1366, State of Missouri v. W.B. Sloan. The clerk of the Circuit Court of Jackson County has filed with this court a certified copy of a record entry made at the September 1923 term of said court, as follows: 'Now at this day, comes the Grand Jury, in a body, into open court and presents to this court the following indictments to-wit: C-1366, State of Missouri vs. _____'. It will be noted that the indictments mentioned in the two record entries bear the same number. The defendant may not have been in actual custody, when the indictment was presented to the court at the September term, although it appears that an information had previously been filed against him. The court did not permit its records, which are always open to the inspection of the public, to disclose the name of the defendant named in the indictment, until he had been brought into court to answer the same. Section 3892, Revised Statutes 1919, provides that, when a person indicted is not held in confinement or under recognizance, the

> indictment shall not be docketed or entered upon the minutes or records of the court until the defendant shall have been arrested. The practice of giving the indictment a number and leaving the name of the defendant blank in the record, sufficiently identified the indictment as having been filed under the provisions of Section 3884, without violating the provisions of Section 3892 as to secrecy. The assignment is overruled."'

In this connection we should not overlook Sec. 3547 R.S. of Mo. 1929, which is as follows:

> "When any indictment shall be found against any person for a felony or misdemeanor, not being in actual confinement, or held by recognizance to answer thereto, such indictment shall not be open to the inspection of any person except the judge and clerk of the court and the prosecuting attorney; nor shall it be docketed or entered upon the minutes or records of the court until the defendant therein shall have been arrested."

It is the opinion of this department that this section should have been followed in the first instance by the clerk. There was no necessity of placing them on the docket and carrying them merely by number. It is a very ancient case but has never been overruled, being State v. Corson, 12 Mo., l.c. 263, in which the court said:

> "'These provisions of our statute make it a misdemeanor for a grand juror, a judge, prosecuting attorney, or other officer of any court, to disclose the fact of any indictment for a felony being found, unless the defendant is in custody or on bail; and the 1st section of the 4th article above referred to, declares that such indictment shall not in such a case be open to inspection of any person, except the judge, circuit attorney and clerk, until the defendant therein shall have been arrested. The third section provides for the officers in issuing and executing the process and in the discharge of official duty.
>
> Under the provisions of the statute, I hold it to be the duty of the clerk not to enter on his docket, or minutes, or records, the fact of the grand jury finding the bill of indictment against the defendant for a felony, unless he be in custody or on bail, nor to enter the continuances

> of the cause from term to term. He should keep a private memorandum book, in which all such indictments for felonies are entered, and which, together with the indictments, should not be open to the inspection of any person except the officers mentioned in the statute; and such indictment should never be docketed nor entered on the minutes nor records of the court until the defendant is in custody; otherwise the statute is nugatory. Why require the secrecy under a penalty of a misdemeanor if the officer keeping the records is required to docket and note the case and the continuances thereof from term to term? What is the object of these statutory provisions? What evil was to be guarded against? Criminals, knowing they had been indicted, often made their escape before the officers could arrest them. It was to prevent this, and to render the administration of the criminal law more efficacious, officers were required not to disclose the findings of indictments for felonies; grand jurors were under the same requisition. Indictments were not to be open to inspection. All this was to be kept secret until the defendant should be arrested. Now establish the doctrine contended for by the defendant's counsel in this case, and you virtually repeal the sections of the statute above referred to. The last section of the fourth article of the above statute about 'continuances of the cause from term to term', should not be construed so as to render useless, if not repeal, the 1st, 2nd and 3rd sections of the same article. The clerk may very well keep a private memorandum of all such indictments for felonies, where the defendants are not in custody or on bail, and may issue capiases by the order of the court whenever he thinks the officer can apprehend the defendant.'"

In view of the foregoing opinions, it is the opinion of this department that you may continue the cases generally, as you have suggested, or you may instruct the clerk to withdraw them from the docket, and later, if the defendants are apprehended, you may request that the cases be restored to the docket.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN - AFF

STATE AUDITOR: COUNTY COURTS:

State Auditor may use some discretion in period covered by audit and examination of county records under Section 11478.

July 27, 1933 8-10

FILED
3

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated July 12, 1933, as follows:

> "We would be pleased to have the opinion of the Attorney General upon the following question:
>
> From a practical standpoint, how many years back should an audit by the State Auditor, under authority of Secs.11478 and 11482, R. S. Mo. 1929, of a county officer's official records and accounts be extended?
>
> Under Sec.863,R.S.Mo.1929, an action for official misconduct or omission of duty is barred within three years from the time the right of action accrued. But Sec.862, R. S. Mo. 1929, provides that actions for relief on the ground of fraud shall not be barred until five years. Is it possible that Sec.862 applies only as to fraud perpetrated by an officer in his individual capacity, Sec. 863 being alone properly applicable to official misconduct or fraud or omission of duty?
>
> Assuming that Sec.862 was alone applicable, might it not be desirable to have the audit extend back more than

three years because of the following proposition: "Where a public officer misappropriates money intrusted to him, and fraudulently conceals his defalcations, the statute will not begin to run until the discovery of the fraud - 22 R. C. L. 510"? "

Section 11478 Revised Statutes Missouri 1929, referred to in your letter was repealed by Laws 1933, page 417.

Section 11478 as amended reads as follows:

"It shall be the duty of the State Auditor at least once every two years, either in person or by one or more competent persons appointed by him, to visit, examine, inspect and audit the accounts of the various institutions of the state, including the state hospitals, state university, Rolla School of Mines, State Teachers Colleges, Missouri State School, Reform School for Boys, Industrial Home for Girls, Missouri State Sanatorium, Confederate Soldiers' Home, Federal Soldiers' Home, and all other institutions supported in whole or in part by the state, and such other officers of the state as receive their appointment from any elective officer, and also at least once during the term for which any County officer is chosen to examine, inspect and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the county, County Clerks, Circuit Clerks, Recorders, County Treasurers, County Collectors, Sheriffs, Public Administrators, Probate Judges, County Surveyors, County Highway Engineers, County Assessors, Prosecuting

> Attorneys, County Superintendents of Schools, in every county in the state which does not elect and have a County Auditor. Such audit shall be made by the State Auditor as near the expiration of the term of office as the auditing force of the State Auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per centum of the total number of votes case in said county for the office of Governor at the last election held for Governor preceding the filing of such petition shall petition the State Auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury. Provided, that any county having an audit by petition shall not be audited more than once in any one year.

The above section requires that you, at least once during the term for which the respective county officers are chosen, examine, inspect and audit the accounts of such officials, which means that you should examine the entire records and accounts of such officials made and kept by them during the entire term for which the respective official was chosen or elected. If such examination develops a situation that warrants you, in your judgment, in making an examination of additional books or records kept by any of the county officials named in the above section, then we think you would have a right to and should extend your examination and audit to such an extent as the facts developed by you would justify.

Section 863 Revised Statutes Missouri 1929, is as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

Section 862 Revised Statutes Missouri,1929, provides:

> "Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

While Section 863 follows Section 862 yet we think both sections should be read together and that an action brought under the provisions of Section 863 on account of acts done by

virtue of an office may be extended under the provisions of Section 862 where fraud and concealment are properly pleaded and proven.

In Putnam County v. Johnson, 259 Mo. 73, a suit by the county against a county clerk, our construction of the two statutes is recognized. The court at page 84 of the opinion, referring to the case of Shelby County v. Bragg, 135 Mo. 291, saying:

> "It is true that Judge MacFarlane was discussing the tolling of the Statute of Limitation by fraudulent acts, but he says much that is of interest here. The county court passes upon and allows charges of the county clerk. To state a good cause of action grounded upon fraud, and fraud practiced must be pleaded. This is as much requisite in a petition grounded upon fraud, as it is a requisite to show fraud for the purpose of tolling the statute. We do not believe the pleader intended to ground the action upon fraud, but if he did, the demurrer was well taken, because the facts alleged were insufficient. The five-year Statute of Limitation has no application to the first and second counts.
>
> But plaintiff says the three-year statute, supra, has no application, because the items of cash named were not received by defendant "in virtue of his office". We do not agree to this view. If they were not received "in virtue of his office " how were they received? We can conceive of no other way or capacity in which they were received. They may have been wrongfully and, speaking from the statute, unlawfully received, but they were evidently received "in virtue of his office." In other words they were received as an officer, not as an individual or agent. Take the alleged overcharge for the tax books. Whether the defendant was allowed or retained the proper or the improper

> amount for such service, yet whatever amount he did retain for such services was retained by him officially, for official work, and was received, had, held and retained "in virtue of his office" as used in the statute.
>
> If these two counts (first and second) do not plead actions grounded upon fraud, as we have held, and if they do seek to recover from defendant money wrongfully held by him, but received by him "in virtue of his office," then the three-year Statute of Limitations applies, and the causes of action stated in these two counts are barred by such statute. Upon this theory the trial court was right in sustaining the demurrer as to these counts."

In the case of City of St. Joseph v. Wyatt, 274 Mo. 566, being an action by that city against the city treasurer, the court at page 570 of the opinion, referring to the defense that the action was barred by what is now Section 863, said:

> "We are clearly of the opinion that the liability of the Guaranty Company for the payment of said sum of $16,431.69 must be determined under the above section, <u>in connection with the facts of the case</u>. The burden of proof devolved upon plaintiff to show a state of facts which prevented said statute from running against it. The quantum of proof necessary under such circumstances is fully discussed in Shelby Co. v. Bragg 135 Mo. 1. c.298, and following; Callan v. Callan, 175 Mo. 1. c. 360-1-2; State ex rel.v. Harter, 188 Mo. 516; State ex rel. v.Yates, 231 Mo. 276; Johnson v. United Railways, 243 Mo. 1. c. 298, and following; Putnam County v. Johnson, 259 Mo. 73."

Obviously, the court was of the opinion that the Statute of Limitations provided for in Section 863 could be tolled when the facts as to fraud and concealment referred to in Section 862 were properly pleaded and proven.

For your information and future guidance as to what constitutes fraud and concealment within the meaning of the above Section 862, the case of State ex rel. v. Yates, 251 Mo. 276, is exhaustive.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

STATE AUDITOR: TAXATION: County Clerks. Senate Bill Number 50, Laws 1933, page 421, applicable to counties having township organization.

July 27, 1933

FILED
3

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated May 22, 1933, as follows:

> "This department would be pleased to have an opinion of the Attorney General as to whether Senate Bill 50, as finally passed and agreed to, is applicable to counties having township organization."

Senate Bill Number 50 about which you inquire is now found in Laws 1933, page 421, Section 9876, is as follows:

> "As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the tax book for the use of the Collector; and when the Assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the Clerk with the seal of the Court. And upon a failure to make out such extension of taxes in the Assessor's book or books, as the case may be, and deliver same to the Collector in the time specified, the County Court shall

> deduct twenty per centum from the amount of fees which may be due the Clerk for making such extension, and such Assessor's book, with the taxes so extended therein, shall be called the "Tax Book". "

It will be noticed that by the amendment to Section 9876 the Assessor's book when corrected and adjusted, except in St. Louis City, is to be authenticated by the seal of the County Court and the Assessor's book when so authenticated is to be used by the collector as and for the "Tax Book". Whereas, under Section 9876 Revised Statutes Missouri 1929 the clerk of the county court, except in St. Louis City, was required to make a copy of the Assessor's book, such copy to be authenticated and delivered to the collector as and for the "Tax Book".

Certain provisions are made in the statutes whereby persons or corporations owning assessed property may appear before county boards of equalization, the State Tax Commission and the State Board of Equalization, for the purpose of correcting and adjusting assessments made by assessors and if and after such corrections and adjustments are made, then the tax books are ready for delivery to the respective tax collectors so that taxes may be collected. The assessments made by township assessors may be corrected and adjusted the same as assessments made by county assessors.

Dealing with counties under township organization and with the assessment and collection of taxes in the respective townships in the respective counties where such law is in effect, Section 12328 Revised Statutes Missouri 1929, provides:

> "The assessor* * shall * * proceed to take a list of the taxable property of his township and assess the value thereof in accordance with the provisions of the general laws of this state in relation to the assessment of real and personal property by county assessors, in all things pertaining to the discharging of his official duties, except when the same may be inconsistent with the provisions of this article.* * * "

After such assessments are made Section 12330,

directing the disposition of the assessment list made by the township assessor, provides:

> "He shall file with the county clerk * * all of the assessment lists taken by him, which lists shall be kept by the clerk as now provided by law.* * * *"

With reference to the duties of the various county clerks in counties operating under township organization law, and with respect to the collection of taxes, Section 12320 provides as follows:

> "The county clerk shall cause a copy of the assessment roll of each township in their respective counties, with the taxes extended thereon, to be delivered to the collector of such township, on or before the day in each year, as fixed by law, when taxes become due."

Section 9880 provides that as soon as may be after the tax book for each year has been corrected and adjusted the county courts shall cause the same to be delivered to the proper collector, who shall give his receipt therefor to the county clerk.

Section 9881 requires the collector to sign a receipt for the tax book and this receipt shall be endorsed on the aggregate abstract of the taxes assessed and to be collected, which abstract bearing such receipt shall be transmitted by the county clerk to the State Auditor.

The sections above quoted and referred to are found in Chapter 59, Revised Statutes Missouri 1929.

Section 9976 provides as follows:

> "The term "assessor" or "assessors", wherever used in this chapter, shall be held to mean and refer to county, township, city, town or district assessors, as the case may require. The term "collector" or "collectors", wherever used in this chapter, shall be held to mean and refer to the county, township, city, town or district collectors, as the case may require."

We do not see wherein Senate Bill Number 50 changes the duties of the various county clerks with reference to the collection of taxes in counties under township organization. The township assessor is required to take lists of taxable property in his township and assess the value thereof accordin to law. Such assessor upon takin such list is required to file the original lists with the county clerk of his county and by the law the county clerk is required to keep such lists in his office, and the clerk is further required by law to make a copy of such assessment lists or assessment rolls with the taxes as levied by the proper authorities extended thereon, and such copy of such assessment rolls shall be delivered to the collector of the township and the receipt of the collector taken therefor and the receipt endorsed on the aggregate abstract of the assessment roll. The copy of the assessment roll so delivered by the county clerk to the township collector becomes the "Tax Book" of and for the township collector.

Section 9877 Laws 1933, page 422, limits the fees the county clerk may receive to ten cents per hundred words and figures for all words and figures extended by him in making out the tax book, whereas Section 9877 Revised Statutes Missouri 1929 allowed the county clerk ten cents per hundred words and figures for makin out the tax book. The amendment of Section 9877 with reference to fees was made to conform to the work to be done under the amendment to Section 9876.

We doubt whether Sections 9876 and 9877 Revised Statutes Missouri 1929, had reference to tax books to be furnished collectors where the township organization law was in effect, but rather that the duties of the county clerk with reference to tax books to be furnished township collectors were and are governed by the sections of the statute above quoted relating to counties under township organization, and that the fees of a county clerk for making the tax book to be furnished township collectors were and are governed by subdivision 2 of Section 10007, Revised Statutes Missouri, 1929, which subdivision reads as follows:

> "For making a copy of the tax book for the use of the collector, including certificate and seal to the same, for every hundred words and figures, ten cents, one-half to be paid by the state, the other half by the county; for making an abstract of the assessor's book for the state auditor, five dollars, and in addition thereto fifty cents for every one hundred thousand dollars' worth of property on such abstract, to be paid by the state."

It is the opinion of this Department that Senate Bill Number 50 in nowise impaired or enlarged the duties of the county clerks in the respective counties in this state where township organization law is in effect, with reference to making and authenticating tax books for the use of township collectors or the fees of the county clerks therefor.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:C

IN RE: CITY OF THE FOURTH CLASS CANNOT PROVIDE BY ORDINANCE FOR APPOINTMENT OF CITY POLICE JUDGE.

Anderson

August 7, 1933.

8-9

FILED
3
38

Hon. Joseph Babka
Assistant Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

Your letter of August 1 requesting an opinion from this office reads as follows:

> "Sometime ago, the City of Valley Park passed an ordinance making the office of Police Judge an appointive office. The City of Valley Park is a 4th class city and the question is whether said office of Police Judge can be made appointive.
>
> "I would appreciate an early reply as to the legality of such appointment."

Section 6972 R. S. Mo. 1929 provides as follows:

> "The Mayor and Board of Aldermen of cities of the 4th class, may, by ordinance, provide for the election of police judges in such cities who shall be elected at the regular city elections * * * ."

Section 6960 R. S. Mo. 1929 provides as follows:

> "The Mayor with the consent and approval of the majority of the members of the Board of Aldermen shall have power to appoint a Treasurer, City Attorney, City Assessor, Street Commissioner and night watchman and such other officers as he may be authorized to appoint. * * * "

A city of the 4th class can exercise only such powers as are granted in express words to it by the statutes or those necessarily incident to or implied in by the powers expressly granted.

City of Richland v. Null, 194 M. A. 176.

The section 6972, above quoted, is the authority given cities of the fourth class to have a Police Judge and the method of naming same is pointed out in said section; and it is provided that the Police Judge shall be elected.

The method provided by law for either appointment or election to a city office must be followed. An appointment to a city office is not an election.

McQuillin "Municipal Corporations" (2d) Vol. II, Sec. 471, p. 107;
State v. Bowman, 184 Mo. App. 549 - 180 S. W. 700.

It is the opinion of this department that a fourth class city cannot by city ordinance make the office of Police Judge an appointive office. The provisions of Section 6960 R. S. Mo. 1929 do not apply to the office of Police Judge.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

ECC/AJ

STATE FAIR)
APPROPRIATIONS) Premiums paid in prizes for horse-racing at State Fair paid out of appropriations under heading, "Premium for live stock shows".

August 11, 1933

FILED
3

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter of August 10th, 1933, which is as follows:

> "Will you please advise me if the premiums paid in prizes for horse-racing, publicity, band music, pay of judges of racing, stock and poultry, vaudeville acts and concessions can be paid out of the appropriations under Section 1, Missouri State Fair, sub-division, C-D as shown on pages 63 and 64, 1933, Laws of Missouri."

Section 12475 R. S. 1929, provides in part as follows:

> "The state board of agriculture, at such time as may be determined upon by them, shall hold, annually, a fair upon the state fair grounds above designated: and at these fairs all important products of the state shall be recognized, according to merit, by premiums or rewards, for excellence offered by the board of directors, out of a fund provided therefor by the legislature of the state at each biennial session thereof, * * * *
> *
> And provided further, that should the state fail for three consecutive years to hold a fair, the land thus used for state fair purpose shall revert to the parties donating it."

Section 12353, Laws of Missouri, 1933, page 168, provides in part as follows:

> "The State Commissioner of Agriculture shal be and is hereby constituted the official who shall have supervision of the State Fair * * * * * * * *"

The Legislature commanded that State Fairs should be held and evidenced such intention by appropriating moneys to conduct them.

Laws of Missouri, 1933, pages 63 and 64, Section 1, of the Appropriation Act, provides among other things, the following:

> "C-D Repairs, Replacements, Premiums and Operation:
>
> Labor, material and supplies, including paint for general repairs of buildings, communication, printing and binding and travel, including boys' state fair school; material and supplies consisting of grounds and roadways material and supplies and special material and supplies, including paper for state printing, premiums for live stock shows, boys and girls 4-H club, vocational agriculture * * * * * * * * * $50,000.00"

Your attention is directed to the words "premiums for live stock shows", used above. In order to determine whether or not premiums in prizes for horse-racing are included in the appropriation for "premiums for live stock shows". we must look to a definition of the words used in said act.

Webster defines "premiums" as follows:

> "A reward or recompense; a prize to be won by being before another or others in a competition;"

Corpus Juris, Vol. 60, page 102, has the following to say regarding "live stock":

> "* * *; live stock; and in this sense the term has been held to include asses, calves, cattle, colts, cows, foxes, goats, hogs, horses, jennets, meat cattle, mules, sheep, swine; * * * * *."

In Hopemann Citizens Mutual Fire Ins. Co., 85 N. W. 454: 126 Mich. 191 and Lee County Savings Bank v. Snodgrass Bros., 166 N. W. 680; 182 Iowa 1387, the courts held horses were "live stock".

Webster defines the word "show" to mean:

> "To outstrip or distance."
> "To exhibit one's gait, speed, or the like; said especially of a horse."

Thus, the words "premiums for live stock shows", as defined, would include premiums in prizes for horse-racing at the State Fair and should be paid out of the appropriation mentioned in Section 1, C-D, Laws of Missouri, 1933, pages 63 and 64, and such is our opinion.

We assume the other items, mentioned in your letter, are not for premiums or awards for live stock shows. And, thus, it is our further opinion such items should be paid from the funds contemplated by Section 2 of the same act, supra. We remind you that the provisions of Section 2a of above act bust be followed.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JLH:EG

TAXATION AND REVENUE: Constitutionality of Section 10070.

August 15, 1933

Hon. Frank K. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

We herewith quote your letter of July 14, 1933, addressed to this department in which you request an opinion as to the constitutionality of Section 10070 R. S. Mo. 1929:

> "Please be advised that I as Prosecuting Attorney of the County of Mississippi brought a suit under Section 10,070 of the Revised Statutes of the State of Missouri to enforce the penalty of $100 per day for failure to file the report as required. This suit was for all the year 1930 or 365 days and for the first 45 days of 1931 which was the first day a report was filed.
>
> A demurrer was filed to my petition and the argument was that Section 10,070 was not operative nor was Section 10,066 but that Section 9853 Subdivision 5, being the new Tax Commission Law had supplanted the old law when it was said that 'all reports formerly to be given any State officer shall now be filed with the State Tax Commission and or forms prescribed by the commission'. I prepared a lengthy brief on the theory that the law was not changed except as to the party to whom the report was to be made and that the old law providing for the penalty was still operative. The Court sustained my position and overruled the demurrer but before the proper record was made attorneys for the Bridge Company suggested to the Court the following:

Section 10,066 of the Bridge Statute names the following bridge, telegraph, telephone, electric power and light company, electric transmission lines, oil pipe lines or express company, while 10,070 which provides the penalty for filing the notice required in Section 10,066 names only, express companies, telegraph companies, telephone companies, and bridge companies, leaving out electric power and light companies, electric transmission lines, and oil pipe lines.

They claim that because the reports are to be filed by seven separate and distinct companies and only four of them are subjected to penalty under 10,070 for not doing so, that this is special legislation and unconstitutional.

My first thought is that because of the fact that 10,066 was amended in the laws of 1923 adding the names of the new company which were neglected to be put in the penalty statute that this would make the law invalid as to the other three names added and save the law as to the other four for which a penalty is provided.

I am afraid the Judge may decide to rule this law unconstitutional and beat me in this suit before I have had proper time to examine the law..... I am pressed for time in that I am beginning a very heavy criminal docket here and overrun with work,

Would you kindly assign some one the task of looking up this law for me at the earliest possible minute. I will endeavor to hold the Judge off until the law can be looked up.

If I could get over this hard point, I will need an answer to the following question but we have plenty of time to go into it carefully:-

Is a penalty under Section 10,070 such a penalty or forfeiture which will be a lien,

> prior and superior to a first mortgage which was on the property at the time the penalty was sued for by attachment.
>
> The Cairo Bridge had a bond issue against it when this suit was brought which has since been foreclosed. The suit was brought by attachment.
>
> I contend this is a penalty in contemplation of the statute making penalties and forfeitures prior and paramount liens on bridge property under the general tax laws.
>
> The question of un-constitutionality is the immediate need of hurry.
>
> This means $41,000 to this County School fund if we can make it stand up."

We are herewith quoting from an opinion in the case of State ex rel. Power Transmission Company v. Baker, 320 Mo. l.c. 1154:

> #6# "The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms now possessed and exercised by the state board of equalization. Said commission shall also have all powers of original assessment of real and personal property now possessed by any assessing officer, subject only to the property now possessed by any assessing officer, subject only to the rights given by the Constitution to the State Board of Equalization. Section 13056, Revised Statutes 1919, as amended by the Laws 1923, page 372:
>
> 'All bridges over streams dividing this State from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock

company and all bridges across or over navigable streams within this State, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this State, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, or express company, or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, or express companies, in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property.'

The italicized words were inserted in the

section by the Legislature in 1923.

Relator contends said Subdivision 6 is the sole power and authority of original assessment possessed by the Tax Commission, and that Section 13056, as amended by the Laws of 1923, confers no power or authority on the Tax Commission to assess property, but only provides a method of levying and assessing taxes.

Respondents contend that the expression 'now possessed and exercised by the State Board of Equalization' in Subdivision 6 limits the authority of original assessment conferred on the Tax Commission to authority then possessed by the State Board of Equalization. However, they insist that the power to originally assess relator's property is conferred on the Tax Commission by Section 13056. That section provides that taxes levied on electric transmission lines 'shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property.'

We think the word 'manner' as used in said section covers not only the method of assessment of electric transmission lines, but also locates the authority to make the assessment with the Tax Commission. (State ex rel. Union Electric Light & Power Co. v. Gehner, 286 S. W. l.c. 119; State ex rel. Union Electric Light & Power Co. v. Baker, 293 S. W. l.c.402.)

The power of original assessment over purely local property is fixed by Section 10, Article X, of the Constitution in the following words: 'The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.'

> Thus it appears that local property must be assessed by local authorities. If, therefore, the Legislature intended by an amendment of 1923 to Section 13056 to confer upon the Tax Commission the power of original assessment over local property devoted to private use, then said amendment is violative of this section of the Constitution. (Laclede Land & Improvement Co. v. State Tax Commission, 295 Mo. 298, l.c. 305, 243 S. W. 887). However, if the Legislature only intended to confer on the Tax Commission the power of original assessment over public utility electric transmission lines, then said amendment is a valid law. We will not assume that the Legislature undertook the enactment of an unconstitutional law. Rather, we hold that by the amendment the Legislature intended to confer upon the Tax Commission the power of original assessment over only public utilities.* * **

This case contains one of the sections involved in your case, namely, Section10066. We are not quoting the section again, but will refer to the same throughout the opinion.

Thus it will be seen from the foregoing case that all the within named companies and utilities of Section 10066 are now under the Tax Commission as to the power of original assessment instead of the State Board of Equalization. We think this disposes of your matter which you originally presented to the court and on which the court sustained your position.

As to Section 10070 R. S. Mo. 1929, which we herewith quote,

> "If the president or other chief officer of any bridge, telegraph, telephone or express company, or the owner of any toll bridge within the intent and meaning of Section 10066, shall fail to render to the state auditor, on or before the first day of January in any year, a statement of the property of such bridge, telegraph, tele-

> phone or express company, as the case may be, as required by said section 10066, then such express company or telegraph company or telephone company or the owner of such toll bridge so failing for each and every day of failure to render such statement after such first day of January, shall forfeit and pay to the state of Missouri the sum of one hundred dollars for the county public school fund in each and every county in which such bridge, express or telegraph or telephone company shall have used its franchises at any time within one year prior to such first day of January, or in which such toll bridge, or any portion thereof, was situated on such first day of January; which penalties shall be sued for by the prosecuting attorneys of the proper counties in the name of the state of Missouri, at the relation of such prosecuting attorneys, to the use of the proper county public school funds, in any court having jurisdiction,"

we find that it is an old section which has not amended as was section 10066 and does not include as you state in your letter three other utilities, namely, Electric Power and Light Companies, Electric Transmission Lines and Oil Pipe Lines. And hence, the defendant claims it is therefore unconstitutional.

The Cairo bridge, being a bridge "over a stream dividing this State from any other state owned, controlled, managed etc," has always been included in both sections, but Electric Power and Light Companies, Electric Transmission Lines and Oil Pipe lines, being industries which have sprung into existence in the last generation, the legislature saw fit to amend Section 10066 so as to include them.

It will be noted in said section 10066 R. S. Mo. 1929, that all of them are to be assessed and equalized as railroad property:

> "* * *And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts and the county and state boards of equalization

> are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property." " " "

Since they are all included under subdivision 6 quoted above in the powers of the state tax commission and are compelled to make the reports to the tax commission, they therefore are all in the same class, and should be treated and assessed as railroads. You will note that Section 10070 R. S. Mo. 1929, mentions twice section 10066 and apparently includes all companies mentioned in said section, and if it were not for this fact that the section was mentioned in the penalty statute there might be some valid contention on the part of the defendant as to the unconstitutionality of the law of this statute. There is no change as far as the bridge is concerned in its relation. It was formerly one of four utilities mentioned in the statute and is still one of the same four in Section 10070. The three companies which have been added if any of three were prosecuted under the section would be in a better position than the bridge company to plead the unconstitutionality of the section,

We have been unable to cite you a case directly in point but suggest the following as bearing on the question.

In the case of City of Springfield v. Smith, 332 Mo. l. c. 1137, the court said:

> "*** It is well established in this State that a law is not a special law if it apply to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis."

In the case of Hamman v. Central Coal & Coke Co. 156 Mo. 242, the Court makes this statement:

> "Both upon principle and authority the acts of the Legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt every possible presumption, not directly and clearly inconsistent with the language and subject matter, is to be made in favor of the constitutionality of the act."

In the case of State ex inf. v. Hedrick, 241 S. W. l. c. 420, Judge Blair has the following to say which the defendant might be relying on in this case:

> "A law may not include less than all who are similarly situated. If it does, it is special and, therefore, invalid, because it omits parts of those which in the nature of things the reason of the law includes. The question is not whether considering all the circumstances which exist, the Legislature might not constitutionally make a law which would include a larger class. On the contrary it is whether it appears beyond a reasonable doubt that there are no distinctive circumstances appertaining to the class with respect to which it has legislated which reasonably justify its action in restricting the operation of the law to the persons, objects or places to which the law is made applicable."

In the case of State ex rel. v. Hartmann, 253 S. W. l. c. 994, Judge Graves rendering an opinion said:

> "That the law-makers have the right to make reasonable classifications of subjects, notwithstanding that some kind of a general law might be passed, is a matter of universal recognition in this State. A general law could be passed to

> cover any particular subject, yet it might not work out well in actual practice* * * If there is a reasonable basis for the classification, the law must stand. If there is no reasonable basis the law must fail."

In the case of State ex inf. v. Southern, 265 Mo. 1. c. 286, the Court said:

> "The rule that a statute which relates to a class of persons or a class of things is general, while one which only applies to particular persons or things is special, has been generally announced in this and other jurisdictions.* * * * * * * * * * *
>
> It is, however, an essential adjunct of this rule that the classification made by the Legislature shall rest on a reasonable basis and not upon a mere arbitrary division made only for purposes of legislation. * * * When this is borne in mind, and a statute is enacted upon a basis justifying its classification and is made to apply to all persons who may hereafter fall within its purview, it is not special legislation."

With reference to the last portion of your letter, in the event that you succeed in obtaining a judgment against the bridge company will that be a prior lien to the first mortgage?:

Sections 10066 and 10070 quoted supra, are both under the general taxation and revenue chapters, and Section 10066 refers particularly to the fact that the assessment of taxes and collecting of taxes shall be in the manner prescribed for railroads. The penalties in the matter of collecting delinquent taxes in the case of railroads is found under Section 10034 which is as follows:

> "All property owned or held by any railroad company in any county in this state shall be liable for the taxes assessed and levied against such company in such county, and all state, county, city, town, village, school taxes, and taxes for the erection

> of public buildings, and for other purposes, levied on the property of any railroad company in such county, together with all dues, penalties and costs accruing thereon, are hereby declared a prior lien in favor of the state on all the property of such company, real, personal or mixed, including roadbed and rolling stock, lands, depots and other buildings in such county; and the fact that taxes assessed against any specific property of such company shall have been paid shall not exempt such property from being subjected to the payment of any and all other taxes due by such company, and the same are hereby declared to be a prior lien upon all such property, real and personal, which lien shall have precedence of all other liens, judgments and decrees of whatever kind, and shall be enforced as hereinafter provided."

The bridge company, being prosecuted for its failure to comply with its duty under the taxation and revenue laws of the state, is not a penalty which you are trying to exact because of its failure to perform a duty as in the case of a contract between individuals. Further than that the penalty should be a prior lien just as all delinquent taxes and the penalties are prior liens, under Sections 9936 and 9937, R. S. Mo. 1929, which are as follows:

> "All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way effect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

> "The taxes due and unpaid on any real estate which has heretofore been returned delinquent, and which has not been forfeited to the state, and the taxes due and unpaid on any real estate which has been forfeited to the state for the nonpayment of such taxes, shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained on each such tracts and lots of real estate to the amount of the taxes due thereon, and also the interest and costs accruing under this chapter."

In view of the foregoing authorities it is the opinion of this Department that Section 10070 is constitutional and that the penalties mentioned in your letter can be established as prior liens in the event of judgment.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:MM

STATE FAIR: Entertainment may be paid for under Sec. 1, sub-section C-D, Laws of Mo. 1933, p. 63. (H B 649)

August 15, 1933.

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter in which you request an opinion from this department on the following state of facts:

> "Can entertainment at the State Fair be paid out of the appropriation provided for in Section 1, subdivision C-D, Laws of Missouri 1933, p. 63?"

Section 1, sub-section C-D, Laws of Mo. 1933, p. 63 provides as follows:

> "Repairs, Replacements, Premiums and Operation:
>
> Labor, material and supplies, including paint for general repairs of buildings, communication, printing and binding and travel, including boys' state fair school; material and supplies****$50,000.00."

It will be readily noticed by a reading of this section that the only way in which entertainment at the State Fair can be paid out of this appropriation is in the event that such entertainment can be brought within the term of the word "labor" as found in said section.

In the case of Crook v. Commonwealth, 136 S.E. 565, 147 Va. 593, professional baseball players and umpires engaging in a Sunday game were held to have violated Code 1919, Sec. 4570 although no admission was charged; "labor" meaning physical or mental toil, bodily or intellectual exertion.

In the case of City of Clinton v. Wilson, 101 N.E. 192, 257 Ill. 580, it was held that to keep open, manage and superintend a theatre and sell tickets therein on Sunday is labor within a municipal ordinance, subjecting to fine any person who shall on Sunday pursue his daily labor.

Webster's New International Dictionary defines the word "labor" as follows:

> "Physical or mental toil; bodily or intellectual exertion, esp. when fatiguing; painful, irksome, or unavoidable; work."

It is therefore the opinion of this department that the word "labor" as used in Section 1, sub-section C-D, Laws of Mo. 1933, p. 63 is so comprehensive as to include entertainment offered at the State Fair; therefore, entertainers working at the State Fair may rightfully be paid out of the appropriation provided for by Section 1, sub-section C-D, Laws of Mo. 1933, p. 63.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

STATE OFFICERS--State Officer cannot receive salary from State Department and also from State Fair Board.

August 15, 1933

FILED
3

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department is in receipt of your letter of August 11, in which you request an opinion from this Department on the following state of facts:

> "Will you please advise me if a person receiving a salary from any state department can receive additional salary from the State Fair Board for services rendered while the Fair is in session.
>
> Can an individual who is now working for the state be paid expenses from the Fair Board for attending the Fair and working for the Fair Board?
>
> Or in other words, can an individual receive salary from two different sources of the state for the same period."

Section 12479, Revised Statutes of Missouri, 1929 provides as follows:

> "No money shall be paid out by the treasurer of the association except upon warrant issued by order of the board of directors, signed by the president and the secretary. And no warrant shall be drawn unless there is money in the treasurer's hands to pay it."

Section 12480, Revised Statutes of Missouri, 1929, insofar as it is pertinent provides as follows:

> "The board of directors shall have power to make all rules, regulations and by-laws necessary and suitable for the conduct and

> government of the exhibitions, the sale of privileges, and for the proper control, operation and conduct of the fair not inconsistent with the purposes of this article, nor with the Constitution and laws of this state. It shall have the power to employ marshals, superintendents and assistants, needful for the proper management of the fair, * * * *."

At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment. 46 Corpus Juris, 941.

There being no constitutional or statutory provision relating to the subject or under discussion, the common law remains the law of Missouri.

In the case, State ex rel, McAllister v. Dunn, 277 Mo., 38, 209 S. W. 110, the Court held, "It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices, the duties of which are incompatible.

In the case of State ex rel. v. Bus, 135, Mo., l. c. 338, the Court said:

> "The remaining inquiry is whether the duties of the office of deputy sheriff and those of shhool director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time.

> At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.
>
> It was said by Judge Folger in People ex rel v. Green, 58 N. Y. 1. c. 304; 'Where one office is not subordinate, to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law' ".

As has been indicated above, the question of incompatibility does not arise when one position is an office and the other is merely an employment; the rule is laid down in the case cited, supra, referring only to public offices. As to what is a public office, the Court in the case of Gracey v. St. Louis, 213 Mo. 1. c. 394, lays down the following definition:

"If, however, the question be referred to the more general definition of public office, the result would be the same. For instance, McFarlane, J., in State ex rel v. Bus, 135 Mo. L. C. 332, declares the sum of the matter to be 'that if an officer receives his authority from the law and discharges some of the functions of government he will be public officer.' An office has been defined as 'a special trust or charge created by competent authority'—more tersely still, 'a public office is a public trust.' His oath, his bond, his liability to be called to account as a public offender for misfeasance or nonfeasance, the tenure of his position, etc., have been said to be indicia of a public officer. (State ex rel. v. May, supra; Throop v. Langdon, 40 Mich. 682.) And the general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers as well as that of duty. (8 Words and Phrases, p.4933.) It has been aptly said that the true test of public office is 'that it is a parcel of the administration of government'. (2 Bouv. L. Dict., Tit. 'Officer'.)"

Section 18, Article 2, of the Constitution of Missouri provides as follows:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this state, or any ordinance of any municipality of this state, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Therefore, it is the opinion of this Department that it is unlawful for any person receiving a salary from any State Department to receive additional salary from the State Fair Board for services rendered while the fair is in session, for the reason that the functions of the two offices are inconsistent and incompatible.

Respectfully Submitted

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

CRIMINAL COSTS--Liability of county or state for costs.

3827-28
RSMo 1929.

August 23, 1933

File 3

FILED
3

Hon. Frank K. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

Your letter addressed to this department has been assigned to me for answer. After reading your letter, I gather the following statement of facts, to-wit:

Mander Carr was charged with murder in the first degree. He entered a plea of not guilty and upon that issue a trial was had, resulting in a conviction of a crime of a lesser degree, and punishment fixed at a jail sentence and fine. Thereafter, a proper cost bill was certified to the County Court of Mississippi County and by them paid.

QUESTION: Was the State liable for the cost incurred by the prosecution in said case?

Section 3827 R.S. 1929, read thus:

> "When the defendant is sentenced to imprisonment in the County jail, or to pay a fine, or both, and is unable to pay the cost, the county in which the indictment was founded or information filed shall pay the cost, except such as were incurred on the part of the defendant."

In this case the defendant was charged with first degree murder. Had he been acquitted, it is the opinion of this department that the state would have been liable for such cost, under Section 3828 R.S. 1929. However, the facts are he was convicted of a lesser degree of crime, than that he was charged with, and his punishment fixed at a jail sentence and fine; therefore, the liability of cost is fixed under the section herein copied--Section 3827, Supra.

This department holds that before the State can be made liable to pay the cost in a criminal prosecution, it is necessary that the defend-

ant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case.

Although the information was for a capital crime and under it the defendant might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true it was competent to find him guilty of a less degree or grade of crime by which the punishment would be reduced to imprisonment in the County jail or by such imprisonment coupled with a fine. Such was your case. It is the conviction and sentence which fixed the liability for cost. Being convicted and sentenced to pay a fine and serve a jail sentence fixed the liability upon the county in which the information was filed, State ex rel v. Carpenter, 51 Mo. 555. Had the defendant been acquitted under the charge as filed, then in that case the State would have been liable for the cost. State ex rel Timberman v. Hackman, 302 Mo. 273. We therefore hold that the State was not liable for the cost in this case.

We regret that you have been delayed in receiving this opinion but other matters, which we had under consideration when this assignment reached us, required our attention.

Very truly yours,

W. W. Barnes
Assistant Attorney General.

APPROVED

ATTORNEY GENERAL.

COUNTY CLERKS: Entitled to count printed words in calculating fees due under Section 10007 R. S. Mo. 1929.

Cross index under fees.

August 30, 1933

FILED
3

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is herewith made of your request for an opinion of this office, your request reading as follows:

> "Is the County clerk entitled to charge 10¢ per hundred words for copying the tax book under authority of Sec. 10007, R. S. Mo. 1929, for those words already printed in the tax book as furnished by the County Court at its expense?"

For convenience, we herewith quote the portions of Section 10007 R. S. Mo. 1929, under which he is allowed these fees:

> "The following fees and compensation shall be allowed to the several officers and persons herein named for services rendered under the provisions of this chapter, vis:
>
> 1. To Clerks.--To the clerk of the county court, * * *
>
> 2. For making a copy of the tax book for the use of the collector, including certificate and seal to the same, for every hundred words and figures, ten cents, one-half to be paid by the state, and other half by the county; * * * *"

From a reading of the statute, we must admit that the wording of the section does not materially assist us in determining the question at hand. It is true that "services rendered" implies the fees or compensation are to be in consideration of additional services required, and accordingly the compensation should be in proportion to the services rendered and work required of the

County Clerk in "making a copy." However, on the other hand, "a copy" contemplates a completed whole, a finished and completed tax book, which is not such until the last word is written and until certified and authenticated as a true copy of the assessor's book. It is the latter consideration which is controlling in the present issue.

Section 9876 R. S. Mo. 1929, (now repealed, but which was effective until July 24, 1933, and controlls the making of all tax books up to that date) reads in part as follows:

> "As soon as the assessor's book shall be corrected and adjusted, the clerk of the county court, except in St. Louis city, shall, within ninety days thereafter, make a fair copy thereof, with the taxes extended therein, authenticated by the seal of the court, for the use of the collector;* * *"

The authentication above required is essential to the validity of the tax book. This has been repeatedly held by our courts. In the case of Burke v. Brown, 148 Mo. 309, the Court was considering the validity of a tax sale. It was admitted (l.c.313) that the tax books

> "did not contain a certificate that the same was a true copy of the assessor's book of the year of which it is purported to be the tax book, and that said books are not authenticated by the seal of the county court, or the certificate of the clerk of said court.* * *"

The Court held the sale to be void and the collections under such a tax book to be illegal exactions. This is found on page 316:

> "* * *It is admitted now that there was an entire omission, in all the years for which these taxes were paid, to authenticate the tax books, as required by the foregoing section; and the same remarks, therefore, apply here as in Howard v. Heck, supra, where it was said to 'follow from these premises that the so-called tax books, not being authenticated in any manner whatever, can not be regarded in any other light than mere unofficial lists, bearing on their face none of the insignia of authority.' It must be conceded, then, that when the tax

> collector assumed to act upon these unofficial lists, he was proceeding without authority of law, and his acts were, in effect, the same as if he himself, of his own volition, had made such lists. He has no 'tax books,' properly so-called; nor were these several amounts, which the collector got from Howard, valid and legal taxes. They were mere illegal exactions, to which the State was not entitled and which the landowner was under no obligation to pay." " "

From the foregoing, there is no doubt but that a heavy responsibility rests upon the County Clerk to make an accurate copy of the assessor's books, to know that such copy is true and accurate and to certify to such fact under the seal of the court.

Having determined the foregoing, it is fundamental that this responsibility rests upon the clerk just as certainly and in the same degree respecting the portions which are printed as the portions which are written in by the clerk in completing the tax book.

Your exact question has never been determined by the Courts of this State, but in view of the foregoing statements, it is our opinion that the rulings of the Courts of Appeals in the cases hereinafter referred to, control the instant question.

The St.Louis Court of Appeals, in the case of State ex rel. Huebler, v. Board of Police Commissioners, 108 Mo.App.98, considered the question of compensation due the Circuit Clerk for issuing six writs of mandamus at $1.00 each and six copies of the petition attached thereto at $13.30 each. The principal issue was the clerk's claim for 6 copies of the petition at $13.30 each. The following is found on page 102;

> " " "The clerk is allowed as costs for drawing, sealing and entering every 'writ' original or judicial, and filing and docketing the same, the sum of $1, and 'for copies of records and papers, for every hundred words, ten cents.'" " "

The complaining party had furnished the clerk with the necessary copies of the petition, to be attached to the writs, and objected

to paying the clerk for the "copies" at the rate of ten cents for every hundred words. The party charged with these costs took the position that the statute allowing fees must be strictly construed, that the services for which the fee was claimed were not actually performed; and that the burden of establishing the charge was on the clerk claiming it. The Court, in considering these points, stated on page 104:

> "* * *It is contended that inasmuch as the clerk used these printed copies, he is not entitled to compensation as for 'copies.'
>
> The costs taxed for copies are a part of the emoluments of the office necessary to discharge the expenses of the office, such as the hire of clerks employed to make copies, and the clerk can not be deprived of such compensation, by reason of the fact that parties make and furnish to him copies of their petition.
>
> Such copies thus furnished are not in the eye of the law, legal 'copies.' 'Copies' for which a charge can be made are the 'copies' issued and certified to be copies, under the hand of the clerk, with the seal of the court attached, as in the case at bar. Muerhead's Case, 13 Ct. of Claims,251.***
>
> As contended by the appellant, an officer of the court claiming fees for services must be able to put his finger on some statute expressly allowing the fee he claims, and if he is unable to do so he is not entitled to the fees. And it is also true that statutes regulating costs should be strictly construed. But it is equally true that the Legislature has provided compensation in the way of fees to the clerks of the circuit courts for services which the law requires them to render and when it appears they have rendered such services they ought not to be deprived of the fees allowed for like services because the extraordinary and particular procedure in which the services were rendered is not specifically named in the statute.***"

The foregoing ruling was affirmed and cited in the decision of the Kansas City Court of Appeals in the case of Blackwater Drainage District v.Borgstadt, 163 Mo. App. 151. In this case the plaintiff moved to quash defendant's fee bill, covering fees due as Clerk of the Circuit Court of Johnson County. A substantial portion of this $4,057.25 fee bill was for issuing 229 summonses with copies of the petition attached. In this case, too, the forms for the summonses and petitions were furnished to the clerk. The Court, in allowing these fees to the clerk, stated on page 153:

> "* * *But it is claimed that the clerk did not do the work; that copies of summons and petition were prepared and printed for him. This contention leaves out of view one of the chief considerations which support a statutory fee, and that is, responsibility. If by any means the clerk had caused damage by sending out papers which were not copies, he and his bondsmen would have been liable. As said by the St.Louis Court of Appeals in State ex rel. v. Board of Police Commissioners, 108 Mo. App. 98: 'Such copies thus furnished are not in the eye of the law legal 'copies'. 'Copies' for which a charge can be made are the 'copies' issued and certified to be copies, under the hand of the clerk, with the seal of the court attached, as in the case at bar.'
>
> It is a matter which we judicially know, that nearly all process and official acts are issued upon what are known as printed blanks, filled in by the officiating officer, and we have not heard challenged his right to charge for the printed words." * * *

Without doubt, responsibility rests upon the County Clerk to make a true and correct copy of the assessors book, and to know

and certify that such copy is true and correct. In view of the decisions hereinbefore referred to, it is the opinion of this office that the County Clerk is entitled to include the words already printed in the tax book in calculating the total number of words in the tax book for which he is to be paid under Section 10007 R. S. Mo. 1929.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

IN RE: OPEN STEEL FLOORING INDUSTRY CODES RELATIVE TO MISSOURI ANTI-TRUST STATUTES.

August 31, 1933.

FILED
3

Arrowhead Iron Works, Inc.
421-431 West Fifth Street
Kansas City, Missouri

Gentlemen:

Your letter of August 19, in parts, reads as follows:

> "The Open Steel Flooring Industry, through the Open Steel Flooring Association, has submitted a Code of Fair Competition to the N. R. A. for approval. As a member of the industry, but not of the Association, we have attended the meetings at which the Code was formulated. The Arrowhead Iron Works is the only firm in the industry operating in Missouri.
>
> "We have received a very definite impression at the meetings that the object of the Code is to raise prices to a more profitable level and to reach an agreement whereby the products manufactured by the various firms in the industry will be sold on the same price basis. Article III, Section B (cost code) states:
>
> > 'This industry shall proceed at once to provide for standard methods of costing which shall be used by all manufacturers for the purpose of this section of the Code. It shall be an unfair method of competition for any such manufacturer to sell below his cost. Each unit or participant shall use approved standard methods of costing in order that each unit will use the same rules for finding costs.'

"We refused to sign the Code on the grounds that we were forbidden to enter into price agreements by Section 4614, R. S., 1929 and Section 8728, R. S., 1929, governing the operation of firms doing business in the State of Missouri.

* *

"Our position in the matter is briefly, as follows: We are now operating under the President's Blanket Code, and have increased our prices slightly to cover the additional expense incurred. It would, of course, be attractive to raise our prices to an appreciably higher level, being assured that our competition would do likewise, particularly with the protection of the Government and the sanction of the State of Missouri. If we sign the Industry's Code, it will be necessary for us to join the Association, as this is specifically provided for in the Code. This, of course, will necessitate obeying the rules of the Association."

"If we take the foregoing steps, we will expect your office to release us from submitting the Anti-trust affidavit (Form 3A) which we are required to send in each year with our Domestic Corporations report to the Secretary of State. At present, we are the only firm in the industry operating under the Blanket Code, and are abiding by the spirit and letter of the Code strictly. If we adopt the Code of the Industry, we want to be free to enter into and obey it fully."

* *

This department has no power to relieve your corporation from filing the affidavit required by sections 8728 and 4614 Revised Statutes of Missouri, 1929.

This department has no power to relieve any person or corporation from the provisions of the Missouri Anti-Trust Statutes.

Section 8701, Revised Statutes of Missouri, 1929, provides as follows:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation, or understanding with any other person or persons to regulate, control or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining, or any article or thing whatsoever, of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or participate in any pool, trust, agreement, contract, combination, con-

> federation or understanding, to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and be punished as provided for in this article."

Section 8703, Revised Statutes of Missouri, 1929, provides as follows:

> "All arrangements, contracts, agreements, combinations or understandings made or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale in this state of any product, commodity or article, or thing bought and sold, of any class or kind whatsoever, including the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, and all arrangements, contracts, agreements, combinations or understandings made or entered into between any two or more persons which are designed or made with a view to increase, or which tend to increase, the market price of any product, commodity or article or thing, of any class or kind whatsoever bought and sold, including the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, are hereby declared to be against public policy, unlawful and void; and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this article."

Section 3. paragraph (a) National Industrial Recovery Act, commonly known as "N. R. A." provides as follows:

> "Upon the application to the President by one

> or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices. * * * * *

It is the opinion of this department, the Industrial Recovery Act does not repeal nor suspend the operation of the herein above quoted provisions of the Missouri Statutes prohibiting contracts to fix prices or restrain trade and commerce.

This department will enforce the Missouri Anti-Trust Statutes against any person or corporation who violate same.

This department appreciates highly the spirit of your letter and will be pleased at any time to furnish you any information we may have available upon the subject matter of your letter or any other question properly coming within the sphere of the Legal Department of the State of Missouri.

Very respectfully yours,

APPROVED:

EDWARD C. CROW
Assistant Attorney General.

ROY McKITTRICK
Attorney-General.

ECC/AJ

STATE BARBERS BOARD: Salary of retiring Board ends July 7, 1933

September 6, 1933.

9/6

FILED
3
42

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Mr. Smith:

This office is in receipt of your letter of August 16, 1933 in which you request an opinion from this department as to the following state of facts:

> "I have presented for payment the July expenses and July salaries of both the retiring members of the State Barbers Board and the new members.
>
> The commissions of the new members issued by the Governor were all dated June 30, 1933. The new members qualified by taking their oath of office on July 7, 1933.
>
> My office would appreciate an opinion as to whether both the old board and the new board could legally draw salary for services during the same time. Also, whether both boards could draw travelling expenses for the same period.
>
> The appropriation made by the Legislature for the Barbers Board is contained in Sec. 4, page 92 of the 1933 Missouri Laws."

Section 13523, R.S. Mo. 1929 provides, in so far as it is pertinent, as follows:

> "A board of examiners, to consist of three persons, citizens of this state for at least three years prior to their appointment, is hereby created to carry out the purposes and to enforce the provisions of this chapter. Such board shall be appointed by the Governor, by and with the advice

> and consent of the senate: Provided, that all members must have had a practice of at least five years at the said occupation prior to their appointment. Each member of said board shall serve for a term of four years and until his successor is appointed and qualified.
> *****

Sec. 5, Art. XIV of the Constitution of the State of Missouri provides as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

In the case of State ex rel v. Thompson, 38 Mo. 193, the Court held that by virtue of the Constitution the Superintendent of Public Instruction was continued in office until his successor was appointed or elected and qualified. The Court said:

> "When the plaintiff's successor was duly appointed and qualified, his term expired, and not before." (Emphasis ours)

In the case of State ex rel, The Attorney General v. Ranson, 73 Mo. 78, the Court said:

> '"The first question is, what constitutes, under the law, the official term of justices of the peace? The statute in force now and when respondent was elected and qualified, provides that: 'Justices of the peace are to be commissioned by the county court, and shall hold their office for four years, and until their successors are elected and qualified.' The constitution of the State--5th section, 14th article--declares that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.' The stipulation of the parties shows that at the November election in 1876, the respondent was duly elected, commissioned and qualified as a justice of the

> peace within and for Kaw Township, in Jackson County, Missouri, for the period of four years, and until his successor was duly elected or appointed and qualified. It would seem from this that the period of four years, and whatever time thereafter may elapse before the election or appointment and qualification of his successor, constitutes the official term of justices of the peace. ****"

From a consideration of these cases it may be seen that the term of office of a public officer elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, expires at the time of the qualification of such successor.

This principle of law is announced by Judge Arnold of the Kansas City Court of Appeals in the case of State v. Brown, 274 S.W., 965, l.c. 967:

> "The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo.333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel Ranson, 73 Mo. 78."

It is a well recognized rule of law that the right of a public officer to the salary of his office is a right created by law and is incident to the office; it does not have a contractual basis, nor is it dependent upon the fact or value of services actually rendered.

In the case of King v. Riverland Levee District, 279 S.W. 195, 218 Mo. App. 490, the Court said: (L.c. 196)

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel Evans v. Gordon, 245 Mo. 12

loc. cit. 27, 149 S.W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel Troll v. Brown, 146 Mo. 401, 47 S.W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel Evans v. Gordon, supra. "

Therefore, in view of the foregoing, it is the opinion of this department that the term of office of the retiring members of the State Barbers Board expired July 7, 1933, at the time the new members qualified by taking their oath. The salary and expense appropriation being incident to the office, the retiring members of the State Barber Board can not legally draw any salary or travelling expenses for the period subsequent to July 7, 1933.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

BUS & TRUCK LAW: Constitutionality of paragraph (e) of Sec. 5270, Laws of Mo. 1931 p. 304.

9/12

September 11, 1933.

FILED
3

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of August 16, 1933, which reads as follows:

> "This office has been requested to give an opinion by the Dyer O'Hare Hauling Company, of this vicinity, which company operates a number of trucks as a contract hauler in Missouri within a radius of 120 miles of this point.
>
> The question arises from the construction to be placed on Section 5270 paragraph (e) of the Missouri Bus and Truck Law passed by the 56th General Assembly of 1931, and given as General Order No. 27.
>
> The language of Sec. 5270, paragraph (e) reads as follows: '(e) It shall be unlawful for a contract hauler to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points and any contract hauler so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this Act.'
>
> The question is whether or not this is constitutional, and it seems that this section is somewhat unfair and discriminatory.
>
> This question was previously submitted by A.J. Frank, Constable of Central Township, of this County, but owing to the prohibition against giving an opinion to anyone but the Prosecuting Attorney, the opinion was not given.

> Because of the very high standing of this firm in this community, we are pleased to renew the request for the opinion and will thank you for an early reply.'"

You ask whether or not paragraph (e) of Sec. 5270, Laws of Mo. 1931, p. 310 is constitutional because it appears to be discriminatory. At first glance the same does appear discriminatory between contract haulers and motor carriers, as both use the highways for their place of business; however, a comparison of the statutes relating to both classes reveals that the Legislature in exercising its right to regulate and supervise trucks using the highways for private gain or business imposed restrictions on the classes thereof to the end that the Public Service Commission would have complete supervision and power of regulation over all classes of persons thus using the highways. The State has the right to regulate and use the highways in the manner it has provided.

In Carson v. Woodram, 120 S.E. 512, the Supreme Court of Virginia said:

> "The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a right common to all, while the latter is special, unusual and extraordinary. As to the former the extent of the legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied to others, because of this extraordinary nature. (Many cases cited)".

The United States District Court in Schwartzman Service, Inc. v. Stahl, et al, 60 Fed. Rep. (2d) 1034, l.c. 1037, recognizes this doctrine; we quote:

> "At the outset it must be acknowledged that the State has the power to regulate and control the movement of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. (Many cases cited)"

Judge Reeves in redering the decision, quoted on the same page, said:

> "The highways belong to the State. It may make provisions appropriate to securing the safety and convenience of the public in the use of them. **** Assuming therefore the power and right of the State to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the State has a broad discretion in classification in the exercise of its power of regulation. **** Upon such classification no person can interpose an objection save only in those cases where the classification or discretion is entirely arbitrary."

Having thus established the fact that the State may regulate the uses of its highways, we now proceed to determine in what manner and method the State has sought by statute to regulate trucks using the highways for private gain or business. The distinction and definition of a "contract hauler" and "motor carrier" can be discerned by reciting herein the definition of each. A "contract hauler", under Sec. 5264 Laws of Mo. 1931, p. 305, is defined as follows:

> "'The term 'contract hauler' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of such city or town and its suburban territory as herein defined.'"

In the same section, under paragraph (b), the term "motor carrier" is defined as follows:

> "'The term 'motor carrier' when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier.'"

A distinction exists between contract hauler and motor carrier in this: A contract hauler is not required to pay an annual license fee, whereas, a motor carrier must.

Art. IV, Sec. 44a, p. 92 of the Constitution of the State of Missouri in part provides:

> "****For a period of ten years after the adoption hereof, the General Assembly shall have no power to levy and collect state registration fees, license taxes or other taxes on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) or state taxes on the sale or use of motor vehicle fuels ****"

Sec. 5272, Laws of Mo. 1931, p. 311, subdivision (c) provides the amount of the annual license fee on motor carriers. Thus, a distinction is made between contract haulers and motor carriers in that the former pays no annual license fee and the latter does.

A further distinction between the two classes exists in this: That a contract hauler receives a contract hauler's permit and is restricted by certain limitations of the statute in his activities, i.e., paragraphs (d) and (e) of Sec. 5270, Laws of Mo. 1931, p. 310, which provide:

> "(d) A contract hauler may receive persons or property at a point located on a regular route and destined to a point not located on a regular route and receive persons or property at a point not located on a regular route and destined to points on a regular route."

> "(e) It shall be unlawful for a contract hauler to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points and any contract hauler so offending shall be guilty of a misdemeanor and punished as provided by Section 5275 of this act."

A motor carrier is restricted to travel on a regular route and may only do business on the route as shown in the original application for the Certificate of Necessity and Convenience, while the contract hauler, by his permit is entitled to contract and conduct his business under said contracts in any manner in so far as it does not conflict with a regular route allotted to the motor carrier.

The trucks of both contract haulers and motor carriers are regulated as to size, weight, speed, capacity of load, insurance and safety devices, and the only distinctions exercised between the two classes are:

(1) The route over which they travel;
(2) The payment of annual license fees;
(3) The kind of permit each receives.

In order to hold paragraph (e), Sec. 5270, Laws of Mo. 1931 unconstitutional, it must be shown that the discrimination between contract haulers and motor carriers hereinbefore set out is unjust and arbitrary. We again quote from the Schwartzman Case, supra, l.c. 1038:

> "It is the law that, even though an exemption is a clear discrimination, it is not invalid unless arbitrary. German Alliance Ins. Co. v. Kansas, 233 U.S. 389, etc. The fact the legislative classification may rest on narrow distinctions as decided in German Alliance Insurance Company v. Kansas, supra."

In State ex inf. Barker v. Kansas City Gas Company, 254 Mo. 515, l.c. 534, our Supreme Court said:

> "That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussions. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water,

> car service, et.) is in its nature a monopoly; that competition is inadequate to protect the public, and if it exists, is likely to become an economic waste; that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service."

In Pugh v. Public Service Commission, et al, 10 S.W. (2d) 946, l.c. 951, the Supreme Court held:

> "It is settled by the decisions of both state and federal courts that the mere fact a rate fixing is discriminatory is not conclusive that such discrimination is unjust and therefore unlawful and invalid. (many cases cited)"

And further, in State v. M.K. & T. Railway Company, 172 S.W. 40, the court said:

> "Arbitrary discriminations alone are unjust if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination."

Many cases could be cited to show the narrow bounds in which the Supreme Court has held discrimination in classifications was constitutional. The Schwartzman Case, supra, held that the provision relating to exemption of dairy and farm products was constitutional. In that case the Court distinguished between our statute and the Florida statute, which was the basis of the decision in Smith v. Calhoun, 283 U.S. 553. The constitutionality of the entire Bus and Truck Law was clearly upheld in the Schwartzman Case, supra, when the Court said:

> '"This case involves the constitutional validity of certain sections of the statute of Missouri. The particular act assailed relates to 'transportation of persons by motor vehicle over public highways of the State of Missouri.'"

And further:

> "'Every presumption must be indulged in favor of the constitutionality of the law. While validity of a statute cannot stand upon legislative declaration alone, yet the rule is that 'the legislative declaration of purpose and policy is entitled to gravest consideration, and unless clearly overthrown by the facts of record, must prevail.'"

And further:

> "The whole enactment in view of the foregoing appears to be designed to accomplish the legislative purpose by it 'of promoting and conserving the interests and convenience of the public'.
>
> It is obvious in view of the evidence before the court that it was needful legislation, not only to limit the number of motor vehicles in use on the highways, both as motor carriers and contract haulers, but in like manner to supervise and regulate them in the matter of the size of the trucks, the character of business done, and the responsibility of the operators.'"

From the foregoing, it is the opinion of this department that paragraph (e) of Sec. 5270, supra, is constitutional, and that the discrimination between motor carriers and contract haulers is not unfair or arbitrary.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

Roy McKittrick,
Attorney General

OWN:AF

MISSOURI COMMISSION OF THE BLIND: No authority to pay Board of Health from funds appropriated to Commission for specific purposes.

#8659 Acts Laws 33

September 11, 1933.

FILED
3

9-20

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department acknowledges receipt of a letter from you as follows:

> "I am in receipt of a letter from Mrs. Mary E. Ryder, executive director of the Missouri Commission of the Blind, asking an opinion as to whether $175.00 a month could be taken from the general operating expense of the appropriation as shown in Sec. 1, pages 137 and 138, Missouri Laws 1933, and given to the State Board of Health.
>
> Our department would appreciate an opinion from your office as to the legality of this transfer, also from what item in the appropriation, if any, could this money be taken.

In the proper determination of your question, we are first directed to the provisions of our Constitution from which we quote. Section 43, Art. IV of the Constitution begins with this provision:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury and the General Assembly shall have no power to divert the same, or to permit the money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Also, Sec. 19, Art. X of the State Constitution provides:

> "No moneys shall ever be paid out of the treasury of this state or any of the funds under its management, except in pursuance of an appropriation by law."

In the case of State ex rel v. Gordon, 236 Mo., l.c. 158, our Supreme Court inconstruing these sections, said:

> "'The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State Treasury 'received from any source whatsoever', or 'of any funds under its management', except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose, no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department.'"

And in State ex rel v. Hackmann, 314 Mo., l.c. 53, stated:

> "It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid and since under the provision of Section 19, Article X of the Constitution, no money may be paid out of the State Treasury except in pursuance of an appropriation by law the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act where it is paid out of money specifically appropriated for a different purpose."

From the above it clearly appears that if no money has been appropriated from which the Missouri Commission of the Blind could pay the $175.00 per month, and since under the provisions of the Constitution, supra, no money may be paid out of the State Treasury except in pursuance of an appropriation by law, the State Auditor was and is without authority to issue a warrant in payment of such a claim. It cannot be said that a claim is paid pursuant to an appropriation if it is paid out of money specifically

appropriated for a different purpose. Laws 1933, p. 137, Sec. 1, reads as follows:

> "For the purpose expressed in Chapters 50 and 51, R.S. 1929, there is hereby appropriated out of the State Treasury, chargeable to the blind pension fund, for the use and benefit of the Commission of the Blind, the following amounts for the specific purposes expressed herein."

From the above appropriation act it will readily be seen that the appropriation is made for the use and benefit of the Commission of the Blind and for the specific purposes expressed in said Act. Now, if Twenty-one Hundred Dollars ($2100.00) annually, or any sum for that matter, be paid out of money specifically appropriated for the purposes expressed in subdivisions A, B, C and D of Sec. 1 of the Laws of 1933, p. 137, for the benefit of the Commission of the Blind, it could not be said that said sum, or any sum, so paid was pursuant to the appropriation, as it necessarily would be paid out of money specifically appropriated for a different purpose.

In view of the provisions of the Constitution and the decisions of our Supreme Court, this department is of the opinion that the State Auditor would have no authority to issue a warrant to the State Board of Health and charge it to the general operating expense of the Commission of the Blind.

Respectfully submitted,

W. W. BARNES,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

WWB:AH

INCOME TAX: Income tax by foreign state may be deducted.

10115 -- 10117 - 10120

September 11, 1933.

9/11

FILED
3
43

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Mr. Smith:

This department is in receipt of your letter in which you make the following request for an opinion:

> '"Will you please furnish this office an interpretation of the following paragraph, found under Section 10120, imposed by Revised Statutes, 1929, and Amended Laws, 1931:
>
> 'Income on which tax paid in another state: Such part of the income in any taxable year, on which a tax is imposed by any other state and paid to such state, shall be deducted where such income is included in the taxpayer's return, but this deduction shall not be allowed in any case where the net income applicable to this state shall be determined by multiplying the total net income by a fraction.'
>
> An early reply will be appreciated.'"

Sec. 10115, R.S. Mo. 1929, as Amended Laws of Mo. 1931, p. 365 provides in part as follows:

> "****a tax shall be levied upon, assessed against, collected from, and paid by every individual, a citizen or resident of this state, upon net income received from all sources during the preceding year in excess of the exemptions now or hereafter provided, and a like tax

> shall be levied upon, assessed against, collected from, and paid by every individual, not a resident or citizen of this state, upon net income received from all sources within this state, during the preceding year in excess of the exemptions now or hereafter provided; ****.

The regulations of the State Auditor with reference to this section of the law are as follows:

> (a) Individual Residents and Citizens. Every individual a citizen or resident of the State of Missouri is liable to tax on his or her entire net income from all sources within and without this state, even though he may own no assets within this state and derive no income from sources within this state. A person domiciled in the State of Missouri and any person who maintains a permanent place of residence within this state is considered a resident of this state. See Sec. 10117 for gross income of residents and citizens and Sec. 10120 for allowable deductions.
>
> (b) Non Resident Individuals are liable to tax on net income derived from sources within the State of Missouri. Any non-resident individual employed by, or working for any corporation or individual, with principal office or branch office in this state is considered as receiving his income from sources in Missouri even though his employment may be entirely outside this state and only directed from such principal or branch office. Any individual actively engaged in employment in this state shall be considered as receiving income from this state regardless of where principal office or point of remuneration may be.
>
> Non-resident individuals failing or refusing to file returns within the time required shall lose the right to claim personal exemptions. See Sec. 10117for gross income from sources within Missouri, and Sec. 10120 for deductions allowable to non-resident individuals."

For the purpose of determining net income, the law permits certain deductions from gross income. The statutory deductions are in general, though not exclusively, expenditures other than capital expenditures, connected with the production of income. Sec. 10120 R.S. Mo. 1929 provides for these deductions, and listed thereunder is the following deduction:

> "Income on which tax paid in another state: Such part of the income in any taxable year, on which a tax is imposed by any other state and paid to such state, shall be deducted where such income is included in the taxpayer's return, but this deduction shall not be allowed in any case where the net income applicable to this state shall be determined by multiplying the total net income by a fraction."

In interpreting the above paragraph, it may be helpful to illustrate our position by the use of two hypothetical cases:

(1) For instance, X lives in the State of New York and has income from said state and also, income from sources within the State of Missouri. A tax is imposed by the State of New York on the income received from the State of New York. In making his return to the State of Missouri, X includes the New York income. This may be deducted in arriving at the taxable net income in Missouri, for under Sec. 10115, R.S. Mo. 1929 a non-resident is taxed only "upon net income received from all sources within this state". However, in making his return to the State of Missouri, if X determines the net income applicable to this State by multiplying the total net income by a fraction, no deduction shall be allowed for the taxpayer has already subtracted the income earned without the State of Missouri and he is, therefore, under Sec. 10120 entitled to no deduction.

(2) The situation becomes more complicated when we consider the case of a resident of the State of Missouri. For instance: X, a resident of the State of Missouri receives income from the State of Missouri and also, from the State of New York. Under Sec. 10115, he is required to pay a tax "upon net income received from all sources". This necessarily means that a tax is

imposed on all income, whether received from within or without the State of Missouri. This is equitable in so long as the foreign state does not impose a tax upon income earned within the foreign state. If such tax is imposed by the foreign state, it certainly cannot be said to have been the intention of the Legislature to tax the same income twice. Therefore, under the deduction allowed in Sec. 10120, X may, in determining his net income, deduct the income upon which a tax is imposed by the State of New York, providing he does not determine the net income applicable to this state by multiplying the total net income by a fraction.

It is therefore the opinion of this department, reading that portion of Sec. 10120 referred to by you as a whole, that a resident or non-resident individual having income from sources within the State of Missouri, and also income from without the state, and a tax is imposed by another state from which the other income is derived, and such income is included in the Return filed to the State of Missouri, that portion may be deducted in arriving at the net taxable income to the State of Missouri, provided the net income applicable to the State of Missouri is not determined by multiplying the total income by a fraction as provided in Sec. 10115.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

COUNTY BUDGET LAW: When effective

SB 154
Laws 33
S. 11 19-20

9/13

September 12, 1933.

FILED
3

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Attention: Hon. John J. Wolfe,
Associate Prosecuting Attorney

Dear Sir:

This department acknowledges receipt of your letter of August 4, 1933 relating to the "County Budget Law" passed by the last Legislature. Your letter reads as follows:

> "At the last session of the Legislature a bill was passed providing for a County Budget in certain counties - Session Acts of 1933, page 340.
>
> According to the provisions of this law a budget for county expenditures and a statement of income for each year must be prepared by the budget officer.
>
> At the present time the County of St.Louis is advertising for bids on several highway projects and we are in doubt as to whether or not we will be required to comply with Section 19 of the Budget Act and be subject to the penalties of Section 20 before a budget can become effective during the month of January 1934."

From reading the County Budget Law we note that sections 9 to 20 inclusive apply to counties of more than 50,000 inhabitants; St. Louis County being much greater in population, will therefore be guided by the above mentioned sections, and we shall look to these sections in determining the questions presented in your letter.

There is no emergency clause at the close of the County Budget Law; therefore, the law became effective 90 days after the close of the session of the Legislature, same being July 24. In the sections mentioned above there appear to be no duties

which become mandatory for any official to perform before October 1, 1933. Sec. 11, Laws of Mo. 1933, p. 347, is in part as follows:

> "On or before October 1 of each year, each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for the next budget year compared with the corresponding figures for the last completed fiscal year and estimated figures for the current fiscal year. The expenditure estimates shall be classified to set forth the data by funds, organization units, character and objects of expenditure; the organization units may be subclassified by functions and activities, if so directed by the budget officer. The estimates shall be accompanied by work programs showing the work it is planned to do and the estimated cost thereof classified according to funds, organization units, character and objects of expenditure. The estimates of revenues shall be prepared by the accounting officer and shall be classified so as to show the receipts by funds, organization units, and sources. The budget officer may direct that estimate forms be prepared and sent to such departments, offices, institutions, commissions and courts by the accounting officer and that the estimates shall be returned to the accounting officer for tabulation. If any department, office, institution, commission or court shall fail to return its estimates by October 10, the budget officer shall make the estimates and such estimates shall be considered as the estimates of such department, office, institution, commission, or court."

You state in your letter that St. Louis County is now advertising for bids on several highway projects. There being no duties devolving upon any one at the present time, we are confronted with the proposition as to whether the terms of the statute should be taken into consideration before said bids should be considered. It was stated in the case of State ex rel v. Dierks,

211 Mo. 568, as follows:

> "A statutory provision, though not going into actual operation until a future time, may have a potential existence."

The projects which you mention will, no doubt, be let in the near future, and the law now being effective in executing contracts, we quote the pertinent part of Sec. 19, Laws of Mo. 1933, p. 350:

> "No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating; provided, that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it shall be sufficient for the accounting officer to certify that such bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of such bonds yet to be sold or of such taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least 500 copies per issue, if there be such, except that such advertising shall not be required in case of contracts or purchases involving an expenditure of less than $500.00, in which case notice shall be posted on the bulletin board in the court house. All bids for any contract or purchase may be rejected and new bids advertised for,"

the provisions of which should be so construed so as not to defeat

the purpose of the County Budget Law and make it impossible for the accounting officer to carry out his duties, and subject himself to the penalties as set forth in Section 20, Laws of Mo. 1933, p. 351, which is as follows:

> "The accounting officer shall be personally liable and liable on his bond for the amount of any obligation incurred by his erroneous certification as to the sufficiency of an appropriation or of a cash balance, or for any warrant drawn when there is not a sufficient amount unencumbered in the appropriation or a sufficient unencumbered cash balance in the fund to pay the same, or for the payment of any amount not legally owing by the county."

Under Section 19 as quoted above, if the construction of the highways mentioned in your letter was to be financed by bonds or from taxes levied for that specific purpose, it might not involve in any way the accounting officer, but you have not stated how the projects are to be financed; we therefore assume that no bonds or special taxes have been issued or levied.

It is therefore the opinion of this department that all the duties of the accounting officer and the budget officer should be taken into consideration and carried out before the bids are accepted for the several highway projects.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

STATE PURCHASING AGENT ACT: Effective July 24, 1933, and the exclusive authority for purchase of supplies therein contemplated

September 14, 1933

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

My Dear Mr. Smith:

Acknowledgment is herewith made of your request for an opinion of this office dated August 29th in respect to the State Purchasing Agent Bill. Your request reads as follows:

> "The last Legislature passed a bill known as the State Purchasing Agent, found on page 411 of the 1933 Missouri Laws. This bill became a law July 25, 1933.
>
> "Will you please advise me if I am liable on my bond for auditing accounts and Mr. Nacy, State Treasurer, is liable on his bond for the payment of these accounts, even though at this time the Purchasing Agent has never qualified. If we are liable, should we require all small purchases to be okayed by the Purchasing Agent?
>
> "I would appreciate an early opinion as it affects a number of bills now on file in this office."

After the receipt of the foregoing communication we received an additional request from your office reading as follows:

> "The State Purchasing Agent Bill became effective July 24, 1933, but no State Purchasing Agent was appointed by the Governor until sometime later. Is the State Auditor authorized to audit accounts made for state purchases July 24th to the date of the appointment of the State Purchasing Agent?"

The State Purchasing Agent Act, known as Senate Bill 192, is found at page 410 et seq. Laws of Missouri 1933. We shall not quote the entire Act here but will refer to such portions of the Act as are appropriate as we deal with your inquiry. Generally speaking, this act creates a public office known as the State Purchasing Agent. This agent is to be the central agency for the purchase of all supplies for the various State boards, bureaus, commissions and departments. It defines his powers and duties in very broad terms, provides penalties for failure to comply with the Act and repeals all parts of law inconsistent therewith.

In determining your problem, we are first confronted with the issue as to when this Act became effective. There being no emergency clause appended to this law, it would under the constitutional provision be effective ninety days after the adjournment of the 57th General Assembly. Upon an examination of this Act we can see no reason for this general rule being inapplicable. As heretofore stated, this bill creates a public office, this by virtue of the very first sentence of the first section of the Bill:

> "There is hereby created and established the office of the State Purchasing Agent."

This public office came into existence on the 24th day of July, 1933. In our view of the case whether or not this office was promptly filled has no bearing upon the effective date of the act. Section 2 of the Act provides as follows:

> "SEC. 2. SHALL PURCHASE SUPPLIES.--The Purchasing Agent shall purchase all supplies except printing, binding and paper, as provided for in Chap. 115, R. S. 1929, for all departments of the State, except as in this Act otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Section 14 of this Act provides as follows:

> "SEC. 14. REPEALING INCONSISTENT OR CONFLICTING ACTS.--All acts or parts of acts inconsistent or in conflict with this Act are hereby repealed to the extent of such inconsistency or conflict."

Therefore, on the effective date of this Bill the Purchasing Agent was authorized and required to purchase any and all supplies for the various departments, and all parts of existing laws inconsistent therewith were thereby repealed. No power or authority remained with the various boards, bureaus and commissions affected to purchase these supplies, but all such authority was vested in the office of State Purchasing Agent. It seems that the Legislature was not satisfied with the enactment of the repealing clause above referred to but went further to insure that all purchases be made through the office created and by virtue of the provisions of the Act. The following section is indicative of their vowed intention to prevent purchases except as provided for in the Bill:

> "SEC. 10. VIOLATION OF ACT RENDERS CONTRACT VOID.--Whenever any department or agency of the State government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this Act or the rules and regulations made thereunder, such order or contract shall be void and of no effect. The head of such department or agency shall be personally liable for the costs of such order or contract, and, if already paid for out of state funds, the amount thereof may be recovered in the name of the state in an appropriate action instituted therefor."

Accordingly, from and after the 24th of July, 1933, no department or agency of the State Government had any power or authority to purchase or contract for any supplies as defined in the law, but all such supplies were required to be purchased under the provisions of the act and through the office of the State Purchasing Agent.

We have viewed your problem from several angles but the foregoing conclusion seems inescapable. The foregoing construction of the Act places it within the requirements of the constitution, other interpretations which might seem to give relief would for one reason or the other invade constitutional provisions.

Article 3 of the Constitution of Missouri reads as follows:

> "THREE DEPARTMENTS OF GOVERNMENT.--The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Section 1 of Article 4 of the Constitution of Missouri is as follows:

> "SECTION 1. THE LEGISLATIVE POWER, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

The Courts have jealously guarded the rights and powers of the three Departments of Government and have unhesitatingly held statutes void which invaded these rights and powers or attempted to delegate these rights and powers to others. In the case of Merchants Exchange vs. Knott, 212 Mo. 616, the Court held the Grain Weighing and Grain Inspecting Act of 1907 void, as a delegation of the Legislative power. In considering this question Judge Lamm, speaking for the Court, stated on page 640:

> "* * *Section 1, article 4, of the Constitution provides that:
>
> 'The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assmebly of the State of Missouri.'
>
> Legislative power in Missouri is, therefore, lodged with the General Assembly and not elsewhere except as to such of it as may be delegated under the provisions of that instrument--for instance, to cities in matters of local concern. Briefly,

> legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Kent, 'is a rule of civil conduct prescribed by the supreme power of a State.' (1 Kent Com. (14 Ed.), 447.) That definition is part of Sir William Blackstone's, which adds, 'commanding what is right and prohibiting what is wrong.'"
>
> * * * *
>
> "Speaking to that part of his definition, Blackstone says (1 Blk., 46): 'For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore, it is requisite to the very essence of a law that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other."
>
> * * * *
>
> "Measured by the foregoing definition of law, can the statute stand? We think not. We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, <u>to say when</u> and where <u>it is law</u> is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission. True, the act was passed by the General Assembly, approved by the Chief Executive and stands published as authenticated law, but to all intents and purposes it is only a barren ideality, having such life as is thereafter breathed into it from an unconstitutional source." * * *"

It should be noted that the statutes there in question gave a body other than the General Assembly, the power to say when the act there under consideration would be operative and for that reason said act was declared unconstitutional.

In the often quoted case of State ex rel. Maggard vs. Pond, 93 Mo. 606, the Court considered the constitutionality of the Dram

Shop Option Law. The Court, after making the general statement that laws may be passed subject to a condition (such as a law giving to School Districts a portion of a school fund on condition that such districts will raise an equivalent or proportional sum) declared as follows:

> "* * * These are good conditions, capable of being performed without in any way interfering with the legislative will. But the law declaring an offence, or providing a punishment, or repealing an existing law, on condition that the Governor or any other individual shall assent to it, is as plainly unconstitutional. It is the naked veto power. It substitutes for, or rather adds to, the legislative will another will, which it makes necessary to the existence of the law. This is unconstitutional; no one doubts it; no one will pretend that a law with such a condition would be good. Per Harrington, Judge, in Rice v. Foster, 4 Harrington, 499. See Parker v. Commonwealth, 6 Barr (Penn.) 510;* * * *"

The Supreme Court of Ind. in the case of Isenhour vs. State, 62 N. E. p. 40, had the Food and Drug Act under consideration. The appellant in the case had been convicted under this Act for selling milk containing formaldehide. One of Appellant's defenses as set forth at page 41, is as follows:

> "* * *The pure food law provides that 'within 90 days after the passage of this act the board of health shall adopt such measures as may be necessary to facilitate the enforcement thereof, and shall prepare rules and ordinances where and when necessary regulating minimum standards of foods and drugs, defining specific adulterations, and declaring the proper methods of collecting and examining drugs and articles of food.' From this provision it is argued that the law could not become effective and 'could not be violated until the state board met, within 90 days, prepared its rules, and passed its ordinances regulating minimum standards, defining adulterations, and declaring the methods of collecting and

> and examining foods,' and, in substance, an attempted delegation of legislative power to the State Board of Health."****"

The Court stated on this proposition as follows, l.c. 41:

> "* * * *the duty imposed upon the state board (does not) in any sense postpone the taking effect of the law until the duty is performed. Performance can never be said to be complete. The duty is continuing, and will arise at any time when a new food or drug is put forward. Besides, it is paradoxical to say that the law is not effective until the state board have acted, when it is certain that without the law they could not act at all. And to say that their act puts the law in operation is to excuse them from acting, because no law requires it.* * *"

While the above case was reversed on other grounds, it was held that the duty of the Board of Health to prescribe rules and regulations in no sense varied or affected the penalty prescribed by the statute for any violation of its terms. The penalty was effective from the date the Act became a law. The Court would not construe the law otherwise for to do so would render it unconstitutional.

So in the instant case, to construe this Act as not effective until the Governor exercised his power of appointment is untenable, First, because to do so would delegate to the Governor the power to create a public office, and Second, because to do so would delegate to the Governor the power to determine when, or if ever, the law would become effective.

As heretofore stated, this act establishes a public office. The power of establishing such an office is purely a legislative power, one which must be exercised by the Legislature and which cannot be delegated to others.

In the case of State ex rel. Rosenthal vs. Smiley et al. 263 S. W. 825 l.c. 826, Judge Ragland stated:

> "(1) It is well settled that only the Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate.

State v. Butler, 105 Me. 91, 73 Atl. 560, 24 L.R.A. (N.S.) 744, 18 Ann. Cas. Note 489."

To delay the effective date of this Act to the day that the appointment is made by the Governor would be to delegate to the Governor the power of creating the public office of State Purchasing Agent.

To construe the bill as not taking effect until the Governor appoints the State Purchasing Agent would be to invade the right and power of the Legislature to determine when the act shall be effective, as the power of appointment is in the Governor and it is he who may determine when the appointment is to be made and accordingly, when the act is to be effective. The Governor, having this power would then be the agency determining when, if ever, and whether or not the Act would be effective. Under this theory, in the event he failed to make the appointment, the law would never be operative. It would be just as logical to hold this as to say that upon the death or disqualification of the present Purchasing Agent the law would be repealed and then again revived upon the Governor exercising his power of reappointment. This of course cannot be.

As is seen by the Indiana case above referred to, the penalizing provisions of that law were not in any way abated by reason of the failure of the Board of Health to make its rules and regulations. The penalizing sections of the act were separate and distinct from those requiring the Board to do certain acts provided for in the law. So in the instant case it is our opinion that Section 10 of the State Purchasing Agent Act was effective on the 24th of July of the present year and did not in any manner depend upon the action of the Governor for its validity or effectiveness.

Having determined that the State Purchasing Agent Act is effective on July 24, 1933, we now proceed to consider the further problems presented by your inquiry. One of the first questions which arises is the question as to the failure of the State Purchasing Agent to qualify. By your letter we note that you specifically stated that he has not yet qualified, or at least that some accounts or contracts were incurred prior to his qualification but after his appointment. This presents the proppsition of whether or not he is or was a de facto officer after his appointment but prior to his qualification. We assume of course that he entered into his duties and exercised his powers as State Purchasing Agent upon his appointment.

In 46 C. J. 1053, Sec. 366, we find the following definition of de facto officer:

> "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession and is exercising the duties of an office, his incumbency is illegal in some respect; he has at least a fair color of right or title to the office."

And as to what is to be considered as color of right or title to office, we find on page 1056 of said C. J. the following:

> "It (color of right or title to office) may also exist where the incumbent, although duly elected or appointed, is ineligible or has failed to qualify," * * *"

Therefore, under the foregoing authorities, having been duly appointed by the Governor as State Purchasing Agent and entering into the duties of such office and representing himself to be fully qualified to act and to carry on those duties, but failing in some respects to qualify as provided by law, we are of the opinion that he would be a de facto officer. This statement however is subject to qualifications as will later appear.

Touching the validity of his acts as de facto officer, we find this statement in 46 C. J. 1060, Sec. 378:

> "The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party. But to be valid, the acts of a de facto officer must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of de jure officers." * * *"

In the case of State vs. Dierberger, 90 Mo. 369, the Supreme Court discussed the status of a constable who had been appointed but had failed to qualify by taking the oath of office. The Court on this situation remarked as follows, l.c. 375:

> "* * *The act of the defendant here in question was probably his first act as deputy, but we do not see how that can make any difference, for the constable had the undoubted right to make the appointment, and the appointment was in every way a good, formal and valid appointment. The appointment made and constituted him a deputy; and although he failed to take the oath he was an officer de facto. The principle of law is well settled that the acts of such an officer are as effectual when they concern the public, or the rights of third persons, as though they were officers de jure.* * *"

In the case of In re Oak Street; Kansas City v. McTernan, 308 Mo. 494, the Court considered the validity of an ordinance passed by the common council of Kansas City, which had been passed by a majority of one, one of the aldermen voting for the proposition having removed from the ward from which he was elected, and under the city charter said alderman forfeited his office. The Court stated at page 509:

> "* * *The record shows that Sandler continued to attend the meetings of the Council and to participate officially in its proceedings, including thepassage of the ordinance in question, for a long period of time after his removal from the ward from which he had been elected. The fact of his removal, however, was not at the time known to the other city officials or to the public generally. Under the circumstances he was a de facto alderman, and for reasons of public policy his actions as such must be deemed valid and binding.* * *"

The foregoing ruling seems subject to one qualification, however, and that is this, one of the reasons for clothing a de facto officer with the power and authority of a de jure officer

is to protect third parties and those who rely upon his apparent authority. However, if his shortcomings and disqualifications are well known to those with whom he deals, it cannot be said that his official acts are clothed with even the authority of a de facto officer. This rule is forcefully laid down in the case of State ex rel. Cosgrove v. Perkins, reported at 139 Mo. 106. In this case the Honorable Edward C. Crow presumed to act as Judge of the Circuit Court of Jasper County, two days after his successor had qualified, and assuming such authority passed on two motions for new trial. At the time he passed on these he stated in open court that he knew that his successor had qualified but that he was going to dispose of pending matters. The Court in declaring this action void stated on pages 116 and 117 as follows:

> * * *The foundation stone of this whole doctrine of a defacto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo-officer. However, much color of authority may clothe the person who assumes to perform the functions of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it cease also all of its ordinary validating incidents and consequences.
>
> In the case before us there was no misapprehension on the part of the public or of third persons, because Judge Crow (whose term of office had indubitably expired at least when Judge Perkins, having been elected, was duly commissioned and qualified) proclaimed from the bench that he knew that Judge Perkins had qualified as judge, that his own term of office had expired, and that he did not claim that he was judge of the court, but was only disposing of business left unfinished on December 31, 1896. This being the case,

> there is no room in this record for the de facto doctrine to occupy. Consequently the acts of Judge Crow were null and void, and should have been thus treated by his successor in office, who should have proceeded as requested by counsel for relators, to pass upon and determine the motions for new trials.* * * **

Under the foregoing ruling, the status of the Purchasing Agent being well know to you, it is the opinion of this office that he is not clothed with the authority of a de facto officer. We realize that the requirements of this rule are that the illegality of his title must be known by those who deal with him. However, under the State Purchasing Agent Act, before the Purchasing Agent can proceed with any contracts or purchases, he is required to obtain a certification from you and you are required to do certain acts which are prerequisite to his involving the rights of third parties or others who might not know of his failure to qualify. In view of this fact it would seem that your knowledge would vitiate the entire proceeding and th t you could not in good faith proceed to authorize any sale or contract under he has duly qualified.

We shall next proceed to consider the question of liability on your bond for the payment of accounts created between July 24th and the date the State Purchasing Agent was appointed and qualified.

In considering the question of your personal liability for the payment of these accounts, we shall first refer to the portions of the act which place upon you duties in respect thereto. Section 4 of the Act provides:

> "No department shall make any purchase except through the Purchasing Agent as in this Act provided. The Purchasing Agent shall not furnish any supplies

> to any department without first securing a certification from the auditor that an unencumbered balance remains in the appropriation and allotment to which the same is to be charged and that an unencumbered balance remains in the fund from which payment is to be made, each sufficient to pay therefor. The Purchasing Agent shall be liable personally and on his bond for the amount of any purchase made without such certification and the auditor shall be liable personally and on his bond for the amount of any false certification."

Your duties under the above section are, upon the request of the State Purchasing Agent, to certify to him that there is a proper appropriation for the board, bureau, etc., covering the articles desired to be purchased, that there is a balance in said appropriation which will be sufficient to cover the proposed expenditure and that funds are deposited with the State Treasurer from which the expenditure can be met. In other words, you are required to certify that a proper appropriation has been made for the use of the bureau or department requesting the purchase of the supplies; that the supplies are of a nature and kind which properly fall within such appropriation, that said appropriation has not been exhausted by said bureau or commission or agency, and that there exists funds in the Treasury credited to the agency, board or bureau which are unencumbered by any other demands, and can be applied to the payment of the supplies requisitioned.

In this connection we respectfully direct your attention to Section 43 of Article IV of the Missouri Constitution:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury and the General Assembly shall have no power to divert the same, or to permit the money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

The Supreme Court, construing this Section stated in State ex rel. v. Gordon, 236 Mo. l.c. 158:

> "The language of the foregoing provision of the Constitution is clear and explicit and

> forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose, no funds could be lawfully paid out of the State Treasury for the support and maintenance of the game department."

Respecting the payment from the particular fund of the appropriation, we refer to Section 19 of Article X of the Constitution reading as follows:

> "No moneys shall ever be paid out of the treasury of this state or any of the funds under its management, except in pursuance of an appropriation by law.

And in applying this Section, the Supreme Court stated in State ex rel. v. Hackman, 314 Mo. l.c. 53:

> "It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid and since under the provision of Section 19, Article X of the Constitution, no money may be paid out of the State Treasury except in pursuance of an appropriation by law the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act where it is paid out of money specifically appropriated for a different purpose."

Therefore, before issuing any certification to the State Purchasing Agent, you should be sure that all these conditions and requirements are met. In the event of your failure to properly certify these facts to the State Purchasing Agent, the foregoing section makes you liable personally and on your bond for the amount of any false certification. However, the penalty provisions of this act end there. They do not answer or cover the situation as outlined

in your request, but before dealing with this portion of your inquiry under the general statute respecting your general duties and obligations and liabilities, we shall give attention to your suggestion that these various orders and purchases might be okeyed by the State Purchasing Agent and then handled by you in the usual manner after being thus ratified. This act on the part of the State Purchasing Agent would amount to a ratification by him of these contracts which were not made under the provisions of Senate Bill 192.

Section 10 of the Act heretofore quoted provides that when any purchase is made of supplies contrary to the provisions of the Act

> "such order or contract shall be void and of no effect,"

and that the head of the agency or department shall be personally liable and

> "if already paid out of state funds, 'the amount thereof may be recovered.'"

This plainly indicates the intention of the Legislature to put an absolute end to all purchasing of supplies under contract or otherwise by any board, bureau or agency of the State except to the State Purchasing Agent. There cannot be any question as to the Legislative intent respecting the contracts which are made contrary to the provisions of the act. They have in plain and emphatic words declared these to be void and of no effect and have gone further to place the liability elsewhere in the event the act is ignored. We cannot overlook this Legislative intent as written in plain and unequivocal terms.

In respect to such contracts we find in 6 Ruling Case Law, 701, the following statement:

> "A contract directly and explicitly prohibited by a constitutional statute in unmistakable language is absolutely void. That has never been judicially doubted, and is unanimously conceded. To hold such a contract binding would be to enforce that which the legislature has forbidden, to give effect to that which the legislature has declared void,--the repeal of a law by judicial construction." * * *"

And again in regard to the enforceability of such illegal contracts we find on page 830 of said work the following:

> "* * *but there is practically no conflict of decisions on the proposition that a contract void because it stipulates for doing what the law prohibits is incapable of being ratified. Contracts and acts that are absolutely void are contracts to do an illegal act or omit a legal public duty, usually bonds of married women, contracts in a form forbidden by law, official acts of persons having no recognized title to office, contracts to do an impossible thing or that leave uncertain the thing to be done, and the like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties.* * *"

In keeping with the general rule as above laid down, the St.Louis Court of Appeals considered a contract for the sale of liquor made in violation of a law forbidding such sale and declaring any such contract void, and the terms therefore unenforceable and held such contract to be incapable of ratification. This is the often quoted case of Bick vs. Seal, 45 Mo. A. 475. The Court in determining this matter stated at page 480:

> "* * *It follows, therefore, as a consequence which is entirely unavoidable, that there can be no such thing in law, strictly speaking, as a ratification of a transaction which, at the time of its performance, was prohibited by statute. The parties cannot legalize that which the law has declared illegal. Reeves v. Butcher, 31N. J. L. 224.* * *"

And in the case of Woolfolk v. Duncan, 80 Mo. A. 421, the Court, in holding a promissory note given for a gambling consideration void, stated at page 427:

> "* * *It is well settled that no action will lie upon any contract based upon any unlawful consideration, or which is repugnant to law or sound policy or good morals, ex turpi contractu actio non oritur. And it is equally well settled that if a contract grows immediately out of or is connected with an illegal

> or immoral act a court of justice will not enforce it. And if the contract in fact be only connected with the illegal or immoral transaction and growing out of it, though it be in fact a new contract, it is equally tainted. Hayden v. Little, 35 Mo. 418; Gwinn v. Simes, 61 Mo. 335; Sumner vs. Summers, 54 Mo. 340; Kitchen v. Greenabaum, 61 Mo. 110; Buckingham v. Fitch, 18 Mo. App. 91; Bick v. Seal, 45 Mo. App. 475; Ryan v. Judy, 7 Mo. App. 75; Hill vs. Johnson, 38 Mo. App. 383; Hatch v. Hanson, 46 Mo. App. 323. There is no distinction between a contract that is immoral in nature and tendency and therefore void as against public policy and one that is illegal and prohibited by law. Buckingham v. Fitch, ante.* * * *

In the more recent case ofIsaacson v. Van Gundy, 48 S. W. (2d) p. 208, the Kansas City Court of Appeals affirmed the foregoing ruling in considering a contract for the sale of a motor vehicle void. You will probably recall the Motor Vehicle Act declares any sale of a motor vehicle made otherwise than through a transfer of a certificate of title shall be null and void. In this case the sale was made on the 24th of July, 1928, and the certificate of title delivered some nine days thereafter. At the time of the sale a chattel mortgage was given to cover a balance due. A replevin suit was brought on this note and chattel mortgage but this suit was compromised by the giving of a new note secured by a new chattel mortgage. When the purchaser failed to make the payments called for in the second note a replevin suit was brought by the holder. The court held that the failure to deliver the title at the time of the sale vitiated both the first and second transactions and that the sale was void and incapable of ratification. The Court in denying the recovery stated at page 212 as follows:

> * * *The new note given in the settlement amounted to an extension of time for the payment of the note given for the original purchase price of the GMC truck. There can be no question but that the second chattel mortgage upon which this suit is based is void under the circumstances if the sale of the truck took place on July 24th, 1928.

> 'Modification or abandonment of an illegal contract by mutual agreement can not be a lawful consideration for a new contract based on such original contract, even if there is some additional lawful consideration, as long as the new contract is in any way based upon the subject matter which originally made such contract illegal. So dismissal of an action on an illegal contract is no lawful consideration for a promise based thereon.' 2 Page on Contracts, p. 1838, 1040.* * * **

These purchases and contracts, the subject of your inquiry, being void and unenforceable and not subject to ratification, the only relief that can be obtained is through the Legislature.

In Donnelly on Public Contracts, we find the following statement, l.c. 26:

> ** * *Those dealing with these officials are chargeable with knowledge of the limitations upon their power to contract, and where they transgress the powers, their acts are void and will bind no one. In like manner, even though a contract is not ultra vires but is entirely within the scope of its corporate powers, public bodies are not bound by such a contract executed in its name, if the officer who executes it had no power or authority to enter into the contract.
>
> In this latter class of cases, of course, the public body may ratify the contract, but where the public body had no power to enter into the contract, such a contract cannot be ratified except by the legislature.* * * **

To return to your inquiry respecting your personal liability for the issuance of warrants for payment of any obligations contracted by any board, bureau or agency subsequent to the 24th of July, 1933, we turn to Section 11390 R. S. Mo. 1929, parts of which read as follows:

> "Sec. 11390. BOND OF TREASURER--BOND OF AUDITOR. * * *Immediately after his election or appointment, the state treasurer shall execute and deliver to the governor a bond to the state* * * conditioned for the faithful performance of

> all the duties required or which may be required of him by law,* * *The state auditor shall execute in like time and manner as herein provided for the treasurer, a bond* * * *with like provisions* * * and subject to the same conditions.* * **

Portions of Section 11404 R. S. Mo. 1929, respecting the Auditor's general duties, are as follows:

> "SEC. 11404. GENERAL DUTIES OF AUDITOR.-- He shall: First, audit, adjust and settle all claims against the state payable out of the treasury,* * *second, draw all warrants upon the treasury for money* * * third, express in the body of every warrant which he may draw upon the treasury the particular fund, appropriated by law, out of which the same is to be paid;* * **

Section 11435 provides the penalties in case the Auditor knowingly issues any warrants unauthorized by law, and is as follows:

> "SEC. 11435. PENALTY FOR ISSUE OF UNAUTHORIZED WARRANT BY AUDITOR.--If the auditor shall knowingly issue any warrant upon the treasury, not authorized by law, he shall, upon conviction thereof, be fined in a sum not exceeding fourfold the amount of such warrant, and imprisoned for any length of time not exceeding one year, and shall be deemed guilty of a misdemeanor in office."

There being no authority in law for the issuance of any warrants for the payment of these accounts accrued after the 24th of July, it is the opinion of this office that in the event you issued warrants in payment of the same you would be liable on your bond and subject to prosecution under Section 11435 R. S. Mo. 1929.

In the foregoing consideration of this law, this office has not overlooked the rules of constructions which require that unjust or absurd conclusions be avoided; that the spirit of the law should control and not the letter, and that an inconsistent, inconvenient or impossible construction should not be placed upon any legislative act. However, all of the rules and axioms

arising are but rules of construction and can only be exercised and put into effect where there is an ambiguity in the law construed or when there is no absolute repeal or prohibition attached to acts which might be done consistently with the law where it not for such prohibition or repeal. We refer to Black on Interpretation of Laws, page 103, wherein he considers presumptions in aid of interpretation:

> "It would not be consistent with the respect which one department of the government owes to another, nor with the good of the state, for the courts to impute to the Legislature any intention to exceed the rightful limits of their power, to violate the restraints which the Constitution imposes upon them, to disregard the principles of sound public policy, or to make a law leading to absurd, unjust, inconvenient, or impossible results, or calculated to defeat its own object,* * *"

and states as follows on page 104:

> "* * *At the same time, as we have already remarked, the object of all construction and interpretation is to ascertain the meaning and intention of the legislature. If the meaning is obscure, or the intention doubtful, the courts should seek it out. And in this search they will be aided by the presumptions which we have mentioned. But if the meaning and intention are clear upon the face of the enactment, there is no room for construction. In that event, the literal sense of the statute is to be taken as its intended sense, and the judiciary having nothing to do with considerations of justice, reason, or convenience.* * **

On page 126 this author states:

> "It is always to be presumed that the legislature intends the most reasonable and beneficial construction of its enactments, when their design is obscure or not explicitly expressed, and such as will avoid inconvenience, hardship, or public injuries. Hence

> if a law is couched in doubtful or ambiguous phrases, or if its terms are such as to be fairly susceptible of two or more constructions, the courts, having this presumption in mind, will attach weight to arguments drawn from the inconvenient results which would follow from putting one of such constructions upon the statute, and will therefore adopt the other.* * *"

But qualifies the foregoing with this statement on pages 127 and 128:

> "* * *But if there is no doubt, obscurity, or ambiguity on the face of the law, but its meaning is plain and explicit, the argument from inconvenience has no place. 'It may be proper, in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can be avoided only by a change of the law itself, to be effected by legislative and not judicial action.* * *"

There is another rule which states it is desirable and necessary to consider the effects and consequences of any given construction, and we find that these remarks by this well known author are on page 100:

> "If the language of a statute is ambiguous, or if it is fairly open to either of two constructions, the court may and should consider the effects and consequences which will follow from construing it in the one way or in the other, and adopt that construction which will best tend to make the statute effectual and produce the most beneficial results.
>
> But if the statute plainly expresses the legislative purpose and meaning on its face, it must be enforced exactly as it stands and without any regard whatever to the results which will flow from it.* * *"

Our Courts, in recognizing and applying the foregoing rules, have always recognized the exceptions thereto to-wit, that when a law is positive and explicit it must be construed as read.

In the case of State ex rel. v. Cook 178 Mo. l.c. 193, we find the following statement:

> "It is our opinion that the sixty days' notice does not apply to conditions like the present, and that the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable."

And in the case of State v. St. Louis-San Francisco Railway Company, 300 S. W. l.c. 277, the Court stated as follows:

> "* * *A construction should never be given to a statute or a constitutional provision which would work such confusion and mischief, unless no other reasonable construction is possible.* * *"

And in the case of State v. Sanderson, 217 S. W. l.c. 63, the Court remarked:

> "* * *When the law expressly attends a judgment with a particular effect, or imposes specific penalties upon a transgressor, an argument about the hardships thereby entailed is of no weight to mitigate the rigor of the consequences.* * *"

And in the later case of State ex rel. Gorman v. Offutt, 26 S. W. (2d) l.c. 832, the Court stated as follows:

> "* * *Respondent says, however, that this construction would work an absurdity, because it would of necessity require the superintendent of one county to accept, against his judgment, the judgment of the superintendent of another county, and therefore that it is reasonable to believe that the change from 'may' to 'must' was through a clerical error.

> But that is entirely speculative and is not in accord with what seems to have been the intention of the Legislature when considered in the light of the other provisions of the statute. We are bound to construe statutes as written, without regard to the results of the construction or the wisdom of the law as thus construed." * * "

It would seem that the remarks of the Court in the Sanderson case supra, are particularly appropriate to the instant problem, as in the State Purchasing Act we have a section of that act which specifically lays a penalty for the making of any contract except in accordance with the Purchasing Agent Act. The penalty section of the Purchasing Agent Act together with the repeal section thoroughly indicate the intention of the Legislature to make the State Purchasing Agent Act the one and only method of purchasing State supplies. They have thrown up such safeguards and barriers as to make in avoidance of the act impossible. There is but one way and that way is straight and narrow.

There is one further observation to be made and that is that any and all purchases or contracts made by any board, bureau, commission or department by virtue of any constitutional power vested in such body cannot in any way be effected by the State Purchasing Agent Act. This is a general statement, but only such as can be made to your general inquiry.

We sincerely trust that the foregoing may be of some value to you in disposing of your problems.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

SENATE BILL 94: Section 9963e unconstitutional as delegating legislative power to county courts.

September 19, 1933

9-25

FILED
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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is herewith made of your request for an opinion of this office respecting the interpretation of Section 9963e, as found on page 449 of the Laws of Missouri, 1933. Your request reads as follows:

> "I would appreciate your legal opinion as to whether or not Section 9963e entitled 'Legislative Authority vested in Certain Officers- constitutionality of Act' which is the last Section in Senate Bill 94 approved April 7, 1933 entitled 'Taxation and Revenue' and 'relating to collection of Delinquent and Back Taxes' appearing in Laws of 1933 at page 449, is constitutional.
>
> Recently your Department held that Senate Bill 80 was constitutional. If Section 9963e above referred to is held constitutional, advise whether or not a conflict exists between said laws.
>
> Appreciating your immediate attention to this matter, I beg to remain."

The Section referred to is the last Section of Senate Bill 94, the general import of which bill was to change the method of collecting delinquent taxes. This bill was approved on April 7, 1933, and became a law on the 24th day of July, 1933, there being no emergency clause attached to the bill. This Section reads as follows:

"SEC. 9963e. LEGISLATIVE AUTHORITY VESTED IN CERTAIN OFFICERS--CONSTITUTIONALITY OF ACT.--Public welfare and necessity demand that legislation be enacted to encourage the payment of delinquent and unpaid taxes, to promote the payment thereof and to protect the property owners of this state from foreclosure of their homes and property for for delinquent taxes in order that the economic and industrial life of the state may be preserved. To accomplish such purpose it is believed necessary to grant legislative authority to the county court of each county, and to the comptroller, mayor and president of the board of assessors of the City of St.Louis, to forgive and forbear the collection of penalty interest on delinquent and unpaid taxes delinquent January 1, 1933, and prior thereto, or such part of such penalty interest as in the opinion of said county court, comptroller, mayor and president of the board of assessors of the City of St.Louis shall be necessary to accomplish the purpose referred to in this section. Therefore, the State of Missouri, through its legislature, hereby exercising its police and sovereign power, declares and enacts that the county court of each county in the state, the comptroller, mayor and president of the board of assessors in the City of St.Louis shall have the right to forgive and forbear the collection of penalty interest on taxes unpaid and delinquent on January 1, 1933, or becoming delinquent for the first time prior thereto, or such part thereof as in the opinion of said county court, comptroller, mayor and president of the board of assessors of the City of St.Louis shall be necessary to protect the owners of such lands and that they may be encouraged to pay said delinquent taxes thereon. If for any reason this section should be declared unconstitutional and beyond the power of the legislature to enact, such fact shall not affect or impair in any way other pro-

visions of this act, but such other provisions shall be in full force and effect."

The foregoing section is a remedial act by means of which the Legislature attempted to give the taxpayers some relief from the penalties which had been assessed by virtue of the penalty statutes. This section is but a further evidence of the fact that the 'key-note' of the 57th General Assembly was 'relief to the taxpayers.' I wish at this point to call your attention to the passage of Senate Bill 80, the terms of which you are well familiar, (page 423, Laws of Mo. 1933) and to particularly point out that the sole and only purpose of this act was the remission of interest, penalties and costs in the event the original tax was paid according to the terms of the bill. It should also be observed that this law was approved on April 13, 1933 and after Senate Bill 94 was approved.

As to the general powers of the Legislature to remit interest penalty and costs, there cannot be any doubt. In the cases of State of Missouri ex rel. Crutcher vs. Koeln, reported at 61 S. W. (2d) p. 750, and State of Missouri ex rel. Roy McKittrick vs. Bair, not yet officially reported, the Supreme Court passed upon and upheld Senate Bill 80 as a valid and presently affective law, impregnable to every possible constitutional attack. Having determined that the power rests with the Legislature to make this remission, we must direct our attention to the manner in which it has exercised this power. From reading the foregoing quoted section, it is apparent that the manner in which this remission is to be made is to authorize the County Courts of each county to make such orders as they might deem necessary remitting and releasing any part or portion or the whole of any statutory penalty interest. We herewith requote a portion of that section:

"To accomplish such purpose it is believed necessary <u>to grant legislative authority</u> to the County Court of each county* * *to forgive and forbear the collection of penalty interest on delinquent and unpaid taxes delinquent January 1, 1933 and prior thereto, or such part of such penalty interest <u>as in the opinion of said county court</u>* * * may be necessary to accomplish the purpose referred to in this section."

And then further state:

> "* * * that the county court of each county in this state* * * *shall have the right to forgive and forbear the collection of penalty interest on taxes unpaid and delinquent on January 1, 1933, * * * *or such part thereof as in the opinion of the county court* * * * may be necessary to protect the owners of such lands and that they may be encouraged to pay said delinquent taxes thereon.* * *"

The foregoing portions place in the county court the discretion of determining when and under what conditions and what part or portion of the penalty statutes of this state shall be in force and during what time they shall be enforced. In other words, the county courts of the various counties and other bodies designated in said act, are vested with the Legislative authority of determining who shall pay penalties, the amount of penalties that shall be paid, and when the penalties shall be paid.

It is the opinion of this office that this delegation of legislative authority is contrary to the provisions of the state constitution and therefore this section is void.

We first desire to point out the distinction between the foregoing section and the provisions of Senate Bill 80, a portion of which latter act is herewith quoted:

> "* * * *The collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes* * * * relieved of all the penalty interest and costs accrued upon the same."

We thus wish to emphasize the distinction between Senate Bill 94 and Senate Bill 80 in this respect, as it is clear that in Senate Bill 80 we have a direct legislative enactment which in itself remits the penalties, interest and costs which have accrued under the penalty statutes, providing the original amount of tax is paid in compliance with the provisions of the act. However, Senate Bill 94 gives to the county courts of this state a vast and unregulated power, entirely free from statutory or judicial control and delegates to those courts the final power to state

and determine, capriciously if they so desire, at what places and under what conditions and at what time the penalty statutes of this state shall be enforced, or to determine that they shall not be enforced to any extent. It is not at all absurd to visualize a majority of the county courts of this state taking advantage of this act and by doing so greatly retarding the payment of state and county taxes into the respective treasuries, as it is a recognized fact that under such stringent times the payments of taxes would be retarded if no incentive existed to encourage prompt payment of taxes.

Returning to our consideration of Senate Bill 94, we call attention to Article 3 of our Constitution:

> "The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

The powers of the legislative department are vested in the General Assembly by Section 1 of Article 4 of the Constitution which reads as follows:

> "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri."

By these two constitutional provisions, the legislative power is completely and entirely vested in the General Assembly, and by Section 9963e, the power is delegated to the county courts. One of the earliest decisions in this State on the subject of delegation of legislative power is that of State v. Field found at page 529 of Vol. 17 of the Missouri Supreme Court Reports. The Court in that case had under consideration a statute providing as follows:

> "If the county court in any county should be of opinion, that the provisions of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in said county for the period specified in said order;* * * *"

The Court in considering the constitutionality of this law stated as follows:

> ** * *The constitution of the State, after declaring, that 'the powers of government shall be divided into three departments, each of which shall be confided to a separate magistracy,' proceeds to vest the legislative power of the government in these words: 'The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives.'* * *The power thus conferred is the power to make laws; and the exercise of the power is entrusted to bodies of men, who are supposed to be selected by the great body of people, entitled to vote, because of their prudence, wisdom and integrity.* * *This power, thus reaching every citizen, in every relation and every interest, is to be regarded as a sacred trust, which is to be exercised by those to whom it has been committed, and every citizen has a right to demand that the rule for his conduct shall be established by that body, in which he, with his other fellow-citizens, have vested the power.* * * *"

In holding that portion of the act delegating legislative power to the county court unconstitutional stated at page 534:

> "* * * It appears impossible to doubt, that the power which has been exercised by the court under the thirty-third section of the act, and which has the effect of determining what law shall be in force in the tribunals of the state for the recovery of penalties which its own laws impose, is a part of the legislative power which cannot be entrusted to the county courts.* * *"

Although the foregoing case was determined in 1853 under a different constitution than now governs this state, we find that the requirements of the two constitutions in the matter at issue were the same, and while not identical they had the same force and effect. The foregoing ruling was affirmed in the case of Lammert v. Lidwell, 62 Mo. 188, wherein the court remarked on page 192:

> "* * *But no body but the legislature can make or repeal a law. The provision of the road law of 1851 which declared that if the county court of any county should be of opinion that the provision of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in such county for the period specified in such order; and, thereupon order the roads to be opened and kept in good repair under the laws heretofore in force, or the special acts on the subject of roads and highways, were adjudged to be unconstitutional and void in this court, as attempting to confer upon the county courts legislative power.***"

And again in the case of Merchants Exchange vs. Knott, 212 Mo. 616. One of the later cases in which this early case is referred to is that of Drainage District v. Lassater, 29 S. W. (2d) 716. The Court on page 719 reviews these two cases in the following language:

> "* * *In State v. Field, a statute was held invalid, as violative of the above constitutional provision, which undertook to authorize the county courts of the state to suspend the provisions of a general statute within their counties. In Merchants' Exchange v. Knott, the Board of Railroad and

> Warehouse Commissioners had been given the power by the act assailed to establish an inspection and weighing of grain, etc., 'at such places or in such territory within this state as in their opinion may be necessary.' The act was held to be an improper delegation of legislative power. In speaking of the power thus delegated, this court said: 'It is the wholesale, unregulated power to say, in effect, there shall be an operating law or no law, to say where the law shall operate, on whom and when. This phase of the case, having been heretofore fully developed, needs no further attention, beyond saying that no man in Missouri holds his property or rights subject to the unregulated discretion of any other man.'"

In arriving at our conclusion in this matter we have not overlooked the fact that the legislation here considered was probably taken from the Oregon Remission Law of 1925. Section 1 of that Act found in Chapter 314, General Laws of Oregon, 1925, reads as follows:

> "* * *Section 1. The county courts of the several counties of the state may and are hereby authorized to remit all interest, penalties and costs which have been or may be incurred on all taxes levied in their respective counties on the tax rolls for the years 1921, 1922 and 1923 to all taxpayers who, prior to May 1, 1925, or prior to the date on which foreclosure of certificates of delinquent taxes could have been instituted under the law if certificates of delinquency had been issued, shall have paid the original amount of such delinquent taxes on the property affected. It shall be the duty of the tax collector upon whose rolls any such interest, penalties and costs may have been remitted through the authority of this act to forthwith satisfy and cancel the same upon such rolls: Provided, however, that this act shall not apply to any tax upon which a certificate of delinquency has been issued."

There are three distinguishing features between this Oregon Act and the Act under consideration. In the first place in the Oregon Act the County Courts were only authorized to remit all or none of the interest penalties and costs. In other words, there was no discretion given them by the act as to what portion of the penalties should be remitted. Secondly, there was a definite date fixed in the Oregon Act after which time the courts were no longer authorized to remit the penalties, interest and costs, and in the third place, the words 'may and are hereby authorized' were construed by the court to be mandatory and not discretionary or permissive.

In the case of State ex rel. Pierce vs. Coos County, 237 Pac. 678, the Court considered the character of these words and stated as follows:

> "* * *It is contended by the defendants on demurrer to the writ that the act is merely permissive, leaving to the various county courts the discretion whether to make such remission or to withhold it. On the other hand, it is contended by the petitioners for the writ that the act is mandatory, and that, upon the compliance with its provisions, there is no discretion in the county courts as to its duty in the premises.
>
> We are of the opinion that the words used, to wit, 'The county courts of the several counties of the state may and are hereby authorized to remit,' etc., when used in the connection in which they appear in the act, should be construed as mandatory.* * **

Therefore, the act being mandatory upon the county court and not discretionary or 'in their opinion', there was no legislative act for them to perform. The law was complete in itself and prescribed every necessary condition to uniform enforcement. This being the case it of course left no legislative act for the county courts to perform. However, it is readily seen that in the Missouri Act here considered there is no limit to the time during which it shall be enforced, nor is there any limit to the time within which the taxpayer shall be required to pay his taxes in order to obtain the remission of the penalty interest. Then again the Missouri Act is worded so that it would be impossible to construe it as being mandatory upon the county courts to make an order remitting the

penalty interest. It places in the discretion of the county court the power to remit all interest if in their opinion they feel that such an order is necessary and then particularly provides that the court shall have the further power to remit a portion of the interest penalty if such is, in their opinion, advisable. By giving this additional discretion it would be impossible to construe this act as being mandatory upon the county courts to remit all the penalty interest accrued.

It is therefore the opinion of this office that Section 9963e as contained in Senate Bill 94, found at page 449, Missouri Laws 1933, is unconstitutional as it delegates to the county court legislative authority contrary to the constitution.

I note your inquiry respecting the possible conflict between Senate Bill 80 and Section 9963e of Senate Bill 94, in the event we considered the latter section constitutional. In view of our opinion in the matter it seems unnecessary to answer this inquiry. However, assuming for the purpose of your inquiry the constitutionality of Section 9963e, we are of the opinion that insofar as they might (in that event) conflict, Senate Bill 80 would prevail. Both of these laws are general in their terms. This being true, the latter of the two would prevail. As heretofore pointed out Senate Bill 94 was approved April 7, 1933, and Senate Bill 80 was approved April 13, 1933, Senate Bill 80 being the later expression. It is to be further noted that Senate Bill 80 was enacted with an emergency clause, making the same immediately affective and thus giving the relief when needed. It should be further noted that Senate Bill 80's entire scope and purpose was relieving the taxpayers from interest, penalties and costs; That it is a general law including all additional charges which are assessed against the taxpayer for untimely payment of his taxes; And that Section 9963e applies only to the penalty interest and does not include other penalties, costs and charges. Therefore, it seems clear that Senate Bill 80 was intended to establish uniform rule and system for the whole state respecting all additional interest penalties, costs and charges assessed against a delinquent taxpayer, which Section 9963e only covers a portion of such charges, to-wit, penalty interest. This being the case it would seem that while Section 9963e is general over the entire state it is special in that it singles out and applies only to the penalty interest. Section 536 of Taxation, 59 C. J. would be applicable. Portions of said section reading as follows:

> "The special Act is not repealed unless a different intent is plainly manifest, or where the two acts are irreconcilably inconsistent or repugnant or where the general act covers the whole subject matter of the special one" * *or is thoroughly intended to establish a uniform rule or system for the whole state."

The statement of Judge Hays in the case of State ex rel. Crutcher vs. Koeln, 161 S. W. (2d) 750, is also appropriate, l.c.756?

> "Senate Bill 80 is a valid and presently affected and operative temporary law and effectually, during the limited period of its operation, suspends the effectiveness and operation of Nos. 110 and 115, and also suspends, during the same period and by necessary implication, such statutory provisions contained in said chapter on taxation as are in conflict with No. 80."

Section 9963e, being a portion of said chapter on taxation would therefore be suspended as per the statement made by Judge Hays in the foregoing case. It appears to us that even if constitutional no effectiveness could be given to Section 9963e until after the expiration of Senate Bill 80, to-wit, January 1, 1934.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

TAXATION - Correction of Assessment Error

September 21, 1933.

FILED 3

9-25

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Mr. C. Arthur Anderson,
Prosecuting Attorney of St. Louis County,
Clayton, Missouri.

Dear Sir:

I have received a request from you under date of September 6, 1933, for an opinion, such request being contained in a letter as follows:

"We would like an opinion from your office relative to a tax question that has arisen here, which is as follows:

'A man made a personal tax return as follows:

Household & kitchen furniture, etc.	$150.00
Piano	100.00
Jewelry, all kinds	50.00
Essex Coach	100.00
Buick Roadster	80.00
Total valuation	$480.00

In making out the tax book the $50.00 valuation of jewelry was entered on the tax book as $5000.00.'

After this was done, the books were certified to the clerk and are out of the Assessor's hands. How can this error be legally corrected."

I. VALIDITY OF TAX. It is my opinion that so much of the tax as is based on the difference between the valuation of $50.00 as submitted by the taxpayer on jewelry and $5,000.00 as entered on the tax book is invalid and uncollectible for the following reasons:

The $5,000.00 assessment is a violation of Revised Statutes of Missouri, 1929, Section 9792 which provides that property must be assessed "according to its true value in money at the time of the assessment" and from the statement of facts in your request for an opinion I assume that the change of valuation was a clerical error, and that $5,000.00 does not represent the true value of the jewelry.

Even if the raised figure were "the true value" of the jewelry, the valuation returned by the taxpayer cannot be raised without notice to him. In the case of State ex rel Ziegenhein v. Spencer, 114 Mo. 574, 21 S. W. 837 (1892) the valuation placed on personal property in the return of a taxpayer was raised without notice to him, and the court held that so much of the tax as represented the increase was void even though the statutes did not require such notice. The court said (l. c. 576):

> "Under the provisions of sections 7532 and 7535, Revised Statutes, 1889, if no list be delivered to the assessor in proper time and manner, 'the assessor shall himself make out the list,' etc. The failure of the taxpayer to give his list is the basis and condition precedent to any authority in the assessor 'to make out the list' for him. In this case then, the act of the assessor was jurisdictionless and void, inasmuch as a proper list had already been returned by the defendants, and consequently no basis for the exercise of the assumed power existed. When the defendants in this cause delivered their list to the assessor, without objection from him, they had the right to presume, and the law justified them in that presumption, that their valuation of the property was accepted and would remain as delivered. And even if the assessor had authority to raise the assessment he could not do this without notice to the party to be affected thereby."

II. REMEDY FOR CORRECTION. So much of the assessment of the jewelry as is in excess of the taxpayer's return, therefore, being void, the proper method for correcting such error would be by an appeal to the County Court under Revised Statutes Missouri 1929, Section 9808, which provides in part as follows:

> "The county court of each county may hear and determine allegations of erroneous assessment * * * at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes."

Presumably, the taxpayer, upon making his return and having it accepted without objection, would, under the authority of the case above cited, have a right to assume that his valuation would be accepted, or that notice would be given to him of its unacceptability, and, therefore, would not have appealed to the board of equalization. It would seem, therefore, that he would be able to make the affidavit required by Section 9808, and the county court would have jurisdiction to declare the assessment erroneous. Section 9809 provides as follows:

> "Sec. 9809. Corrections to be made on tax books. - The clerk of the county court shall immediately correct the tax book, and the copy thereof furnished for the use of the collector, under any order which may be made by said court in pursuance of the foregoing section; and if, by such correction, any alteration is made in the value of the property or the amount of the taxes, he shall certify

the same to the state auditor, who shall, on the settlement, allow the collector credit for any sum or sums to which such correction may entitle him."

Very truly yours,

ASSISTANT ATTORNEY GENERAL.

APPROVED:

ATTORNEY GENERAL.

Change of Venue in Criminal Cases Before a Justice of the Peace.

September 23, 1933

10-2

FILED
3
46

Mr. C. Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri

Dear Sir:

We acknowledge receipt of your letter of September 12, 1933, in which you state and inquire as follows:

> "We have a question that arises constantly in our County in connection with the application for Change of Venue for misdemeanor cases in the Justice Courts.
>
> This County has five townships and about twenty justices scattered about the County; this number is not constant because appointments are being made from time to time. The practice of some attorneys for the defense is to file a Change of Venue application and then list every justice but one as being prejudiced and in that way they practically designate their OWN judge, which by a strange co-incidence seems to be the same justice.
>
> We would like to have you kindly refer this question of the defendants' practice, as above set out, to one of your assistants for consideration and answer and also with your suggestion as to what means, if any, we may employ to defeat or embarrass this practice.
>
> With highest personal regards, and thanking you for this and the many favors in the past."

Section 3430 R. S. 1929, reads as follows:

> "If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers and a transcript of all his docket entries in the case to the next nearest justice in the township, if

> if there be one, unless the party asking for a change of venue shall, in his affidavit, state that the other justice in the township is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to the injured party or prosecuting witness, stating in what degree, or that he cannot have a fair and impartial trial before such justice in the township, in which case, then to a justice in some other township in the county, or, if the change be allowed on account of the bias or prejudice of the inhabitants of the township, then to a justice in some other township in the county; and the justice to whom such case shall be sent shall forthwith proceed with the same in like manner as if said cause had been originally brought before him. No more than one change of venue in the same case shall be allowed."

In State ex rel v. Watkins, 212 Mo. App. l. c. 511, the St. Louis Court of Appeals, in construing what is now section 3430 Sup. said:

> "Appellant's able counsel stand on the strict letter of the statute, section 3775 R. S. 1919 (now 3430) and there is support therein for their contention; but when we take into consideration the contemporaneous construction; the policy of the law and the statute requiring that a misdemeanor, when prosecuted in a justice of the peace court, shall be in the township where it is alleged to have been committed, unless taken out on a change of venue; and also the object and purpose of the law providing for additional justices of the peace, we are of the opinion that the change of venue in the cause at bar should have gone to the remaining qualified justice in Little Prairie Township. A cause, in a justice of the peace court, civil or criminal in our opinion, cannot be sent out of a township on change of venue, unless all of the justices are disqualified or unless the affidavit goes against the inhabitants."

From the above case, it clearly appears that a defendant may disqualify as many justices in a township as he desires, however if one is left the case must be sent to the one remaining justice who is not disqualified in said township. We find no authority for disqualifying justices of other townships in the same affidavit.

We suggest that if in the future, a defendant by affidavit, undertakes to disqualify all the justices of the county, save one, and in that way selects the forum, the State should have the justice before whom the case is pending refuse to send the case to said justice not disqualified and then the defendant could institute his case in mandamus against said justice so refusing and test the question in the courts.

Yours very truly,

W. W. Barnes

Assistant Attorney General

APPROVED

Attorney General.

NEPOTISM:

Official appointing step-father of his wife does not violate Section 13, Article 14 of the Constitution because they are not related either by consanguinity or affinity.

September 26, 1933.

FILED 3

10-2

47

Mr. C. Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "We would like an opinion from your office on the Anti-Nepotism section of the constitution of the State of Missouri, particularly Article 14, Section 13. The facts are as follows:
>
> A Judge of the County Court employs the step-father of his wife, or causes the employment of him in the County Hospital in the County of St. Louis, and we desire an opinion from your office as to whether or not this constitutes a violation of the anti-nepotism laws of the State of Missouri."

Section 13, Article 14 of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision the officer appointing a relative within the fourth degree, either by consanguinity or by affinity, shall forfeit his office. The question arises in your inquiry as to whether or not an official appointing the step-father of his wife comes within the prohibition of the Constitution.

In 2 C. J. 378, it is said:

> "Blood relations of the husband and blood relations of the wife are not related to each other by affinity.

Nor does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, 11th Ed. Vol. 1, page 301, the author has the following to say about affinity:

"The marriage having made them one person (husband and wife), the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relationship is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

The Judge is related to the wife by affinity and is also related to the wife's mother by affinity. The wife is related to the mother by consanguinity and the wife is related to the step-father by affinity. Under the foregoing rules, however, we are of the opinion that the step-father of the wife ~~mother~~ is not related by affinity to the Judge of the County Court. Under the above rule the marriage of the Judge of the County Court to the wife would not bring into relationship by affinity the step-father who is related to the wife only by affinity.

It is therefore the opinion of this Department that the Judge of the County Court would not be guilty of violating Section 13 of Article 14 by appointing the step-father of his wife for the reason that said step-father of his wife is not related to him either by consanguinity or by affinity.

Very truly yours,

Frank W. Sorgat

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

EMPLOYEES :

BUDGET LAW:

The power to administer budget law and hire employees and fix salaries vests in the Governor.

September 27, 1933.

FILED
3

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge receipt of your letter of September 27th, 1933, which reads as follows:

> "On page 459, Sec. 1, of the 1933 Laws, it provides for a Budget Director, and on page 59 of the same Laws, is the appropriation set-up to pay salaries of the Budget Department.
>
> Will you please advise our office what employees if any, and the salary, can be paid from this appropriation?"

Laws of Missouri, 1933, page 459, is an act which establishes an Executive Budget System for the State. It contains sixteen sections, was approved May 12th, 1933, without an emergency clause and became effective July 24th, 1933, or ninety days after the Legislature adjourned.

Section 16 of the act reads as follows:

> "REPEALING SECTIONS 9832 to 9847, INCLUSIVE.--Sections 9832 to 9847, inclusive, Revised Statutes of Missouri, 1929, are hereby repealed."

Referring to the sections repealed in the 1929 statutes, we find an entirely different law relating to the budget. The 1929 statutes conferred such duty upon the Tax Commission. Some of the sections repealed are similar and incorporated in the

present act. We only invite attention to the repealed 1929 sections for the historical value they may have, their provisions being of no force and effect at the present time.

Laws of Missouri, 1933, page 459, Section 1, provides in part as follows:

> "The Governor shall have full authority to carry out the provisions of this act and to do all things necessary thereto. * * * The Chairman of the State Tax Commission shall be ex officio budget director, and shall serve as such without additional compensation. * * * * * * * * * * * * * * "

Other sections provide what work is to be done under the supervision of the Budget Director. Section 6, page 461, reads as follows:

> "POWERS OF GOVERNOR-ELECT RELATIVE TO BUDGET.-- In any year in which a Governor is elected, the Governor shall permit the Governor-elect to examine and study all estimates and other budget information, and shall invite the Governor-elect to sit with him in conferences and hearings on the budget. The Governor-elect shall be entitled to make suggestions and the Governor may accept such suggestions or may incorporate them separately in the budget as the recommendations of the Governor-elect."

It is thus seen that the plan or scheme relative to the budget, under 1933 Laws, is vested in the Governor and the responsibility for administering its provisions reposes in him. But the Legislature did not provide, in so many words, for the employing of clerks or employees to do the clerical work entailed by virtue of the provisions of the act.

Laws of Missouri, 1933, Section 59, page 20, provides in part as follows:

> "FOR DEPARTMENT OF BUDGET.--There is hereby appropriated out of the State Treasury, chargeable to the State Revenue Fund, the

> sum of seventeen thousand dollars ($17,-000.00), or so much thereof as may be needed to pay the salaries, wages and per diem of employees engaged in the work of the Department of the Budget of Missouri, and other general expenses thereof, as follows:
>
> A. Personal Service:
> Chief Clerk, accountant, stenographer, janitor and other necessary employees $10,000
> Etc."

It will be observed that the Legislature made provision, supra, for paying salaries for a "Chief Clerk, accountant, stenographer, janitor and other necessary employees", but limited the amount therefor to $10,000. The question presents itself as to whether or not, and by what authority, such persons may be employed if the budget act is silent and only money appropriated to pay such. The law is well settled as stated in State ex rel. Buder v. Hackman, State Auditor, 265 S. W. 532:

> "Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment. (Cases Cited)"

In the present inquiry, such person, if employed, could point to the appropriation act as authority for payment for his services. However, before said person could do so, he would likewise have to show by what authority he was appointed. In the latter case he would not be able to do so unless it may be reasoned that the Governor by virtue of the first sentence in the act (Sec. 1, p. 459, Laws of Mo. 1933) has such authority. We requote: "The Governor shall have full authority to carry out the provisions of this act and to do all things necessary thereto." In other words, if we read into the act, keeping in mind the appropriation for the department of budget, that the Legislature intended the Governor to appoint persons to render services necessary to carry out the provisions of the act, then persons, thus employed, are thereby lawfully employed. We are of the opinion, and so hold, that the Governor, in matters relating to the budget, has the power and authority to appoint necessary help

to carry out the provisions of said act and that the amount to be paid to employees, thus appointed, shall not exceed, however, $10,000 for the biennium for all such employees.

Having established the above premises, we are confronted as to what amount of salary such employee, or employees, shall receive. Again the act is silent, as likewise the appropriation. On the question of salaries paid other employees of the State, we would say Section 11768, R. S. 1929, is persuasive, however not conclusive. It is our opinion the Governor may also fix the amount of compensation of all employees hired by virtue of this act. While the administration of this act is left entirely to the discretion of the Governor as to hiring and fixing the amount of compensation of employees, yet, he is limited to $10,000 during the biennium for the payment of all salaries.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

APPROPRIATION:
MISSOURI COMMISSION FOR THE BLIND:

Section A1 discussed.

October 2, 1933.

10-3

FILED
3
48

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We are in receipt of the following communication from you:

> "Section A-1, Page 138, Missouri Laws 1933, under MONEY FOR USE AND BENEFIT OF COMMISSION FOR THE BLIND, there is an appropriation of $2400 for the purpose of paying the tuition and expenses of Leonard Dowdy to Perkins Institute.
>
> Q.1. Will you please advise whether this $2400 should be taken from the $38,832 appropriation under 'Operation' above or whether it is an additional appropriation over and above the total of $137,854 as shown in Section 1?
>
> Q.2. In the appropriation as shown in Section 1, has the Eleemosynary Board the right to take from the $39,832 as shown in 'Operation' any amount to assist the Board of Health in operating the Trachoma Hospital at Rolla, Missouri?"

We dispose of your questions in the order asked.

The appropriation act relative to the Commission for the Blind is found at pages 137-138, Laws of Missouri, 1933, said act consisting of two sections and five sub-sections. You inquire

concerning Section A1, which reads as follows:

> "MONEY FOR TUITION OF LEONARD DOWDY AT PERKINS INSTITUTION.--There is hereby appropriated out of the state treasury, chargeable to the fund for the blind commission, the sum of Twenty-four Hundred Dollars ($2400.00) for the purpose of paying the tuition and expenses of Leonard Dowdy, Junior, of Sedalia, Pettis County, Missouri at Perkins Institution, Watertown, Massachusetts, the said Leonard Dowdy, Jr. being blind and deaf and there being no institution in the State of Missouri for the education and training of blind and deaf persons. Such funds shall be expended under the supervision of the Commission for the Blind."

We quote parts of other sections and sub-sections, to-wit:

Section 1, page 137, in part provides:

> "For the purposes expressed in chapters 50 and 51 Revised Statutes, 1929, there is hereby appropriated out of the state treasury, chargeable to the blind pension fund, for the use and benefit of the commission of the blind, the following amounts for the specific purposes expressed herein:"

Section A2, page 138, in part provides:

> "There is hereby created a fund to be known as the Commission for the Blind Industrial Fund etc."

Section A3, page 138, in part provides:

> "There is hereby appropriated out of the state treasury, chargeable to the Commission for the Blind Industrial Fund, etc."

Section A4, page 138, in part provides:

> "There is hereby appropriated out of the state treasury, chargeable to the Blind Pension Fund etc."

Section 2, page 139, provides in part:

> "There is hereby appropriated out of the state treasury, chargeable to the blind pension fund etc."

You will note that Sections 1 and 2, and A4 appropriate money chargeable to the blind pension fund. Section A2 creates a fund known as the Blind Industrial Fund, and Section A3 appropriates money chargeable to such fund. Section A1 (of which you inquire) appropriates $2400, chargeable to the fund for the blind commission. Nowhere in the act is a fund for the blind commission created. The question, then, to be determined is if said $2400 may be paid out of the $39,832 under "Operation", Section 1, as no fund for the blind commission exists.

It is our opinion that the $2400 item shall not be paid or taken from the $39,832, under "Operation", Section 1, supra. In this connection it seems that the General Assembly made a useless appropriation when it appropriated $2400 out of the fund for the blind commission when such fund does not exist or was not created.

Section 19, of Article X, page 144, of the Constitution of Missouri provides in part:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law;"

In State ex rel. Long v. Auditor, 37 Mo., l. c. 90, the Supreme Court of Missouri said:

> "By law every warrant must be drawn on a specific fund."

In a opinion to you of June 7th, 1933, written by Edward C. Crow, Assistant Attorney-General, "appropriations" were fully discussed, and a reading of that opinion will give the reason sustaining our conclusion. We, therefore, will not lenghten this opinion by reciting herein sections of the statute and cases that hold that no moneys shall be paid out of the treasury of this State or (out) of the funds under its management, except in pursuance of an appropriation by law.

On September 11th, 1933, an opinion was written to you by W. W. Barnes, Assistant Attorney-General, which answers the identical question asked in your second question. Said opinion held:

> "In view of the provisions of the Constitution and the decisions of our Supreme Court, this department is of the opinion that the State Auditor would have no authority to issue a warrant to the State Board of Health and charge it to the general operating expense of the Commission of the Blind."

Both of the opinions mentioned above were mailed to your Department, consequently we are not attaching hereto copies of same. If, for any reason, you do not have these in your files, please advise, and copies will be forwarded to you.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

AUDITOR: Proper to issue warrant for stationery purchased prior to June 12, 1933

October 5, 1933 10/5

FILED
3
49

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We acknowledge receipt of your letter of October 5th, requesting an opinion of this office on the following matter:

> "I am enclosing for your convenience an invoice of printing which was done for the Board of Health. This printing job covers both paper and the work.
>
> You advised me over the telephone that this bill could be legally paid. Due to the fact that this work was done before your opinion covering lithographing came under the State contract, I will appreciate if you will advise me in writing if I will be safe in paying this bill."

An examination of the invoice forwarded shows the same to be dated June 16, 1933, and while our opinion to the Secretary of State was dated June 12, 1933, wherein we advised that the printing contract included embossing, engraving and lithographing, we presume that the order was made and the liability contracted for prior to June 12th. As this obligation was created long prior to the effective date of the State Purchasing Agent Act it cannot be said to be affected in any way by that law. However, if it was customary and usual for letter heads and envelopes to be supplied by others than the Botz Printing Company, under their contract with the State it would seem unfair and unjust at this time to deny payment of the claim. It is our understanding that

at the time this obligation was created the printing commission had no contract under which this work was required to be done or under the terms this work was to be done. Therefore, so long as the price charged for the stationery and envelopes supplied is reasonable and proper there should be no objection to the payment of the account.

However, this office is not passing upon the justness or reasonableness of the charge in this instance as that is a matter which should be passed upon by you, and this opinion is not to be construed as an approval of the charge made in this case.

Yours very truly,

HARRY G. WALTNER, JR.
Assistant Attorney General.

HGW:MM

CONSTITUTIONAL LAW-- Effect of overruling prior decision dealing with statutory construction on intermediate transactions.

11-13

October 21, 1933.

FILED 3

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

On March 22, 1933 this department furnished you with an opinion holding, first: That income arising wholly from government patents is taxable in Missouri under the State Income Tax Law; second: That said incomes arising from government patents were not taxable under the Income Tax Law of Missouri until May 16, 1932.

You now furnish a memorandum suggesting that, for the years 1929, 1930 and 1931, perhaps, incomes arising from government patents might be assessed under the Income Tax Law of this state.

This department has examined your memorandum and the authorities cited therein and this opinion will attempt to analyze the problems raised in your memorandum and will be divided into the consideration of four questions. I. What barrier or barriers prevent the collection by Missouri of a tax on income from United States patents for the years 1929, 1930 and 1931.? II. Could such barrier or barriers be removed? III. Have such barrier or barriers been removed? IV. Would it now be too late to collect such taxes because of limitations?

I.

WHAT BARRIER OR BARRIERS PREVENT THE COLLECTION BY MISSOURI OF A TAX ON INCOME FROM UNITED STATES PATENTS FOR THE YEARS 1929, 1930 and 1931.

(A) Missouri Income Tax Law. Under the statutes of Missouri relating to taxation of incomes (R. S. Mo. 1929, Secs. 10115-10145) taxes are levied on incomes with certain deductions and exemptions among which deductions and exemptions no direct reference is made to incomes from patents. The only provision which might be argued to exempt such income would be the following:

> "The following incomes shall be exempt from the provisions of this article. * * * (6) Any income derived from any public utility performing functions of national government or those incident to the state or any political subdivision thereof, or from the exercise of any essential governmental function accruing to any state, territory or the District of Columbia." (Sec. 10119.)

It might be argued that since the basis of the exemption of income from patents from state income taxes was based on the theory that to allow such taxes would interfere with a government instrumentality and since the provision just quoted exempts income derived from the exercise of any essential govern-

mental function that this proviso would expressly exempt from the operation of the Missouri Income Tax Law income from patents, but the force of this argument is destroyed by the fact that the second half of the above provision only deals with governmental functions "accruing to any state, territory or the District of Columbia" and does not refer to the government of the United States while in the first part of the quoted provision which deals with public utilities the term "national government" is expressly included, so that whether by oversight or advertence the above quoted provision does not exempt income from patents from the operation of the state Income Tax Law, and if there were no constitutional provision either of the United States or of the State of Missouri involved, and the only law in force were the state Income Tax Law, income from patents would be taxable.

(B) Since the state Income Tax Law by construction applies to income from patents since there is no constitutional provision of Missouri prohibiting such application the only prohibition against taxing income from patents must be imposed by the United States, and in the case of Long v. Rockwood, 277 U. S. 142 (1928) it was held that the Constitution of the United States prohibited the imposition of any tax on income from patents by any state on the theory that to allow such a tax would allow a state to burden a government instrumentality of the United States. The constitutional prohibition against such a tax is not found in any express words of the Constitution of the United States but was deduced from the four corners of the Constitution of the United States by Mr. Chief Justice Marshall in the case of McCulloch v. Maryland, 4 Wheat. 316 (1819) who said:

> "There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so interwoven with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.
>
> This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

The constitutional principle laid down in McCulloch v. Maryland was the authority for the decision in Long v. Rockwood and in a long line of cases between those two. The principle enunciated therein has been laid down as being as much part of the Constitution of the United States as if it were found in the Constitution in express words because a construction of a statute is as much a part of the

statute as the words themselves and probably even more important. Thus the Constitution of the United States as interpreted in Long v. Rockwood was the sole obstacle to a collection of taxes on income from patents by the state of Missouri for the years 1929, 1930 and 1931.

II.

COULD SUCH BARRIER OR BARRIERS BE REMOVED?

Since it is the function of the Supreme Court of the United States to declare the meaning of the Constitution and also the effect of its own decisions, and since it acknowledges no limitation on its powers in these regards the Supreme Court of the United States could without any power competent to oppose it declare that the Constitution had always meant what it is declared to mean in Fox Film Corp. v. Doyal, 286 U. S. 123, and that the Constitution had never meant what the court of Long v. Rockwood, supra, held it to mean if it desired so to hold because there would be no higher power to prevent such a decision, nor would there be a lack of precedent for so holding.

(A) A change of judicial construction of a statute, i. e., where a court of last resort overrules a previous decision construing such statute and says that the statute which though unamended by legislative act had before been declared to mean one thing and now means another is not the same as an amendment of the statute by the Legislature to effect the same result. This is well illustrated by the case of Fleming v. Fleming, 264 U. S. 29, (1924) where the question was presented as to whether or not a change of judicial construction of a statute by a state supreme court constituted an impairment of the obligation of contracts (U. S. Constitution Article I, Sec. 10) which, of course, is prohibited to a state. Mr. Chief Justice Taft dealt with the problem in the following manner:

> "It is urged upon us that the impairment here is legislative, in that the case turned on the effect of Section 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the Flanagan Case. (264 U. S. 31, 32.)

The significance of the opinion just quoted is very great for the problem under

consideration. As was demonstrated above, the Supreme Court of the United States can give one of its own decisions any effect which seems fit, and the Supreme Court of the United States and its interpretation of the Constitution was the only barrier to the imposition by Missouri of a tax on income from patents. Now if the Supreme Court of the United States declares that a change of construction of the statute does not amount to the enactment of a new statute, as it did declare in the case last cited, then there has been no legislative action in Missouri on the subject in question since the original enactment of the Income Tax Law and, therefore, the problem cannot arise of whether or not the Legislature of Missouri has impaired the obligation of contracts or has attempted to pass a retrospective law as prohibited by the Constitution of Missouri, Article II, Sec. 15 which provides "that no * * * law * * retrospective in its operation * * * can be passed by the General Assembly." The Missouri constitutional provision just quoted by its terms applies solely to legislative action, and the Supreme Court of the United States says that a change of the construction of a statute is not a legislative action. Of course, it is not the function of the Supreme Court of the United States to construe a state constitutional provision, but the clear language of the above state constitutional provision confines its operation to acts of the Legislature.

(B) It is held by the Supreme Court of the United States that the impairment of the obligation of contracts clause of the United States Constitution does not apply to a change in ruling by a state Supreme Court, and that a state Supreme Court can give its decisions a retrospective effect without violating the Constitution of the United States. This principle is laid down in Great Northern R. Co. v. Sunburst Oil and Refining Co., 77 L. ed. 153 (1932) where the court, in dealing with the right of a state Supreme Court to make its decisions retroactive, said:

> "We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197, supra), that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted." * * * * * *
>
> "On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning." * * * * * *
>
> "The alternative is the same whether the subject of the new decision is common law" * * or statute. * * * * *

> "The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

To the same effect are Central Land Co. v. Laidley, 159 U. S. 103 (1895), Bacon v. Texas, 163 U. S. 207 (1896); Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619 (1914), Tidal Oil Co. v. Flanagan, 263 U. S. 444 (1924), see Holmes, J., in Kuhn v. Fairmount Coal Co., 215 U. S. 348, 372 (1910). If there is no constitutional limitation to the right of a state Supreme Court, which is subject to the inhibitions of the contract clause of the United States Constitution to change an earlier holding so as to affect intervening rights then obviously there would be no obstacle in the way of the Supreme Court of the United States if it wished to declare one of its own decisions to be retroactive and to have the same effect as if an earlier decision which it overrules had never existed.

III.

HAVE SUCH BARRIER OR BARRIERS BEEN REMOVED?

The issue has thus narrowed down to a small focus so that the chief problem remaining is to decide whether or not the Supreme Court of the United States in the case of Fox Film Corp. v. Doyal, supra, which overruled Long v. Rockwood, supra, intended to give the latter decision a retroactive effect or to give it solely a prospective effect leaving all transactions entered into prior thereto intact and on the same footing as if Long v. Rockwood had not been overruled. The answer to this inquiry will depend upon whether the Supreme Court of the United States follows one or the other of two conflicting theories of jurisprudence which briefly expressed are (1) that the law is found not made and (2) that there is no such thing as the common law aside from the decisions of courts. The same problem is presented where a court of last resort holds that the Constitution prohibits a course of conduct which

it had been held was not prohibited by the Constitution as occurred when the Supreme Court of the United States in First National Bank of Boston v. Maine, 284 U. S. 312 (1932) overruled Blackstone v. Miller, 188 U. S. 189 (1903) and held that an inheritance tax on the stock of a corporation could only be imposed by the domicile of the decedent, so that the two problems will be treated as one.

In 1929, 1930 and 1931, the years for which taxes are in question, any taxpayer would have had a complete defense to an action for taxes on income from patents. Any attorney would have advised him that the tax could not constitutionally be assessed because the Supreme Court of the United States had so decreed and had said that the Constitution of the United States prohibited the imposition of such taxes. Since that time the Supreme Court of the United States has held that an unchanged constitution does not prohibit the imposition of such taxes. The Constitution of the United States only means what the Supreme Court says it means and, therefore, two elements are concerned in all constitutional questions (1) the language used in the Constitution and (2) the construction of such language by the Supreme Court, and when the court says that the language means a certain thing this meaning is as much the law as if words so defining this language were expressly inserted in the Constitution.

> "Whoever hath absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them." Gray, Nature and Sources of the Law, second edition, page 102.

Does the decision in Fox Film Corporation v. Doyal mean that the Constitution has always meant what it is in this case said to mean, or does it merely mean that the Constitution, now and in the future, allows and will allow the type of taxation therein upheld, but that in the past the Constitution meant something else? In other words, can there be successively two different and inconsistent interpretations of the due process clause which are successively the law, or was the former construction never the law but merely an erroneous conception of a fallible court? The solution of this question will involve a choice between the law as an ideal system of principles, the logical inconsistencies of which are due to imperfect powers of divination by certain courts, and the law as a system of decisions which, logical and consistent with each other or not, nevertheless are the sole standard to which men can look for guidance.

"The orthodox fiction that a rule of the common law is always at hand potentially to meet every case and that the judge does no more than discover it by logical process and apply it had broken down without any assistance from Germany. Austin long ago called it a childish fiction." Pound, The New Philosophies of Law, 27 Harv. L. Rev. 718, 733. With an ideal system of what the law should be a lawyer has no practical concern, for law must be regarded in the light of its effect on the conduct of men and not from the point of view of a moral or ethical standard which is not enforced by the

courts. However desirable the attainment of such a standard may be, it is frequently not enforced in the courts, and if a man without morals or ethics desires to enter into a transaction his sole inquiry need only be if the court would hold him subject to liability. "Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms, or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law." Mr. Justice Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 460.

Probably it would be better if the law could be an ideal system where every proposition could be solved by logic. Then it would be easy to say that Long v. Rockwood, supra, had never been really what the Constitution meant. But it certainly meant what the court there held at the time, for example, in 1931 when the Missouri Income Tax Law required a taxpayer to make his income tax return, and it meant this in the sense that the highest authority to which resort could be had had so decreed. The fact that some day Long v. Rockwood might be overruled would have been of little service even to a state official gifted with foresight if he had attempted to bring suit to collect a tax on income from patents. For all practical purposes, the decision of Long v. Rockwood was right when it was made, and was right until May 16, 1932, and the fact that it is now no longer right involves only a logical inconsistency for a theory which says that there can be only one right answer to a given problem according to the common law, no matter at what time the answer is sought. But inconsistent answers have been right, it is submitted, insofar as they have established a required line of conduct. Thus it would seem that logic cannot be used as a sole consideration in dealing with the law. "The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. * * * I once heard a very eminent judge say that he never let a decision go until he was absolutely sure it was right. So judicial dissent is often blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come."

"This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decisions is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form." Mr. Justice Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 465.

The attitude of the Supreme Court of the United States on the effect of overruling a prior decision has been rather discreet in avoiding statements that the overruled decision had never been the law. Thus, in Fox Film Corporation v. Doyal, supra, the court said:

> "The affirmance of the judgment in the instant case cannot be reconciled with the decision in Long v. Rockwood, 277 U. S. 142, 72 L. ed. 824, 48 S. Ct. 463, upon which appellant relies, and in view of the conclusions now reached upon a reexamination of the question, that case is definitely overruled." (286 U. S. 131.)

Likewise, in Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930) the court said:

> "Blackstone v. Miller, 188 U. S. 189, no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled." (280 U. S. 209.)

The Supreme Court, speaking through Chief Justice Waite in Douglass v. Pike County, 11 Otto 677, 25 L. ed. 968 (1880) was more definite in its language when it was said:

> "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative enactment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.
>
> So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts, in respect to their past adjudications, are well expressed in Boyd v. Alabama, 94 U. S. 645 (XXIV., 302), where we spoke through Mr. Justice Field. If the Township Aid Act had not been repealed by the new Constitution of 1875, art. 9, sec. 6, which took away from all municipalities the power of

> subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

A word must be added about the last quotation to make it clear that the case from which the above quotation was taken has not been overruled by the principles set out in Great Northern R. Co. v. Sunburst Oil and Refining Co., supra, which latter case held that a change of decision by a state court operating retroactively does not conflict with the Constitution of the United States. The rule set out in Douglass v. Pike County is only applicable to cases arising in the federal courts in which the federal court need not necessarily follow the construction of a state statute by a state Supreme Court. As is pointed out by the court in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 672 (1930):

> "The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the state, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. The doctrine of Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520, and Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490, like that of Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865, is, if applied at all, confined strictly to cases arising in the Federal courts." (281 U. S. 681 n.)

The doctrine of Gelpcke v. Dubuque referred to in the last quotation is the doctrine also of Douglass v. Pike County, and this doctrine merely states that while a state Supreme Court can give a change of decision a retroactive effect which will not be disturbed by the Supreme Court of the United States on a writ of certiorari, none the less, where a case originates in a federal court involving a statute of a state the construction of which the Supreme Court of the State has changed the Supreme Court of the United States on appeal or certiorari from the lower federal court need not adopt the changed construction of the state court.

Further adverting to the philosophy of the Supreme Court of the United States as to a change of decision is the following:

> "Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has disregarded its admonition are many. The existing jurisdiction rests, in large part, upon like action of the Court in The

> Genesee Chief, 12 How. 443, 456. In that case the Court overruled The Thomas Jefferson, 10 Wheat. 428 and The Steamboat Orleans v. Phoebus, 11 Pet. 175; and a doctrine declared by Mr. Justice Story with the concurrence of Chief Justice Marshall and approved by Chancellor Kent, was abandoned when found to be erroneous, although it had been acted on for twenty-six years." Mr. Justice Brandeis dissenting in Washington v. Dawson & Co., 264 U. S. 219, 228, 238-9 (1924).

From the above quotations it seems a fair interpretation of the philosophy of the Supreme Court of the United States that it does not regard its own changes of decision as retroactive.

Of course, the United States is not subject to any doctrine preventing impairing the obligation of contracts by a decision or otherwise, but the Supreme Court of the United States does have a regard for vested rights acquired on the basis of its decisions, and while immunity from taxation is not a vested right, an immunity so well established as that established in Long v. Rockwood closely approximates such.

Thus it is believed that Long v. Rockwood, supra, was law during 1929, 1930 and 1931 just as much as Fox Film Corporation v. Doyal is the law today, and for the purpose of recovering income taxes for those years Long v. Rockwood prohibited the collection of such taxes in those years to the same extent that such collection is not prohibited now, and no theory that the law is immutable and that there is only one answer for all time to every constitutional question would allow the recovery by the state of any of these taxes.

> "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified." Mr. Justice Holmes in Southern Pacific R. Co. v. Jensen, 244 U. S. 205, 222 (1917).

IV.
WOULD IT NOW BE TOO LATE TO COLLECT SUCH TAXES BECAUSE OF LIMITATIONS?

Even if the above reasoning were not correct and taxes could be recovered which could have accrued prior to the decision of Fox Film Corporation v. Doyal, taxes for 1929 would probably be barred by limitation. By R. S. Mo. 1929, Sec.10136 the period of limitations for recovery of income taxes is fixed as the same as the period of limitations for recovering personal property taxes, which by Section 9940 is five years. However, Section 10145 provides for the destruction of income tax returns after three years from the date on which they become due provided they have been paid, which would seem to indicate a clear intent that no transactions where payment has been accepted by the state in full should be opened up more than three years after such taxes became due, and the 1929 taxes became due on May 1, 1930, so that the returns on taxes for 1929 which have been paid should now be destroyed.

In conclusion, it is our opinion that no income from patents prior to May 16, 1932 can be taxed by the State of Missouri.

Very truly yours,

EDWARD H. MILLER,

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

COUNTY HIGHWAY ENGINEER: Custodian of road tools, machinery, etc.
Supervisor of construction and maintenance of highways.
Authority to appoint "assistants".
County Court to hire workmen.
County courts cannot issue road warrants without approval of highway engineer.

October 30, 1933

11-13

FILED
3
57

Hon. C. Arthur Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We have your request of October 21st, 1933 for an additional opinion upon the following state of facts:

> "First: In the County Highway Garage all tools, machinery and other property belonging to the County and the Road Districts belonging to St. Louis County are maintained. Under Section 8007 Revised Statutes of Missouri, 1929, the County Highway Engineer is required to give a bond for the faithful performance of his duties, said bond to be approved by the Court, conditioned further that the Highway Engineer will account for and deliver to his successor in office, at the expiration of his term of office, all tools, machinery, books, papers and other property belonging to the County and Road Districts thereof. The County Highway Engineer has given this bond, which has been approved by the Court. In view of Sections 8007, 8012, and 8013, is it your opinion that the County Court has the right to appoint employees in the County Highway Garage, over whom they exercise exclusive control, or does that right belong to the Highway Engineer?
>
> Second: In considering the above numbered statutes, has the County Court the right to order the issuance of warrants in payment for road work, or any other expenditures by road overseers, or for work done under contract with the County of St. Louis, without the knowledge or approval of the County Highway Engineer?

Will you please clarify in your opinion the respective rights of the County Highway Engineer in making appointments under the terms of his bond, under the Section of the Statute which creates his office, and those duties of the County Court, imposed upon them by the Laws of this State?"

I.

THE HIGHWAY ENGINEER IS THE CUSTODIAN OF TOOLS ETC.

In this connection we call your attention to that part of Opinion No. 3 under date of January 25, 1933, issued by this office and to which we still adhere, and which is as follows:

"In applying our conclusion to Section 8012 it is our opinion that this section requires the Highway Engineer to be the custodian of the tools, materials and machinery belonging to the road district and the county. He has the care and responsibility and the safekeeping of the county property therein enumerated and may, under certain conditions deliver the same to others, but the statute gives him no further right or duty than that of a custodian. He is not required to maintain or repair the tools or equipment, nor to do other than to keep them safely in a proper place. None of the approved definitions of custodian of property, or custodian, require more than a safekeeping. The New York courts in PEOPLE VS. BURR, 41 How. Prac. 293 have defined custodian of property as follows:

'"The term 'custodian of property' as contradistinguished from legal possession, means the charge to keep and care for the owner, subject to his order and direction without any interest or right therein adverse to him***."

Corpus Juris in Volume 17 at page 439 defines a custodian as

> "One whose duty it is to watch, guard and account for that which is commanded to his custody"

and approves the definition of "custodian" as set out in TURNER vs. COFFIN, 74 Pacific 962, which is as follows:

> "Custodian. The term means the keeping, guarding, care, watch, inspection, preservation or security of a thing"

and further defines "custodian of property" to be

> "The keeping of property by one who is charged with or assumes responsibility for its safety"

These tools etc. are to be used by two groups of individuals:

(1) By the road overseers,

(2) By the highway engineer.

The highway engineer is made responsible on his bond for the delivery of all tools in his custody to his successor in office at the expiration of his term. Section 8007 R. S. 1929.

The only provision we find in the law wherein tools etc. may be taken from the custody of the highway engineer is that part of Section 8012 R. S. 1929 which reads as follows:

> "When delivering to any road overseer the tools and machinery belonging to the district, he shall require from the overseer an inventory and receipt for all such tools and machinery, and the overseer shall be responsible for the proper care and handling of said tools and machinery, and shall see that they a are properly kept when not in use, and shall account for the same to the county highway engineer."

In all cases where the work is being done under the direct supervision of the highway engineer, these tools remain in the custody of the engineer, who has the authority to "supervise"such work under Section 8013, and in the event that the county engineer cannot properly perform such supervision of said work, he shall, under the provision of Section 8011, appoint an'assistant" to perform such duties, and the tools then are in the constructive custody of such assistant for and on behalf of the county engineer. Therefore, it shows that the authority of the engineer, as custodian of all tools, machinery, etc. extends to the places wherein said tools are kept, and the possession, management, and control of the county highway garage is vested in the county highway engineer.

II.

THE COUNTY HIGHWAY ENGINEER SHALL HAVE SUPERVISION OVER THE CONSTRUCTION AND MAINTENANCE OF PUBLIC HIGHWAYS.

Under the provisions of Section 8013, the county highway engineer shall have direct supervision over:

(1) The public roads of the county,

(2) The road overseers,

(3) The expenditure of all county and district funds made by the road overseers of the county,

(4) The supervision over the construction and maintenance of all roads, culverts, and bridges.

The term 'supervision' or 'supervise' is defined in 60 C. J. p. 1163 as follows:

> "To direct; to have charge of, with the authority to direct or regulate; to inspect with authority; to oversee; to oversee for direction; to superintend; to superintend and direct. The word does not mean to do work in question in detail, but to see that it is done."

It is therefore the duty of the highway engineer to direct, regulate, inspect, and have charge of the construction and main-

tenance of all roads, culverts, and bridges. He shall specify what instruction is necessary, and when, where, and how, repairs in the maintenance of a road are to be made; in substance, he is to boss the job of construction and maintenance of public roads. If he is unable to perform this duty personally, then, under the provision of Section 8011, he shall,with the approval of the county court, appoint one or more assistants to perform such duties.

III.

COUNTY COURT HAS THE AUTHORITY TO EMPLOY WORKMEN, BUT NO AUTHORITY TO EMPLOY "ASSISTANTS" TO THE HIGHWAY ENGINEER.

In the construction and maintenance of roads, culverts, and bridges, it is the duty of the county court to designate who shall be "employees" to do the labor in such projects. We base this conclusion upon the general authority found in Sec.36,of Art.6 of the Constitution of Missouri, and under the statutory authority of 7946 R. S. 1929. They are as follows:

Sec. 36, Article VI:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

Sec. 7946 R. S. 1929:

> "Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end

> may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor."

These "employees" must do the work under the supervision of the engineer, or one of his assistants.

The county court has no authority to perform, or to assist in performing any of the duties delegated by law to the highway engineer, because that authority is vested exclusively in the highway engineer under that part of section 8011 which is as follows:

> "*In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

This power of the county court to "approve" the appointment of "assistants" to the county highway engineer is limited to the question of whether or not an assistant is necessary, and it is proper for the county court to decide <u>how many</u> assistants are necessary to carry on the work delegated to the highway engineer. The authority of the county court to "approve" does not extend or give the county court authority to say <u>who</u> shall be employed by the county highway engineer as an assistant. The power of choosing the man or men who are to be assistants to the engineer is vested exclusively in the highway engineer himself.

IV.

A COUNTY COURT CANNOT ISSUE WARRANTS FOR ROAD WORK WITHOUT THE APPROVAL OF THE HIGHWAY ENGINEER.

While the county court possesses the authority to employ workmen exclusive of the class of "assistants" to the highway engineer, a workman so employed cannot receive pay without performing satisfactory services, and the county court cannot pay them until their claims for services have been examined and ap-

proved by the highway engineer.

Any workman who fails, neglects, and refuses to perform his duties in accordance with the plans and directions of the engineer is not entitled to pay. Public money cannot be paid out at the behest of any individual or officer unless the person receiving the same has rendered the services required by law to entitle him to receive money from the public treasury.

This authority is set out in section 8013 R. S. 1929, as follows:

> "No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

It is, therefore, apparent from the very plain language of the above statute that the examination and approval of the highway engineer is a condition precedent to the county court's authority to issue a warrant, disbursing county funds for:

(1) Road work,

(2) Expenditures by road overseers,

(3) For road work done under contract.

Under the state law, the county court is charged with certain specific duties relative to the handling of finances thereof. Its power and duties are prescribed by the constitution and statutes. A trust is reposed in them, the execution of which is frequently attended with difficulty and embarrassment. By accepting such trust, each county court judge obligates himself to perform the duties as the law directs, and if there is a misapplication of the funds, or the wrongful disbursement of any part thereof, the judges of the court may be required to personally respond in damages therefor. The disbursement of public funds by the county

court for any one of the last three above enumerated purposes, without the same having been examined and approved in advance by the county highway engineer, definitely fixes the personal liability of the county judges therefor.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK

FER:FE

Warrants for Payment of Money:

1. County court has power to order warrants already issued not to be paid, even though such order be made at a subsequent term of court to the one at which the warrant was issued.

11-23

November 15th
1933

FILED
3

Mr. C. Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri.

Dear Mr. Anderson:-

We have your letter of November 10, 1933, in which is contained a request for an opinion as follows:

"Relative to your letter of November 9th, respecting the opinion requested by us on October 2nd, we will amplify our statement of the facts as follows:

"In the May Term of the County Court, several former judges of the County Court made a claim for salary which they claimed was due them. These claims were based on the fact that St. Louis County had increased in population during their tenure of office and that they had consequently drawn less salary during their term of office than that to which they were legally entitled.

"The judges of the present County Court allowed their claims and the clerk of the County Court was ordered to issue warrants to each of the claimants for the amount requested in their various claims. These warrants were drawn as ordered by the Court. One warrant so drawn was presented to the Treasurer and was paid.

"Prior to the presentation to the County Treasurer of the balance of the warrants so drawn, and at a subsequent term of court, the County Court directed the County Treasurer not to pay the warrants previously issued until the validity of the claims had been adjudicated by the Circuit Court.

"The Treasurer is in this position now, there are several warrants directed to the Treasurer for the payment of several sums and there is also an order of the County Court directing him not to honor these warrants. The Treasurer wants to know what action he should take in the matter, inasmuch as these people are making persistent demand for the payment of their warrants.

"We will appreciate receiving an opinion from you on the above."

This question was recently passed on by the Supreme Court of Missouri in the case of Jackson County vs. Fayman, 44 S. W. (2d) 849, 329 Mo. 423 (1931). In that case Jackson County brought suit against J. H. Fayman, County Treasurer, and his surety to recover the amount of a county warrant alleged to have been wrongfully paid. The County Court had issued the warrant and then ordered it cancelled a year later. The County Treasurer paid the warrant some time later in spite of such order. The trial court gave a peremptory instruction to the jury to find for the defendant. Insomuch as this case is conclusive as to the law on the matter in this state, we quote from the opinion of the court in same.

On page 852 in such opinion the court stated:

"The error of the trial court lies in holding that the county court acted judicially both in ordering the warrant issued and in ordering it canceled, whereas neither was a judicial act in the sense of being res adjudicata."

Also, on page 852, the court used the following languag

"By our Constitution, county courts are created and are given jurisdiction to transact all county business. Article 6, Sec. 36. By statute, section 2078, R. S. 1929, such courts are given power 'to audit and settle all demands against the county.' And section 12162, R. S. 1929, provides that 'the county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts.' The county court, when it ascertains any sum of money to be due from the county, shall order the clerk to issue a warrant in a prescribed form. Section 12163, R. S. 1929. And the county treasurer 'shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court.' Section 12136, R. S. 1929."

Further, on page 853 of the same case:

"'It has been held by this court, through an unbroken line of decisions since the case of Marion County v. Phillips, 45 Mo. 75, that the action of the county court in making settlements with county officials is not judicial, but that, in such cases, the judges act merely as the fiscal or administrative agents of the counties. State v. Roberts, 60 Mo. 402; State v. Roberts, 62 Mo. 388; Cole County v. Dallmeyer, 101 Mo. 57, 13 S. W. 687; State v. McConigle, 101 Mo. 353, 13 S. W. 758 (8 L. R. A. 735, 20 Am. St. Rep. 609). The action of county courts in auditing accounts is given no more sanctity by the law than that exercised in making settlements with county officers, and their orders are not entitled to be clothed with superior verity."

And again on page 854 we find this language:

> "It will be noticed that the courts have frequently likened the orders of county courts allowing claims and the county warrants issued thereunder to checks, drafts, or promissory notes of the county, the enforcement or collection of which may be resisted by the county for good cause, such as want of consideration. We think that from the reason of the thing, and the analogy of such warrants to checks or drafts drawn by the county, the formal action of the county court in ordering a warrant canceled, at least where a third party such as the county treasurer is concerned, on information that such warrant does not represent a valid indebtedness of the county and should not be paid, would be, when necessary to protect such third party or the funds in his hands, perfectly proper, and has the same effect as stopping payment of a check or draft by notice to the party called on to pay same."

On pages 856 and 857 we find a good statement of the theory behind the decision:

> "While county courts should not arbitrarily and without reason recall and order warrants already issued not to be paid, yet the public good will be best served by allowing large discretion to the county courts in such matters."

And finally we find the holding of the court on page 857:

> "We are holding that defendant's payment of the warrant after the county court's order annulling same was at his peril, and that plaintiff was entitled to a trial of the issue of whether Jackson county was in fact indebted to Ross, and, if so, how much, for work done and material furnished under his road contract. To that end, the case should be reversed and remanded, and it is so ordered."

From the above language of the court it can be seen that should your County Treasurer attempt to pay the warrants in question in the face of an order by the county court directing him not to do so, he would be acting without authority. The language of the court in the case of Clay County Court vs. Baker, 241 S. W. 447, l.c. 449, is elucidating:

> "The treasurer in this case is only the court's animated strong box, as it were."

It is the county court which controls the county funds and the treasurer is subject entirely to its orders.

In the premises, therefore, we are of the opinion that your county treasurer should not pay the warrants in question.

Very truly yours,

CHARLES M. HOWELL, Jr.
Assistant Attorney General.

CMHJr:LC

Approved:

_____
Attorney General.

JUSTICES OF THE PEACE: Appointment of additional justices in townships having between 75,000 and 150,000 inhabitants.

Secs 2136-37 & 2366 RS Mo 1929

12-22

November the Twenty-Seventh

1933

FILED
3

63

Honorable C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of September 21, 1933, such request being in the following terms:

> "You are probably acquainted with our situation here in St. Louis County relative to the appointment of additional justices in Central Township. These appointments have been made by virtue of Section 2137 R. S. Missouri, 1929, and we believe Section 2366 supersedes Sec. 2137 or prohibits any additional justices above the four which are to receive a salary of $2,000 per year.
>
> We have taken the position that these four paid justices should receive the volume of criminal business and we are issuing informations in these courts only for traffic violations, for the simple reason that we feel that the appointment of these additional justices was invalid.
>
> Under date of September 12th we wrote you inquiring how we could avoid the change of venue situation. Please refer to that letter and give us an opinion as soon as possible on both of these questions, as it is vexing us very much at this time."

There are three sections of the Revised Statutes of Missouri of 1929 providing for fixed numbers of Justices of the Peace in certain localities all of such sections being contained in Chapter 10 of such statutes. Article 8 of such chapter is applicable to townships containing between 75,000 and 150,000 inhabitants and was enacted in 1915 as Laws of 1915, page 324, and such article contains Section 2366 which provides as follows:

> "In all townships which now contain or may hereafter contain seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants according to the last decennial census there shall be four justices of the peace and each shall receive a salary of two thousand dollars per annum, payable monthly out of the treasury of the county in which he is elected."

The second of the three sections above mentioned is found in Article 10

which applies to cities containing 300,000 inhabitants and over, such section being 2395 which provides as follows:

> "For the first one hundred thousand of population in said cities there shall be five districts; and there shall be an additional district for every additional one hundred thousand, and for every fractional part of one hundred thousand exceeding fifty thousand of population. For the purpose of this article the last general census of the United States of America shall be taken as the basis of population."

The third and remaining section governing the numbers of justices of the peace is Section 2136, found in Article 1 which is entitled "Election, appointment, powers and duties of justices of the peace" which section provides as follows:

> "Each municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; and in all municipal townships that now contain or may hereafter contain a city of one hundred thousand inhabitants, and less than three hundred thousand inhabitants, the county court of the county in which said city is located shall, on or before the first day of March, 1890, divide the said township into districts, not to exceed eight, as nearly equal in population as may be possible; and at the general election in 1890, and every four years thereafter, there shall be elected in each of said districts, by the qualified voters thereof, one justice of the peace, who shall possess the qualifications required by law for other justices of the peace, shall take the same oath, possess the same jurisdiction, and shall hold his office for four years and until his successor is elected and qualified, and who shall be a resident of and keep and maintain his office in the district for which he is elected. The persons now holding the offices of justices of the peace in townships affected by this article shall continue to perform the duties of their respective offices until the general election of 1890, at which time one justice of the peace for each district, as herein provided, shall be elected, after which time there shall be no other justices of the peace in townships affected by this article, except as herein provided for."

An analysis of the statutes above quoted shows the following distribution as to numbers of justices of the peace throughout this state. Section 2136 shows that the general rule is two to each township with two special

provisions for justices of the peace in cities and towns within such townships, the first giving one justice beyond the usual two for every town or city having between 2,000 and 100,000 inhabitants, and the second requiring a division of cities in such townships of between 100,000 and 300,000 inhabitants into eight districts with one justice of the peace for each district. This second and latter statutory provision seems distinct and apart from the rest of Section 2136 and not in the nature of an additional provision for or exception to the main subject of 2136 because it eliminates entirely the chief subject matter of Section 2136 which is the general rule of two justices of the peace for each township, with additional justices for cities of from 2,000 to 100,000 inhabitants. Sections 2366 and 2395, above quoted, are self-explanatory so that the following is the regular statutory schedule for numbers of justices of the peace:

(1) Section 2136 - (a) Two justices in every township with one additional for every city therein of 2,000 to 100,000 inhabitants.

(b) Eight justices in townships with cities of 100,000 to 300,000 inhabitants.

(2) Section 2366 - Four justices in townships of from 75,000 to 150,000 inhabitants.

(3) Section 2395 - Five justices for first 100,000 inhabitants and one additional justice for each additional 100,000 inhabitants and one additional for any fraction of 100,000 over 50,000.

Section 2137 relates to the appointment of extra justices under certain circumstances as opposed to the regular number fixed by statute, all of the above quoted statutes dealing with regular numbers, Section 2137 providing as follows:

"Whenever a petition shall be presented to the county court of any county in this state, signed by twelve or more qualified voters of any township in said county, setting forth that they live more than five miles from the nearest justice of the peace in their township, the county court shall have power to appoint an additional justice of the peace for such township, and the justice so appointed shall live in the immediate neighborhood of the petitioners, and at least five miles from any other justbe of the peace of such township: PROVIDED, that the county court shall not appoint more than two additional justices in any township, except if it be shown to the county court that there is no justice of the peace living in any incorporated or unincorporated town or village having a population of at least two hundred inhabitants, then the county court, at the request of any twelve resident householders, in said town or village, may appoint one justice in said town or village in addition to the number of justices hereinbefore specified. The term of office of a justice of the

> peace appointed under this section shall expire on the general election day in the year when justices of the peace shall be elected for the townships, as provided by law: PROVIDED FURTHER, that this section shall not apply to townships which now have or may hereafter have a population of more than 300,000 inhabitants and less than 600,000 inhabitants, and all justices of the peace now holding under appointment in such townships shall continue to perform the duties of their respective offices until the next general election in the year when justices of the peace shall be elected in said townships, and no longer."

On its face Section 2137 applies to every county in this state because at the outset thereof it begins "Whenever a petition shall be presented to the county court of any county in this state". Before 1929 the last proviso and sentence of 2137 was not a part of such section it having been added by Laws of 1929, page 147, such proviso excepting townships containing cities having between 300,000 and 600,000 inhabitants. Before such amendment in 1929 Article 10, including Section 2395, was in force and provided a separate scheme for the appointment of justices of the peace in cities having over 300,000 inhabitants. The General Assembly of 1929 apparently did not think that such special scheme for such cities prevented the application of 2137 to such cities or at least felt that the matter was ambiguous because otherwise the General Assembly would not have felt it necessary to add the amendment of 1929. If Section 2137 applies to cities falling within Article 10 which Article 10 has within it a special section dealing with the appointment of additional justices (Section 2407) then there would seem to be an even stronger case for Section 2137 applying to Article 8 which deals with townships having between 75,000 and 150,000 inhabitants, because Article 8 has no provision for the appointment of additional justices.

As has been seen above Section 2136 provides a special scheme for justices in townships containing cities of between 100,000 and 300,000 inhabitants. Not only does Section 2136 provide that there shall be eight justices in townships containing cities of between 100,000 and 300,000 inhabitants (i. e. a fixed number like the four fixed in Section 2366) but Section 2136 in dealing with townships given eight justices in 2136 says expressly that "there shall be no other justices of the peace in townships affected by this article, except as herein provided for." In spite of this special arrangement for eight justices and no more in such townships the Supreme Court of Missouri has held that 2137 applies to such townships and that additional justices may be appointed for such townships under 2137. State ex inf. Gentry v. Toliver, 315 Mo. 757, 287 S. W. 312 (1926); State ex rel General Motors Acceptance Corp. v. Brown, 330 Mo. 220, 48 S. W. 2d 857; see Travalant v. Kelley-Reppert Motor Co., 16 S. W. 2d 709 (1929-Kansas City Court of Appeals). Just why the Missouri Supreme Court did not feel that Kaw township which territorially is Kansas City was not within Section 2395 dealing with cities of 300,000 inhabitants or more when Kansas City by the 1920 census had a population of 324,410 inhabitants is not clear, but the court clearly, although mentioning the population of Kansas City in its opinion, as of the above figure said in the case of State ex inf. Barrett v. Joyce, 307 Mo. 43, 269 S. W. 623 (1925) that what is now Section 2136

was "the only statute which was designed to provide justices of the peace for Kaw township." (307 Mo. 56). However, the court in all of these four cases just cited did treat Kansas City as within Section 2136 with its special scheme for eight justices and no more. In these four cases every kind of attack was made on the validity of the appointment of additional justices in Kansas City but no mention in any of the cases was made of any contention that 2137 could not apply to Kansas City because Kansas City by 2136 was limited to eight justices and no more.

Section 2366 applicable to Central Township in St. Louis County is no more of a separate exclusive scheme for the appointment therein than is that part of 2136 held applicable to Kansas City, so that if 2137 applies to Kansas City the same arguments would seem to make it apply to St. Louis County and the only conclusion possible is that the fixed number of justices (eight in Kansas City and four in Central Township) refers to regular justices of the peace and does not purport to deal with additional justices who might be appointed under 2137 which by its terms applies to every county in the state. This analysis would explain Laws of 1933 page 214 which repeals Section 2366 and amends it so as to change the number of regular justices in the counties to which it applies from four to three, such enactment merely changing the regular number just as 2136 fixed the regular number for Kansas City at eight.

It might be observed that there is a direct contradiction in allowing 2137 to apply to that part of 2136 which applied to Kansas City because that part of 2136 expressly said that "there shall be no other justices of the peace in townships affected by this article" and yet the Supreme Court said that 2137 applied to Kansas City, but there is no such direct contradiction in allowing 2137 to apply to 2366 because 2366 merely says "there shall be four justices of the peace" in townships to which it is applicable, and says nothing about prohibiting more than such number. Nor is the argument possible that 2366 was intended as a special scheme for St. Louis County and should be respected as such because at the time of its enactment in 1915 St. Joseph was in the only township to which it applied. State ex rel Forgrave v. Hill, 272 Mo. 206, 198 S. W. 844 (1917) wherein the court said:

> "It is agreed by the parties herein that said township is the one in which the city of St. Joseph is situate, and that it is the only township in the State having a population of seventy-five thousand and less than a hundred and fifty thousand." (272 Mo. 208).

To give any construction to the statute other than that given above would mean that there would be in every locality in this state a method for fixing the regular number of justices of the peace, and in every such locality there would be a flexible scheme for additional justices where the exigencies of legal business might require them except in townships of from 75,000 to 150,000 inhabitants, which would seem to be an unreasonable scheme of legislation.

Admittedly the construction above given is in seeming conflict with a dictum in the case of Forgrave v. Buchanan County, 282 Mo. 599, 222 S. W. 755 (1920) wherein the court said:

> "It is true, the old general law relating to justices of the peace no longer governs in townships now or hereafter having the specified population, but the act in question leaves the old general law in force in all other townships in the State, except in the townships provided for by this act, which, we hold, is a general law governing such townships." (282 Mo. 608).

The court in that case did not have before it the problem here presented and perhaps used language unduly broad which it is submitted should not be followed if an attempt were made to apply it to the problem here under consideration of additional justices of the peace.

Where Section 2137 applies the only ground of attacking the appointment of a justice of the peace by the county court is by alleging fraud, and a quo warranto proceeding against the justice so appointed alleging a lack of jurisdiction to make the appointment cannot be maintained where the record of the county court is fair on its face and no fraud is alleged. State ex rel Rice v. Simmons, 35 Mo. App. 374 (1889); State ex inf. Gentry v. Toliver, 315 Mo. 737, 287 S. W. 312 (1926); State ex rel General Motors Acceptance Corp. v. Brown, 330 Mo. 220, 48 S. W. 2d 857.

In the Toliver case just cited where the relators alleged that the power of the county court had been exhausted by the appointment of two justices, the court defined the issues involved as follows:

> "It appears from the allegations of the reply that the county court had previously made orders appointing two additional justices of the peace under the authority of said Section 2689. It is contended that the record proof in support of such allegation demonstrates that said county court had no power to make the appointment of respondent at the time the purported order appointing him was made. On the other hand , it is the contention of respondent that the county court acted judicially indetermining the facts upon which its right and power to appoint respondent depended, including its necessary finding that two additional justices of the peace had not already been appointed, had qualified and were acting as such, and that its finding thereon constituted a judgment which cannot be attacked collaterally and that this proceeding is a collateral attack upon such judgment, and therefore that this court cannot inquire into the facts in respect to such alleged prior appointments of additional justices of the peace." (315 Mo. 740)

and the court held as follows:

> "We hold that the act of making the appointment of respondent necessarily involved a finding by the county court that such a

state of facts existed as to authorize it to appoint an additional justice of the peace, including the finding that two additional justices of the peace had not already been appointed, or, if they had previously been appointed, that both were not qualified and acting at the time. Such finding had the force and effect of a judgment and cannot be attacked in this proceeding, wherein fraud is neither alleged nor sought to be proven." (315 Mo. 746).

It is our opinion that the Revised Statutes of Missouri 1929, Section 2137 applies to townships containing between 75,000 and 150,000 inhabitants and that Section 2366 does not remove such townships from the operation of Section 2137.

Yours very truly,

EDWARD H. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

STATE AU ITOR: No restriction on loose leaf system of bookkeeping in Auditor's Department.

December 27, 1933. 12-30 ✓

FILED
3
65

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Will you please advise me if there is anything in the statutes prohibiting me from installing a loose leaf system of bookkeeping in the Auditor's office."

We have made a thorough examination of the statutes and fail to find any statute that would prohibit you from installing a loose leaf system of bookkeeping in your office.

Very truly yours,

Frank W. Hoagland

Assistant Attorney General.

FWH:S

APPROVED:

_____

Attorney General.

STATE AUDITOR:
GENERAL ASSEMBLY:
LEGISLATURE:
SALARIES: Members of the 57th General Assembly convened in extra session only entitled to $5.00 per day for the first 70 days of the session and $1.00 per day thereafter and during the remainder of the session.

12-29

December 28, 1933

FILED
3
65

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated December 28, 1933, which is as follows:

> "I would appreciate a ruling from your office as to whether the members of this Special Session of the Legislature shall receive $5.00 per day during the entire length of this Session, or whether the $5.00 a day stops at the end of seventy days."

I.

Section 16 of Article IV of the Constitution of the State of Missouri, in reference to the pay of members of the General Assembly of this State, reads:

> "The members of the General Assembly shall severally receive from the public treasury such compensation for their services as may, from time to time, be provided by law, not to exceed five dollars per day for the first seventy days of each session, and after that not to exceed one dollar per day for the remainder of the session, except the first session held under this Constitution, and during revising sessions, when they may receive five dollars per day for one hundred and twenty days, and one dollar per day for the remainder of such sessions. In addition to per diem, the members shall be entitled to receive traveling expenses or mileage, for any regular and extra session; not greater than now provided by law; but

> no member shall be entitled to traveling expenses or mileage for any extra session that may be called within one day after an adjournment of a regular session. Committees of either house, or joint committees of both houses, appointed to examine the institutions of the State, other than those at the seat of government, may receive their actual expenses, necessarily incurred while in the performance of such duty; the items of such expenses to be returned to the chairman of such committee, and by him certified to the State Auditor, before the same, or any part thereof, can be paid. Each member may receive at each regular session an additional sum of thirty dollars, which shall be in full for all stationery, used in his official capacity, and all postage, and all other incidental expenses and perquisites; and no allowance or emoluments, for any purpose whatever, shall be made to or received by the members, or any member of either house, or for their use, out of the contingent fund or otherwise, except as herein expressly provided; and no allowance or emolument, for any purpose whatever, shall ever be paid to any officer, agent, servant or employe of either house of the General Assembly, or of any committee thereof, except such per diem as may be provided for by law, not to exceed five dollars."

It is not necessary to look to the statutory law of the State in determining your question, except in so far as statutory enactments may throw light on the meaning of the constitutional provision above quoted. However, Section 11231 Revised Statutes Missouri 1929, in all pertinent respects, follows the wording of Section 16 of Article IV of the Constitution of Missouri. Such section 11231 is as follows:

> "The members of the general assembly and the president of the senate of this state shall receive, as compensation for their services, the sum of five dollars per day for each and every day

> they may serve as such, for the first seventy days of <u>each</u> session, and one dollar per day for every day they may serve thereafter to the end of the session; <u>except during the sessions for the revision of the statute laws of the state</u>, when they shall receive five dollars per day for every day they may serve as such for the first one hundred and twenty days, and one dollar per day for every day they may serve thereafter, and five dollars per day for every day they may be necessarily employed in going to and from said general assembly, and shall also receive at each regular session of the general assembly the sum of thirty dollars in addition to their per diem, which shall be in full for all stationery used in their official capacity,and all postage,together with all other incidental expenses and perquisites,and no allowance or emoluments for any purpose whatever shall be made or received by the members, or any member of either house,or for their use, out of the contingent fund or otherwise; nor shall any member receive pay per diem until he has appeared in his seat and answered to his name at the meeting of each session of the legislature;nor shall any member be entitled to traveling expenses or mileage for any extra session that may be called within one day after an adjournment of the regular session. And each member of the general assembly, at each session thereof, except sessions called within one day after the adjournment of any regular session, who shall attend at the place of meeting, shall receive the following amounts, for mileage, that is to say: * * * * *"

We particularly direct your attention to what we consider the controlling language of the above sections of the Constitution and Statute, where it is provided that members of the General Assembly shall receive as compensation not to exceed five dollars per day for the first seventy days of <u>each</u> session (meaning each session of the legislature) and

after that (meaning after the first seventy days have passed) one dollar per day for the remainder of the session. It is not said that the compensation of the members is so fixed for regular sessions but for each session.

Section 19 of Article IV of the Constitution of Missouri provides:

> "The sessions of each house shall be held with open doors, except in cases which may require secrecy."

Section 20 of Article IV of the Constitution, with reference to the convening of the General Assembly in regular session, reads:

> "The General Assembly elected in the year one thousand eight hundred and seventy-six shall meet on the first Wednesday after the first day of January, one thousand eight hundred and seventy-seven; and thereafter the General Assembly shall meet in regular session once only in every two years; and such meeting shall be on the first Wednesday after the first day of January next after the elections of the members thereof."

Section 9 of Article V of the Constitution of this State, setting forth the powers of the Governor, in part, empowers the Governor to,

> "* * * * On extraordinary occasions he may convene the general assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary."

Section 55 of Article IV of the Constitution, provides:

> "The General Assembly shall have no power, when convened in extra session by the Governor, to act upon subjects

other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened."

Sections 20 and 55 of Article IV of the Constitution, above quoted, alternately refer to "regular session" and to "extra session" but a session of the Legislature, nevertheless, is referred to and it is a session of the Legislature that is referred to in Section 16 of Article IV of the Constitution for services on which compensation is allowed members of the General Assembly. While Section 55 of Article IV, above set out, limits the General Assembly, convened in extra session, in its deliberations to action upon only the subjects specifically designated in the proclamation of the Governor calling the Assembly into extra session or to such matters as may be recommended to the Assembly by the Governor in a special message or in special messages, but there is no limitation upon the subjects as to which the Governor may require the action of the General Assembly, so long as the same involve extraordinary occasions. We know, as a matter of common knowledge, circumscribed only by the proclamation and messages of the Governor, that the Fifty-seventh General Assembly of this State, convened in extra session, has functioned and transacted its business in the same manner and form as the business of such Legislature was transacted at the last regular session.

Calling your attention again to Section 16 of Article IV of the Constitution, you will note that the compensation of the members of the General Assembly shall not exceed five dollars per day for the first seventy days of each session and thereafter not to exceed one dollar per day for the remainder of such session, but there is excepted from that provision compensation for services of the members of the General Assembly at the first session of same held under the present Constitution and there is also excepted revising sessions of the Legislature when the members may receive five dollars per day for one hundred twenty days and one dollar per day for the remainder of such sessions. If the writers of the Constitution had intended to except a special session, as to the seventy day period, doubtless the same would have been written into Section 16 of Article IV along with the exceptions that were written into that section.

II.

We do not find any decisions of the courts of Missouri that help in a solution of the problem at hand, except those cases declaring the well-known rule that in construing a provision of the Constitution the intention of the framers of that document

must be the end sought to be attained. Decisions from courts of foreign jurisdictions throw more light on the subject.

In the case of People v. Rice 31 N. E. 921, the Court of Appeals of the State of New York had for consideration whether or not the State could be re-districted, as to the Senate and Assembly, at an extraordinary session. The court at page 923 of the opinion said:

> "It is contended on the part of those who allege the invalidity of the law of 1892 that it was passed in violation of that provision of the constitution which directs the alteration to be made by the legislature at the 'first session after the return of every enumeration.' The act was in truth passed at an extraordinary session of the legislature called by the governor, and after the return of the enumeration of 1892. The point is made that an extraordinary session is not such a session of the legislature as is contemplated by the constitution. To my mind the objection is wholly without force. An extraordinary session is, nevertheless, a session of the legislature. The governor by the terms of the constitution has 'power to convene the legislature (or the senate only) on extraordinary occasions.' When thus convened, is not the legislature in session? And can it be for a moment correctly contended that a session thus convened is the same session which had already terminated by an adjournment without day? It is not a regular session, it is true; it is what the constitution describes it,-an extraordinary session,-but yet a session of the legislature. The constitution does not say that the session which is to deal with the question must be a regular one. All it directs is that the legislature at the first session after the return shall proceed to make the alterations. The constitution provides for the assembling of the legislature on the first Tuesday in January in each year. When it adjourns sine die, has not the session of the legislature ended? The term of office of its members may not have ended, but

> the legislative session has certainly terminated by an adjournment without day. It could not again assemble and perform any valid act unless the governor,under the special power given him by the constitution, should convene it. When thus convened, the legislature is in session, and it is clearly not the same session which was ended by a prior adjournment thereof without day.

The case of State v. Olson 176 N. W. 528,defined what was a "special session" of the legislative assembly of the State of North Dakota and held that a special session of the Legislature of that State was a "session" within the meaning of the Constitution of North Dakota. The holding of the court, as well as the matter at issue, is contained in the following excerpt from the opinion at page 533;

> "Can there be any question that the Legislature which met in special session in 1919 was a legislative assembly? Can it be doubted that such session was not a session of the legislative assembly? Is there any room for construction or argument that, under the Constitution, the same members of the House and the Senate might one day be sitting in regular session bound by the constitutional provisions,requiring a two-thirds vote in order to enact an emergency measure,and that acts not so passed should not become effective until July 1st,and that several days later,after adjournment and reconvenement by the Governor,this same Legislature,composed of exactly the same members,sitting in special session,would have the power to enact statutory enactments, irrespective of the constitutional provisions,and in disregard of the legislative power reserved to the people in the initiative and referendum."

In Shaw v. Carter 297 Pac. 273, the Supreme Court of Oklahoma, construing the Constitution of that state with reference to the compensation of the members of its legislature, who receive six dollars per diem for their services during a

session of the Legislature for a fixed number of days and thereafter two dollars per day for such services. Defining "session" of the Legislature of that state the court at page 276 of the opinion said:

> " The phrase 'session' has a fixed and definite meaning which has heretofore received a construction by our court.
>
> In the case of Ralls v.Wyand,40 Okl.323, 136 P.158 the sixth paragraph of the syllabus provides:'The meaning of the word "session" is the sitting of a body,competent for the transaction of its business; the time during it is convened and actually engaged in business;the time during which a legislative body or other assembly sits for the transaction of business.'
>
> In the body of the opinion,the court states;
>
> 'The Ency.of Plead.& Prac.vol.21,pp. 559,560,says: "A session of court is the time during a term in which the court sits for the transaction of business." "
>
> The Century Dictionary includes the following among the word's (session) meaning: 'The sitting together of a body of individuals for the transaction of business;the sitting of a court, academic body,council,legislature,etc.,of the actual assembly of the members of these,or any smaller body,for the transaction of business. As the court is now in session (that is,the members are assembled for business);the time,space or term during which a court,council,legislature or the like,meets daily for business, or transacts business regularly,without breaking up,'
> * * * *"

CONCLUSION.

From the use of the words "session" and "each session" in the various constitutional and statutory provisions

above quoted; the failure to make extra session an exception in Section 16 of Article IV of the State Constitution, and being unauthorized to write into the Constitution or Statutes what is not there, and in the light of the decisions above quoted from, we think the intention of the framers of the State Constitution on the question involved is clear and it is our opinion that the members of the Fifty-seventh General Assembly, convened in extra session, are only entitled to the compensation of five dollars per day for their services for the first seventy days of such session and thereafter one dollar per day for the remaining days of such session.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

ASSESSOR'S FEES: Assessors are entitled to regular fees for additional assessments of income taxes when made under Sec. 10128, R.S.Mo. 1929.

FILED
3
65

December 29, 1933.

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Mr. Smith:

This department acknowledges receipt of your letter of October 20, 1933 relating to fees of assessors for additional assessments of income taxes. We quote your letter, as follows:

> "On October 11, 1933 you gave an opinion to Hon. Elliott M. Dampf, Prosecuting Attorney of Cole County, relative to compensation due County Assessor. As the questions asked you in that opinion did not fully cover the point of controversy, I would like to have an opinion from your department on the following questions.
>
> Section 9806, page 359 of the 1931 Laws provides that the Assessor shall receive 35¢ each for assessment list taken by him and is entitled to 3¢ per line for entering the assessment on his Assessor's books. The Assessor in the course of his duties receives the income assessment list from the individual and enters from that list on the income assessment book, for which service he receives 35¢ for taking the list and 3¢ per line for entry. The Assessor's book is turned over to the County Clerk who extends the tax on the amount as shown on the book.
>
> Section 10132 R.S. Mo. 1929 provides that my office shall have the right to examine the books of a corporation and to check all income assessment lists. In the course of my checking the income assessment lists, I find from the information contained on the list, or by comparing this list with the list that they have filed with the Federal Government, that the tax has not been computed correctly. I make the correction on the income tax list (the list on which the Assessor has already received 35¢ for taking) and certify the corrected tax to the Assessor, or in most cases I make the correction on the income tax book myself, of the additional tax the individual

should pay.

Will you please advise my office whether the Assessor is entitled to 35¢ for the corrected income tax list the same as if a new income tax list had been made out?

Your opinion of October 11, states that 'if it becomes necessary for a new assessment to be made, the Assessor is entitled to receive the same fee that he would have been entitled to had the return been an original one.'

The confusion has arisen over the words 'new assessment' as to whether new assessment means the changing of the list that had formerly been taken by the Assessor and for which he had already received 35¢, or whether it means the taking of an entirely new income list."

I.

Assessors are entitled to regular fees for additional assessments of income taxes when made under Section 10128, R.S. Mo. 1929.

This department has heretofore rendered two opinions bearing on this question - one to the Hon. W.A. Bassman, Assessor of Cole County, and the other to Hon. Elliott M. Dampf, Prosecuting Attorney of Cole County - both opinions holding that assessors are entitled to the fees in case of additional assessments, but apparently the opinions were based on different sections of the statutes.

Section 10128, R.S. Mo. 1929 is herewith quoted for convenience, as follows:

"****Whenever the assessor shall make an assessment on income for a calendar year against any taxpayer who has failed to file a return or an additional assessment against any taxpayer whose return is insufficient, and such assessment or additional assessment shall be made after the 15th day of April following such calendar year, or whenever the assessor shall make an assessment on account of income for any fiscal year against any taxpayer who has failed to file a return or an additional assessment against a taxpayer

> whose return is insufficient, and such assessment or additional assessment shall be made after the 15th of the month following the filing of such return or the expiration of the time in which the return should have been filed if return was not filed, then in every such case the assessor shall send to the taxpayer, by registered mail, a copy of such assessment or additional assessment, but the failure of the taxpayer to receive such copy shall not in any way invalidate or affect such assessment or additional assessment."

Under this section it is made the duty of the assessor to make an assessment of any person "who has failed to file a return or an additional assessment against a taxpayer whose return is insufficient."

Sec. 9810, R.S. Mo., 1929, the pertinent part of which is as follows:

> "In making the said assessment, and in all subsequent proceedings thereon, the assessor, county court, clerk of the county court and collector shall be governed by the same law as is now in force for the assessment and collection of taxes, and shall receive the same compensation as is now provided by law for similar duties"

entitles the assessor to the "same compensation as is now provided by law for similar duties".

Section 10133, R.S. Mo. 1929 relating to the compensation of assessors is as follows:

> "Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes; *****"

Sec 9806-L31

In 1931 the Legislature amended the fees of assessors as set forth on page 359, Laws of Mo. 1931, the compensation varying according to the population of the counties. Said section is as follows:

> "The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed

> a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list. ****"

In view of the plain wording of the statute making it the duty of the assessor under Sec. 10128 to make additional assessments, and the other statutes herein quoted stating what the compensation shall be, we hold that the assessor is entitled to his fees when he has complied with Sec. 10128, R.S. Mo. 1929.

II.

The Assessor is not entitled to fees for additional assessments made under Sec. 10132, R.S. Mo. 1929.

In the opinion heretofore rendered on this question, the writer held the same as set out in Point I of this opinion, but it appears that Ass't. Attorney General Hayes wrote an opinion on October 11, 1933 in which he incorporated Sec. 10132, R.S. Mo. 1929, same being as follows:

> ****At any time within three years after any return shall have been filed the auditor shall have the right to examine, during the usual business hours, the business, records and books of any individual, corporation, joint stock company, joint stock association or partnership, and to issue a credit slip to any taxpayer, if more tax has been paid than legally due, which credit shall be taken as deduction of the succeeding tax or taxes based on incomes to the extent of such credit, and to certify to the assessor any deficiency determined by the auditor and not returned by the taxpayer; and thereupon the assessor shall make any additional assessment in accordance with such certificate of the auditor, including all penalties provided; ***"

Knowing that both opinions were brought to your attention, we are apparently confronted with a conflict. However, a closer scrutiny of Ass't. Attorney General Hayes' opinion does not disclose that he based his conclusion that assessors were entitled to additional assessments exclusively on Sec. 10132, supra. We note that he

failed to incorporate in his opinion Sec. 10128, R.S. Mo. 1929. We are therefore reconciling the two opinions in the following manner:

We quote haec verba from the opinion of Ass't. Attorney General Hayes:

> "If it becomes necessary for a new assessment to be made on account of a deficiency in the first return made by the taxpayer, we believe that the assessor is entitled to receive the same fees as he would have been entitled to had the return been an original one. In other words, the necessity for making the additional return was not the fault or failure on the part of the assessor."

If the condition arises as pointed out by Ass't. Attorney General Hayes, then there is no conflict in the opinions, as he apparently lays down the conditions in Sec. 10128, supra, even though said section is not quoted.

We will now proceed to analyze Sec. 10132, R.S. Mo. 1929. It deals with the duties of the Auditor and directs him to carry out similar duties with respect to additional assessments as contained in Sec. 10128, supra, respecting the duties of the county assessor in cases of additional assessments. After the additional assessment has been made by the Auditor, he then certifies to the assessor any deficiencies determined and not returned by the taxpayer; "thereupon, the assessor shall make an additional assessment in accordance with such certificate of the Auditor." This is the only reference as to the duties of the county assessor after the Auditor has made the additional assessment. The county assessor himself has made no additional assessment; he has merely noted the changes as certified by the Auditor to him and made a correction of his assessment list. If it were possible for the Assessor to be compensated with additional fees under Sec. 10132, supra, it would be very convenient for him to await the action of the Auditor in certifying to him large numbers of such additional assessments, and thereby claim compensation for huge fees for labor which he had not performed.

CONCLUSION

The statutes, though similar in form, evidently were intended to place a double check on all corporations, companies and individuals evading income taxes by failure to make proper return, and as a result, made it the duty of both the assessor and the Auditor to be diligent in their duties in uncovering income which is not included in the individual or corporation returns. However, we cannot interpret the statutes to mean that when the Auditor performs

the work, the assessor should draw the compensation.

It is therefore the opinion of this department that the assessor is entitled to fees for additional assessments made under Sec. 10128, supra, but is not entitled to fees for additional assessments made by the Auditor under Sec. 10132, supra.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

LEGISLATURE: One house of Legislature, originating bill, can only adopt or reject amendments of other branch. Secs. 26, 29, 30, 32, Art. IV, Constitution.

1-8

January 8, 1934.

FILED
4

Honorable D.L. Bales,
Senate Chamber,
Jefferson City, Missouri.

Dear Senator:

This department acknowledges receipt of the questions handed to the writers in this office on January 5, 1933. We incorporate herewith the situation as outlined to us; also, the questions you desire to be answered, arising out of the situation.

> "The Senate amended House Bill No. 5 by striking out all after the enacting clause and inserted new matter. The Senate also adopted Senate Committee Amendment No. 2, striking out the title of the bill and returned it to the House. The House amended the Senate Amendment which struck out all matter following the enacting clause by adoption of seven amendments to Senate Amendment and directed the officers of the House to return a report to the Senate stating they had amended the bill by the adoption of seven House amendments to the Senate Amendment and requested the Senate to recede from the second Senate Amendment."

I.

~~"In view of the provisions of Sec. 29, Art. IV of the Constitution dealing with the question of amendments to a bill pending in the house of its origin of the General Assembly, can the House in which the bill originated amend an amendment adopted by the other house to such bill?"~~

At the outset we make the statement that it is a general rule of law relating to the passage of bills and the conduct of the House and Senate incident thereto that when our Constitution has

provisions respecting the same, the Constitution is to be followed, and parliamentary rules are to be ignored. In the absence of constitutional provisions relating to the steps to be taken in the passage of any bill, then parliamentary rules are to govern the procedure. We are guided in this statement by Section 123 of 25 R.C.L., which is as follows:

> "Formerly, the only rules controlling legislative procedure were the rules formulated and prescribed by legislative bodies themselves. But about the middle of the nineteenth century it began to be customary to insert in the constitutions of the various states provisions prescribing rules to be observed by legislatures in the enactment of laws. These provisions have constantly grown in number so that they now cover a large number of subjects, such as the title and subject matter of bills, the introduction, consideration and passing of bills, the keeping of legislative journals and similar matters ****"

Section 32, Article IV of the Constitution of Missouri is as follows:

> "No amendment to bills by one house shall be concurred in by the other, except by a vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal thereof; and reports of committees of conference shall be adopted in either house only by a vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting recorded upon the journal."

We construe this section to mean that when a bill is returned to the House by the Senate with amendments, it is the duty of the House to concur in or reject the amendments by a vote of yeas and nays. If the House undertakes to amend the amendment made by the Senate and then vote upon the same, the House has not concurred in the Senate's amendment, and it would require a far-fetched imagination to say that it impliedly rejected the amendments. In effect it has evaded the question; it should confine itself solely to a question of rejection or concurrence. Let us assume that it has impliedly rejected the amendment - the House cannot then take any further action respecting the amendment, and cannot engraft another amendment to the amendment, or amend the amendment. The situation is then such as to require the appointment of a conference committee for the purpose of reconciling the differences.

In the case of Browning v. Powers, 38 S.W. 943, the Court said (l.c. 945):

> "The bill first passed the House, and afterwards, with certain amendments, passed the Senate. The Senate amendments were not concurred in by the House. The situation was thus such as, in the opinion of each house, to require the appointment of a committee of conference for the purpose of reconciling differences, and agreeing upon proper amendments to the original bill. Section 32 of said article provides the manner of taking the vote of concurrence to two classes of amendments. The same formality is required in taking the vote of concurrence as in the final passage of a bill under Section 31. This would seem to imply that the concurring vote was intended to be the final vote on the bill. In either case the amendment would be the only matter with which the respective bodies had to deal."

The conclusion reached is further augmented by Section 26 of Article IV of the Constitution of the State of Missouri, which is as follows:

> "Bills may originate in either House and may be amended or rejected by the other; and every bill shall be read on three different days in each house."

Harmonizing the two sections, Sec. 32 as giving the originating house the power to concur, and Sec. 26 the power to reject, in the light of the decision above quoted and the herein quoted constitutional provisions, we reach our conclusion that the House, having originated the bill, is confined in its power to reject or concur in an amendment, but does not have the power to amend the amendment or to add to the amendment or amendments.

II.

> "If a bill originating in one house, goes to the other house and is there amended by two or more amendments, can the house of origin, upon the return of the bill with the amendments, adopt one or more amendments of the other house?"

The House and Senate, under Rule 152, have adopted Jefferson's Manual and the rules and practice of the House of Representatives of

the United States 71st Congress, and have so stated on page 58 of the Manual of the 57th General Assembly of Missouri, as follows:

> "The rules of parliamentary practice comprised in 'Jefferson's Manual' and the 'Rules and Practice of the House of Representatives of the United States 71st Congress', shall govern the House in all cases in which they are applicable and not inconsistent with the standing rules and orders of the House and joint rules of the Senate and House of Representatives; and the Manual and Digest of the rules and practice, above referred to, shall be taken as authority in deciding questions not otherwise provided for in these rules."

In view of our conclusions, and the authorities given in the preceding question, and having held that the house of origin can only adopt or reject an amendment of the other House, we are constrained to the conclusion that the house of origin can adopt some of the amendments made by the other house and can reject other amendments.

In consulting the House Manual of the 71st Congress, 3rd Session, we find as a part of the rules of the House of Representatives, at page 465, the stages of a bill of the House, and at page 467 the following:

> "13. Consideration of Senate amendments by the House:
>
> When a bill with Senate amendments comes before the House, the House takes up each amendment by itself and may vote to agree to it, agree to it with an amendment, or disagree to it. If it disagrees it may ask a conference with the Senate or may send notice of its disagreement, leaving it to the Senate to recede or insist and ask the conference."

In considering question I we have shown that because of constitutional prohibition the House of origin may not "agree to it with an amendment", but it is apparent that the other provisions of this rule can be applied to the action of the originating house on amendments of the other house, and is ample authority for the statement that the amendments to the bill are to be considered individually by the originating house, some of which may be adopted, while others may be rejected.

III.

"Can a conference committee act upon an amendment to a bill which amendment was adopted by the house not of the origin of the bill and in connection with such action also act upon amendments to an amendment to a bill originating in the same house that the amendments to the amendment originated?"

Having held under Question I that the House can only concur or reject an amendment made by the house not of origin, we are constrained to hold that the conference committee should not act upon "amendments to an amendment to a bill originating in the same house that the amendments to the amendment originated". Of course, the conference committee can act upon the amendment or amendments which were originally made by the house not of origin, but having held that the house of origin cannot amend an amendment or engraft an amendment on an amendment, the conference committee would not legally have such amendments before it.

IV.

"Does Sec. 29 of Art. IV of the Constitution, as amended, contemplate that all amendments adopted to a bill originating in the same house shall be offered and considered upon perfection of the bill?"

Section 29 of Article IV of the Constitution of Missouri was amended by a vote of the people on November 8, 1932 and said section now reads:

"All amendments adopted by either house to a bill pending and originating in the same shall be incorporated in the bill, and the bill as agreed to shall, before third reading and final passage, be printed for the use of the members. The printing of bills ordered to third reading and final passage shall be under the supervision of a committee, whose report shall set forth that they find the printed copy of such bill as theretofore agreed to and furnished for the use of the members is correct. A correct record of each day's proceedings in each house shall be furnished for the use of the members of the General Assembly before the record is approved, and no bill shall be signed by the presiding officer of either house until such printed copy thereof shall have been furnished for

> the use of the members of the General Assembly and the record of the previous day shall have been approved. When agreed to by both houses, the bill as finally passed shall be typed or printed and signed by the presiding officer of each house and transmitted to the Governor."

While the office of this section was primarily to reduce cost and labor by permitting bills to be printed, yet we can also read into said section that it contemplates and provides that amendments to a bill originating in the same house shall be offered and considered upon perfection of the bill. Said section uses the terms "all amendments adopted by either house to a bill pending and originating in the same shall be incorporated in the bill and the bill as agreed to shall, etc."

We construe the new section to require that all amendments to a bill originating in the same house in which such amendments are offered must be offered and adopted before the bill is declared perfected and the perfected bill is printed, and that the house of origin is precluded from offering any further amendments to its own bill, unless said amendments be offered and accepted by a conference committee.

V.

"Does Section 32 of Article IV contemplate that differences are to be settled by conference committees?"

We are not certain that we glean the exact meaning of this question. In view of Section 32 of Article IV of the Constitution of Missouri, supra, and interpreting the opinion as quoted in the case of Browning v. Powers, supra, to be that when a situation arises wherein the house of origin of a bill refuses to concur in the Senate amendments, then it requires the appointment of a committee of conference for the purpose of reconciling differences and agreeing upon proper amendments to the bill. Having decided that the differences should be referred to a committee, then said committee constitutes a board of arbitration and it is its duty to attempt to "settle" the differences. If, however, after the differences are "settled" by the conference committee in so far as the committee is concerned, it would require the adoption of the committee's report by both houses. We therefore conclude that the conference committee cannot settle any differences, but can only recommend in its report a settlement of the differences.

This conclusion is further augmented by Jefferson's Manual as found at page 245 of the House Journal of the 3rd Session of the 71st Congress:

> "The report of the managers of a conference goes first to one house and then to the other, neither house acting until it is in possession of the papers, which means the original bill and amendments, as well as the report. **** The report must be acted on as a whole, being agreed to or disagreed to as an entirety",

and Section 32, Article IV of the Constitution of Missouri, supra.

CONCLUSION

Another element which has played an important part in answering your various questions is the uniform custom and practice of long standing which has prevailed in the General Assembly of this State. It is our understanding that for a period of more than thirty years amendments have been adopted or rejected by the house originating the bill. Great weight is to be given the interpretation by legislative bodies of constitutional provisions.

As stated in Cooley's Constitutional Limitations, 86:

> "Greater weight is also given to the practical construction of forms of procedure than to that which concerns the substance of legislation. When there is a real doubt of the proper interpretation of a constitutional provision relating to the course of procedure, it should be solved in favor of the practical construction given it by the Legislature."

This rule has been adopted by the Supreme Court of Missouri in the case of Browning v. Powers, supra, wherein the Court said (l.c. 945):

> "The doubt, by uniform practice, has been solved by the Senate in the negative, and we adopt that solution."

As stated above, we have based our conclusions and the answers to your various questions on the construction of the provisions of the Missouri Constitution, court decisions and the element of custom and practice.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN,

ROY McKITTRICK,
Attorney General

HARRY G. WALTNER, Jr.,
Assistant Attorneys General

School District must enumerate orphans and defective children in the district same as others to obtain state funds.

June 1, 1933.

FILED

Rev. Dr. F.M. Baker,
Pastor Fee Fee Baptist Church,
Pattonville, Missouri.

Dear Dr. Baker:

Your letter of April 28 was received in due time, but on account of general press of business, have been unable to answer until the present time.

You have indeed quite a responsibility in the matter of being in charge of such an important class of people as you have under you and I know that the State (and I personally) will do all that possibly can be done under the law to aid you in your very commendable work of helping these orphan boys and girls get an education.

You state in your letter that you think the state owes them their education in the public schools the same as it owes it to other children of the state, and continuing, you say you think it manifestly unfair that the burden of their education should fall upon the Pattonville district alone because the "Home" happens to be located in it. In reply will say Section 9212 R.S. of Mo. 1929 says:

"The board of directors of each district shall be between the 30th day of April and the 15th day of May each year take or cause to be taken and forwarded to the County Clerk an enumeration of the names of all persons over six and under twenty years of age RESIDENT within the district, designating male and female, white and colored and age of each, ****; and also an enumeration of all blind and deaf and dumb persons of school age resident within the district **** and should the board neglect or refuse to comply with the provisions of this section, such district shall forfeit its right to any portion of the public funds for the next ensuing school year ****."

→ 167.151
167.161
171.011

Section 9207 R.S. of Mo. 1929 provides:

"**** That the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in the state in which they may have a permanent or temporary home; first, orphan children; second, children bound as apprentices; third, children with only one parent living; and fourth, CHILDREN WHOSE PARENTS DO NOT CONTRIBUTE TO THEIR SUPPORT. ****"

If between 6 and 20 and can't pay Tuition

From the foregoing it will be seen that it is the duty of the board of directors every year to enumerate and make a list of all persons over six and under twenty years of age RESIDENT in the district, and makes a penalty on the district to the extent of FORFEITING THE RIGHT TO ANY PORTION OF THE PUBLIC FUNDS if they fail to do so. Section 9207 also emphatically requires that these orphans, apprenticed, or one parent child, or children without parental support shall be listed in the district in which they have a permanent or temporary home regardless from what part of the state they came from.

Our Supreme Court in State ex rel Logan v. School District, 257S.W. 827, l.c. 828, has said:

> '"Whether a child should be enumerated depends upon his 'residence' in the district as distinguished from 'domicile' (under Sec. 9212) **** 'Domicile' and 'residence' are frequently used synonymously, but technically the latter word indicates merely the present place of abode of a person WHETHER TEMPORARY OR PERMANENT."'

Under Sec. 9212 R.S. of Mo. 1929 and the foregoing decision, as well as under Sec. 9207. these orphan children are residents and must be enumerated by the clerk and school board and have all the privileges of attending the public school in the school district the same as any other child therein. Neither the district clerk nor directors have any right to prevent their attending school there.

I might add parenthetically that your "Home" having helped build the school house by"'a liberal contribution towards the building that it might be large enough to accommodate the children of the 'Home'", they will gladly, on second thought, cooperate with you in the matter.

I appreciate your fine feeling that "it is manifestly unfair to expect that the burden of their education fall upon the Pattonville district alone because the 'Home' happens to be located in it." It is hoped you can work together with the school board in harmony, as the state, from the laws above quoted, shows plainly that it wishes to cooperate and will help take care of these orphans in the matter of their education.

I will say further that Sec. 13, page ~~340~~ 341, Session Acts of 1931 says:

161.0315

> "All school funds to be apportioned by virtue of the provisions of this act shall be apportioned in pro rata proportion, paying such percentage of each and every one of these apportionments as the money available in the public school fund will permit."

This indicates how the apportionment will be made and then, pay in proportion to the amount that is available out of state funds. In other words, these orphan children are especially favored by the state funds, first - "the attendance of all orphans (Secs. 9207 and 9212) and defectives (under Sec. 9218) is counted in calculating the regular equalization quota or teacher and attendance quotas; and second, then a separate apportionment for orphan and defective children calculated for these pupils in addition to the regular apportionment." ONE CAN CLEARLY SEE THIS CONSTITUTES A DOUBLE APPORTIONMENT TO THE PATTONVILLE DISTRICT on account of the orphans in that district, there being 208 orphans out of 418 pupils who get this double benefit.

The double apportionment is the ruling of the State Superintendent of Schools and properly so. Therefore, having in the school district these orphan children brings in double the amount of state funds that other children get from the state and that ought to materially soften or cut down any feeling of opposition or disinclination of the local people or school directors against these unfortunates attending the local schools, and I believe they will look at it that way too, if the above laws and facts are impressed upon or called to their attention.

I might add further that during this last year your district received $1993.50 in round numbers state aid instead of $1500 as you thought. The apportionment or estimate was $4400 instead of $4800 and last year was an exceedingly hard, unusual year, the tax collection throughout the state, including the state school funds, being probably the lowest in a number of years, but "times" may, and I hope will, improve, thereby saving cuts in teachers' salaries.

Hoping that the foregoing will be of assistance to you in ameliorating and simplifying the situation you are confronted with, and wishing to assure you and the Pattonville School District that anything I can do in the matter will be gladly done, I am

Respectfully yours,

Geo. B. Strother

GEORGE B. STROTHER,
Assistant Attorney General

APPROVED:

_____
Attorney General

GBS:AH

COLLECTOR'S BOND #9885, R.S. Mo. 1929.

FILED
5

January 19, 1933

Hon. R. Wilson Barrow
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

A letter from Mr. J.T.Holman, County Collector of Macon County, dated January 16, 1933, addressed to General McKittrick, together with a personal request from you, has been handed me for attention.

An opinion from this department is requested on the following facts:

> "The total amount of money collected in Macon County for the months of November and December, 1931, being $265,000, the highest amount in his hands at any one time was,during said months, $150,000. The total amount collected during the months of November and December, 1932, $243,000, the highest amount on hand during said months at any one time was $135,000. My present bond is $433,000, at a cost of $1375 per year. Please advise if, under the law, I am entitled to have the bond reduced."

Section 9885, R.S. Mo. 1929, provides:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any two months of the year preceding his election or appointment, plus ten per cent, of said amount."

It is the opinion of this department that the County Collector of your county would come under the provision of the above quoted statute, and that the highest amount collected for any two months in the year preceding his election being $265,000, his bond should be fixed at that sum, plus ten per cent thereof; that the provision in said statute, to the satisfaction of the county court, refers to the sufficiency of the security offered; that is, that the county court must require a satisfactory bond in the sum fixed by the statute,

and otherwise in compliance therewith.

Very truly yours,

CARL C. ABINGTON
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney General

CCA:ER

SCHOOLS - Sections 16 and 17 Laws 1931 pp. 343 and 344. Power of High and other schools to charge for children coming from other districts.

SB 17

substitute
original
disposed

February 20, 1933.

FILED
5

Hon. R. Wilson Barrow
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Barrow:

Answering your letter of February 16, 1933, in which you state five children from the Bush School District are attending the Atlanta High School; Atlanta High School is demanding payment of tuition and Bush High School wishes to know, "whether or not they can be compelled to pay the high school tuition for the five students in Atlanta High School (even) at the expence of closing up their country school".

The statute is very explicit that,

"The board of directors of each and every school district in this state ..... shall pay the tuition of each and every pupil resident therein ..... (who) attends an approved high school in another district of the same or an adjoining county .....;"

The statute further states,

"The rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, ... and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses.

Hon. R. Wilson Barrow -2-

> "In case of any disagreement between district as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final: * * *

SUPPLIMENTAL OPINION

SCHOOLS:- Sections 16 and 18 Laws 1931, pp. 343 and 344. Power of High and other schools to charge for children coming from other districts

March 14, 1933

Honorable R. Wilson Barrow,
Prosecuting Attorney,
Macon County,
Macon, Missouri.

Dear Mr. Barrow:

In re authorities in support of and supplemental to opinion of February 20, 1933 on the validity of Section 16 regarding the payment by school district for children attending high school in adjacent high school district, being that portion of same as follows:

> "The board of directors of each and every school district in this state*** shall pay the tuition of each and every pupil resident therein***(who) attends an approved high school in another district of the same or an adjoining county.****

The statute further states:

> "The rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars paid by the state for the entire term***and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final*****

The above is an extract from Section 16, pp 343 and 344 Session Acts of 1931

The question has arisen as to whether this law is constitutional or not. The Constitution of the State of Missouri, Article XI, Section 1, says:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the GENERAL ASSEMBLY may establish and maintain free public schools for the GRATUITOUS instruction of all persons in this State between the ages of six and twenty years."

In 1898 a statute (1895 Session Act) supposed to be somewhat similar was declared unconstitutional.

> State ex rel Switzler, 143
> Mo. p. 287

I think that ruling in that case should not have any force or effect in construing this section, because it undertook to furnish certain pupils out of public funds while attending the University, expenses for paying board, clothing, spending money and what not etc. That was going a little too far and the court very properly held same unconstitutional. That law also had another fatal defect in that it was not uniform, but permitted only those financially unable to go to the University to obtain same; purely public money for purely private purposes, and class Legislation.

In trying to carry out the foregoing provisions of the Constitution it would have been inexpedient unwise and very expensive for the Legislature to have required the smaller school district to build and maintain large buildings for the few high school pupils. So the Legislature did the expedient and least objectionable way to comply with the constitution, and this may be considered in arriving at a proper construction of the law.

> Warrington v. Bobb, 56 S.W.
> (2d) (Par.1-5) 837 (March 14, 1933,No.4)
>
> State ex rel. v. Reagan, 317
> Mo. 1216 l.c. 1224

The present laws, Session acts of 1931, Section 16, p. 343, is a broad liberal section permitting ANY ONE who has gone through the local schools to attend the adjoining high schools (if they have none of their own) on an equitable fair basis, giving any pupil in the district, rich or poor, high or low, the right to go to the neighboring high school;- if their parents are rich, these parents have to and do pay their share of taxes into the district school treasury to help pay this, and if they are poor the spirit and intention of the law is to help them and encourage them to get this education that the Constitution contemplates;- That intent is plainly shown by the wording of Article XI, Section 1, above referred to, requiring the GENERAL ASSEMBLY to establish and maintain free public schools for GRATUITOUS INSTRUCTIONS, etc. The General Assembly under Session Acts 1931, Sections 17 & 18, did this. In State ex rel Clymer, 164 Mo. App. l.c. 679, the court says:

> "Now, the question arises as to whether our Statute is to be narrowly and technically construed for the purpose of shutting the doors of the school houses in the faces of many of the boys and girls, and turning them out into the street and by-ways to grow up in idleness and ignorance, or whether it shall be LIBERALLY AND BROADLY INTERPRETED IN THE SPIRIT OF OUR CONSTITUTION."

And in State ex parte Loving, 178 Mo. p. 194, l.c. 203, the court says:

> "In the solution of the proposition before us, we must keep in view the familiar principle that, if there is a reasonable doubt existing as to the constitutionality of the act, SUCH DOUBT MUST BE RESOLVED IN FAVOR OF ITS VALIDITY.*** Every presumption is to be INDULGED IN FAVOR OF THE VALIDITY OF THE ACT***

Farther on l.c. 220, the court says:

> "We are dealing not only with a delicate and tender subject, but also an important one. Every good citizen feels a deep interest in the betterment of the condition of the children of this State; we can not be unmindful that the perpetuity of good government must depend upon the

care and attention given those into whose hands it must eventually fall.*** We have reached the conclusion that the act before us is a valid exercise of the legislative power, under the Constitution of this State. While this conclusion is reached, the question as to the constitutionality of this act is not without doubt; but following the well-settled doctrine upon this subject, all reasonable doubts must be resolved in favor of the validity of the act. This we have done in this case."

And that is what I have tried to do in the opinion written on February 20,1933, uphold the legality of Section 16 of the school laws of 1931, page 343. See Warrington v. Bobb Supra

Very respectfully yours,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney General.

APPROVED

ROY McKITTRICK
Attorney General.

GBS:MB

MUNICIPAL CORPORATIONS:

Cities of the 4th class not authorized to invest city funds in bonds of school districts.

Sec 7010 RS Mo 1929

June 16, 1933.

6-20

FILED
5
29

Mr. R. Wilson Barrow,
Prosecuting Attorney,
Macon, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 8, 1933, in which you inquire as follows:

> "On behalf of John McFadden, Mayor of the City of Bevier, Mo., in this County, I am requesting an opinion from your department as to the legal authorization for the City of Bevier investing certain city moneys by the purchase of school bonds for the construction of a new high school building.
>
> The Bevier city school building was recently destroyed by fire. It was necessary for the school district to vote additional bonds to construct a new building. The Bevier school district includes the city of Bevier and property contiguous to it for several miles around. Prior to the date of the school election to authorize the bonds, the Bevier city authorities indicated that in the event the bond issue was passed that they would purchase or invest in school bonds certain city money to the extent of $5,000.00.
>
> The Bevier city fund consists of the proceeds of sale of the electric lighting system of that town, which was sold several years ago to the Missouri Power & Light Company for $10,000.00. This fund has since been used for various purposes, including the street improvement and other common fund purposes.
>
> Will you kindly send me an opinion as to whether or not this transaction would be legal?"

A municipal corporation only has such powers as are expressly conferred by their charter, or are fairly and necessarily implied from the powers granted. As was said in McMurry v. Kansas City, 223 S. W. 615,623:

> "The powers of a city may be tersely stated as: (1) Those expressly granted by its charter; or (2) those fairly and necessarily implied from those granted; or (3)

those essential to the objects and purposes sought to be attained."

In City of Maryville v. Farmers' Trust Company of Maryville, 45 S. W. (2d), 103, 104, it is said:

"Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

The city seeks to invest a portion of its funds in school bonds of the Bevier school district. The school district is a separate and distinct entity from the municipal corporation, the City of Bevier. The City of Bevier does not have all powers except those which are expressly denied, but on the contrary, only has the powers expressly conferred under the rule laid down in the McMurry case above. Before a municipal corporation can use a city fund to make any investments or the particular investment in question, such power must be conferred by the Legislature. We have made a diligent search of the Statutes seeking to find some grant of power, either expressly or by implication, which would authorize a city to use its funds for the purpose of investment, but have been unable to find any grant of power whatever which, either expressly by implication, would give the city of Bevier the right to invest its city funds in the bonds of the school district. The Legislature must have deemed it unwise to permit this city to invest municipal funds without restriction, otherwise they would have made some provision therefor.

We are assuming that the city of Bevier still remains a city of the 4th class. Section 7010 R. S. Mo. 1929, provides for a city of the 4th class to select a depository wherein city funds may be deposited. The Section further provides as follows:

"And provided further, however, that if such depository cannot be selected, or such satisfactory arrangements made, such boards of aldermen are hereby empowered and authorized to loan such moneys upon the same terms and under the same conditions as provided by law for the loaning of county and school moneys."

The Sections regulating the loaning of county and school moneys are as follows: Section 12123 R. S. Mo. 1929, provides that county funds may be invested in bonds of the United States or of the State of Missouri. Section 12127 and Section 12128, R. S. Mo. 1929, provide that money may be loaned upon real estate secured by mortgage, and that a bond and personal security in addition thereto must be taken. Section 12188 provides for the loaning of capital school funds of the county according to law.

Section 7010 R. S. Mo. 1929, which is the only Section providing as to how city money may be loaned, does not give the city power to invest its funds in bonds of school districts. It provides expressly that such funds may be loaned, "upon the same terms and under the same conditions as provided by law for the loaning of county and school money." The Sections defining how the county shall loan and invest its money do not provide that such funds may be invested in bonds of school districts. The city may lend its funds in the manner provided in Section 7010, and in no other manner. An investment, such as is contemplated in your inquiry, is not a loan. Even if it could be construed to be a loan, it is not such a loan, as is authorized under said Section.

The object to be accomplished by the city is a commendable one, but regardless of how noble the purpose may be, the power to carry it out must be found in the city's charter, which is the Statutes. The power to make the investment in question cannot be found, either expressly or by implication. We, therefore, must rule that the city of Bevier is not authorized by the law of this State to invest its funds in the bonds of the Bevier school district.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

COUNTY COURTS:

SCHOOL MORTGAGES:

BACK TAXES:

County Court may not arbitrarily reduce the principal without payment, County Court may compromise taxes under Section 9950, R. S. Mo. 1929.

FILED 5

June 19, 1933.

Mr. R. Wilson Barrow,
Prosecuting Attorney,
Macon, Missouri.

Dear Sir:

We are acknowledging receipt of your inquiry of June 8, 1933, in which you inquire as follows:

> "I request an opinion from the Attorney General's office as to the following:
>
> 1. Whether or not the Macon County Court has any legal authority to agree with the borrower of school funds, secured by a school fund mortgage, to reduce the principal of same if it appears to the County Court that the borrower will be unable to meet his payments and pay his loan and the real estate under mortgage would not bring the amount of the loan on sale.
>
> Section 9256 R. S. Mo. 1929, authorizes the County Court in its discretion, for the protection of the interest of the schools, to bid in such real estate upon the foreclosure of school fund mortgages and to hold and preserve said property and resell the same, but would the County Court have any authority to arbitrarily reduce the principal of such a loan or renew the same at a lower figure without first offering same for sale in foreclosure, etc.
>
> 2. Has the Macon County Court any authority to waive the payment of delinquent County taxes on property where it appears that the assessment was excessive? That is, would the County Court have any legal right to compromise any back taxes, outside of penalties, commissions, etc., authorized by the last Legislature if taxes are paid by June 30th, 1933."

County Courts are not the general agents of the County or the State and their powers are limited, and they have only such authority as is expressly granted them by Statute. King v. Maries County, 249 S. W. 418; Bayliss v. Gibbs, 251 Mo. 492. In the Gibbs case at page 506, the Court says:

> "This Court, in numerous cases, has repeatedly held that the County Courts of respective counties of the State are not the general agents of the Counties of the State. They

> are courts of limited jurisdictions with powers well defined and limited by the laws of the State; and has been said, the Statutes of the State constitute their warrant of authority and when they act outside of and beyond their statutory authority, their acts are null and void."

Article 6, Section 36 of the Constitution of Missouri provides as follows:

> "In each County there shall be a County Court which shall be a Court of Record, and shall have jurisdiction to transact all County and such other business as may be prescribed by law."

In construing that Constitutional provision, the Supreme Court, in the case of State ex rel v. Patterson, 229 Mo. 273, at 391 held that "the County courts are denied any rights except those expressly conferred."

It will be seen from the foregoing that County Courts are clothed with limited and specifically delegated powers. Section 9256 R. S. Mo. 1929, authorizes the County Court to bid in property sold under school fund mortgages. Other Sections in the Statutes provide how they shall loan money and what security shall be taken. We find no provisions in the Statutes which would authorize the County Court to arbitrarily scale down or reduce the amount of the mortgage without receiving payments thereon.

In Montgomery County v. Auchley, 103 Mo. 492, it was held that the County Court had no power to reduce the interest on a school fund bond. By analogy it would appear that the County Court would have no authority to arbitrarily reduce the amount of the principal note or obligation.

It is true that the County Court is the governing body of the County, entrusted with the management of the finances as well as other duties. Its powers in regard thereto, however, must be found in the Statutes. It has the power to loan, take security and to collect the money loaned. These powers, however, do not include the power to reduce the amount of the loan without receiving payment.

The power to loan and collect given to an agent of an individual has been held not to include the power to accept a lesser amount than due. In Ogilvie v. Lee, 158 M. A. 492, at page 498, the court says:

> "An agent authorized merely to collect or receive payment has no implied power to accept a tender of a lesser amount than that due in full payment, or release the debt in whole or in part."

The County Court has no express power to arbitrarily reduce

the loan without payment. They do have the power to loan and collect school funds. But when the Courts hold that an agent of an individual who has the power to loan and collect does not have the power to arbitrarily reduce the amount of the loan without payment, it is unlikely that the Courts would hold that the County Court having only those powers expressly conferred could arbitrarily reduce the amount of the loan under their authority to loan and collect school funds.

It is, therefore, our opinion in answer to your first inquiry that the Macon County Court will have no authority to agree with the borrower of school fund money to arbitrarily reduce the amount of the original obligation without any payment being made.

In your second inquiry you inquire whether the County Court would have any legal right to compromise any back taxes outside of penalties, commissions, etc. Section 9950 R. S. Mo. 1929, provides, among other things, as follows:

> "Whenever it shall appear to any County Court --- that any tract of land or town lot contained in said 'back tax book' is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book,' or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for said Court --- to compromise said taxes with the owner of said tract or lot ---."

It appears, therefore, from the foregoing Section that the County Court may compromise and accept a lesser amount of taxes than is due from lands contained in the "back tax book," when it appears that the land would not sell for the amount of such taxes, interest or costs, or that the land is not worth the amount of the taxes, interest and costs due thereon.

While the act of the Legislature in 1933, directs the waiver of certain penalties, etc., that law, however, appears to be an additional benefit conferred upon the tax-payer and does not appear to limit the power conferred upon the County Court under Section 9950.

It is, therefore, the opinion of this Department in answer to your second inquiry that the Macon County Court may compromise taxes on land contained in the "back tax book," in the two instances authorized under Section 9950, R. S. Mo. 1929.

Very truly yours,

/s/ Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.
FWH:S

ELECTIONS: Members of United States Conservation corps can not vote in city election.

Dec 7129-7201-10178-PS Nov 1934

9/9

September 5, 1933.

FILED 5 42

Hon. R. Wilson Barrow,
Prosecuting Attorney,
Macon, Missouri.

Dear Mr. Barrow:

This department acknowledges receipt of your letter of August 26 wherein you request an opinion as to whether or not members of a certain U.S. Civilian Conservation Corps are qualified to vote in a special election to fill a vacancy in the office of Mayor to be held on September 12, 1933. We quote your letter in full as follows:

> "Request has been made to me by certain city councilmen of Macon, Mo., for an opinion from your office upon the following question: Whether the members of the U.S. Civilian Conservation Corps No. E.65, Macon, Mo. would be qualified voters at the special city election to fill the vacancy in the office of mayor, to be held in Macon, Mo. on September 12, 1933.
>
> All of these erosion workers, consisting of about 240 men, are residents of the State of Missouri and many have families residing principally in Kansas City, St. Louis, Chillicothe, etc. However, some of these men are claiming that they have resided here in Macon County for sixty days and that this is their home.
>
> I have advised the officials here as well as representatives of these government workers that they would not be legally entitled to vote at this special city election, as they are not in fact residents of Macon and are government workers whose home is considered their place of enlishment, etc.

> If your Department can assist us with an opinion on this matter, it will be greatly appreciated."

We assume that these men are claiming their right to vote under Sec. 7139 R.S. Mo. 1929, which is as follows:

> "All male persons, of the age of twenty-one years, residing within the limits of any incorporated town or city, and who shall have resided within the same for sixty days next preceding an election, if otherwise qualified by the Constitution and laws of this state, shall be entitled to vote at all elections of town officers; and no property qualification shall be required by any person to render him eligible to any office in any city or incorporated town."

Under Sec. 7201, R.S. Mo. 1929, the section "applicable to all towns and cities", the section quoted above is made applicable to a city election in Macon, said section being as follows:

> "The provisions of section 7139 shall be applicable to all towns incorporated under article 7, and to all towns and cities incorporated in any other manner."

Because they are twenty-one years of age and have resided in Macon for sixty days, and might be further qualified under Sec. 10178, R.S. Mo. 1929, the pertinent part of which is

> "First, he shall have resided in the state one year immediately preceding the election at which he offers to vote",

they now offer themselves as qualified voters. Under Art. VIII, Sec. 7 of the Constitution of the State of Missouri, which is as follows:

> "For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service either civil, or military, of this state, or of the United States; nor while engaged

> in the navigation of the waters of the State, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison,"

we find that these voters do not lose their residence by reason of civil service of the United States. Neither do they gain a residence by reason of civil service. We therefore class them as transient and temporary members in the service, same being civil in its nature. In the case of In Re Lankford Estate, 272 Mo., l.c. 9, the Court said:

> "Residence is largely a matter of intention. **** This intention is to be deduced from the acts and utterances of the person whose residence is in issue. ****"

At first glance these men might claim that they intended to make Macon their home, but you state in your letter that they have families residing in other parts of the state, and no doubt many of them are outside the city limits or are dwelling in temporary camps and tents--in fact, regardless of what they might say, their acts, character of work, and the situation surrounding their employment would refute any utterances to the contrary. In the case of Lankford v. Gebhart, 130 Mo., l.c. 633, the Supreme Court has said:

> "So, this court has held that physical stay or residence in a particular place will not of itself constitute a domicile. The physical act of staying must be accompanied with the mental determination of making a home or domicile in the place where the party stays or abides."

The men in question are physically in Macon, but do they have the mental determination of making a home in Macon? We think not. Knowing the conditions surrounding the employment of the men and they themselves knowing that there is a possibility of their being transferred, and that the work is of a temporary nature and that should their stay in Macon become permanent, they would doubtless have to resign from the service or position they now hold, they are in a similar position to the student who attends college in a town and undertakes to cast a vote at an election. However, the student is in reality in a better position to claim residence, as it is reasonable to assume that he will reside in the city for nine months, while the government employees, we dare say, do not know from one day until the next whether they will be living in Macon.

In the case of Goben v. Murrell, 195 Mo. App., l.c. 108-110, the Court said:

> '"In this view of the law, has the contestant, through the agreed statement, clearly shown that the students who voted for the contestee were not legal voters? We think he has. He has shown by that statement that they left their places of residence and 'came to Kirksville for the sole purpose of becoming students at the American School of Osteopathy, an institution of learning located at said city, with the intention of remaining in said school three years and of then locating at places elsewhere for the practice of osteopathy..... And that said persons have never altered their intentions of leaving the city of Kirksville as soon as their course of study at said school shall have been completed.' That is to say, they came to Kirksville not to reside, as that word is understood in its application to the qualification of voters, but for a temporary purpose, which, when accomplished, was to end their presence there. Residence must have some connection or identification with the community. One's stay should at least be indefinite and not, as shown here, for the mere temporary purpose of attending school and then immediately leaving to locate in a permanent home elsewhere.
>
> Fry's Election Case, 71 Pa. St. 302, is much like this. The discussion is able and interesting. It was there said (italics the court's) that 'The stated case expressly declares that the students referred to in it, came to Allentown from other counties, for no other purpose than to receive a collegiate education, but intended to leave after graduating. It is evident that the college was not their true and permanent home; their stay there was not to be indefinite, as the place of a fixed abode, until future circumstances should induce them to remove. Their purpose was definite and temporary, and when accomplished they intended to leave. They retained their original domicile, for the facts stated show that they never lost it. On this point the authorities are in entire accord.' Continuing (p. 311), the court further said: 'Having, as the case states, come to Allentown for no other purpose than to receive a collegiate education, and intending to leave after graduating, they have not lost their home domicile, and could vote there on returning to it though they should not reenter their father's house.'

Another instructive case is Sanders v. Getchell, 76 Maine 158, 165. In the course of discussion of the law as applicable to students, the Court said: 'It is clear enough that residing in a place merely as a student does not confer the franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily presence in a place, coupled with an intention to make such place a home, will establish a domicile or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be, to make the place a home temporarily, not a mere student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course. To constitute a permanent residence, the intention must be to remain for an indefinite period, regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise.' And the same view is taken in Vanderpol v. O'Hanlon, 53 Iowa, 246.

Under our election law a student neither loses his old residence nor gains a new one during his absence from the former, or presence at the latter. It is true that this law does not preclude his becoming a resident and voter at the school town or city, but his intention must be evidenced by something more than his mere physical stay in the place. He must not intend to make it his home--not that he shall remain for life there, but his home indefinitely. And so, if he comes into the place for the temporary purpose of getting an education and then to leave for other parts, he has not such a residence as entitles him to vote. (Matter of Garvey, 147 N.Y. 117)

The same kind of residence (except in some cases as to length of time) necessary to make a legal voter will qualify a person to hold office. Would one suppose that mere students are eligible to the offices at the locality of the school? There are municipalities in which schools are located, where the students outnumber the citizens proper. It certainly would strike one as extraordinary to learn that it was in the power of these non-taxpaying sojourners to wrest the city or county government from the voice and hand

of the permanent citizens!"

In view of the foregoing authorities, it is the opinion of this department that the 240 men who are employees of the U.S. Civilian Conservation Corps E-65 should not have the right to vote in the special election to be held on September 12, 1933.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

ASSESSORS: Entitled to regular fees for additional assessments on Income Tax Returns.

September 13, 1933.

9-20

FILED
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Hon. W.A. Bassman,
Assessor of Cole County,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 12, 1933, which reads as follows:

> "I will appreciate it very much if you will give me your opinion as to whether or not the Assessors of Missouri are entitled to receive the same fee for additional assessments on income tax returns as they are on the original returns."

In determining whether or not you are entitled to any fees for additional assessment on income taxes, we must be guided solely by the statutes of our State. We assume that you have made the additional assessments under Sec. 10128, R.S. Mo. 1929, the pertinent part of which is as follows:

> "****Whenever the assessor shall make an assessment on income for a calendar year against any taxpayer who has failed to file a return or an additional assessment against any taxpayer whose return is insufficient, and such assessment or additional assessment shall be made after the 15th day of April following such calendar year, or whenever the assessor shall make an assessment on account of income for any fiscal year against any taxpayer who has failed to file a return or an additional assessment against a taxpayer whose return is insufficient, and such assessment or additional assessment shall be made after the 15th of the month, following the filing of such return

which the return should have been filed if return was not filed, then in every such case the assessor shall send to the taxpayer, by registered mail, a copy of such assessment or additional assessment, but the failure of the taxpayer to receive such copy shall not in any way invalidate or affect such assessment or additional assessment."

In 1931 the Legislature amended the fees of assessors as set out on p. 359, Laws of Mo. 1931, said section being as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list. ****"

Section 9810, R.S. Mo. 1929 is as follows:

"Whenever, for any cause except when exemptions have been granted by law, there has been a failure to assess the property in any county for any year or years, the assessor of said county for the time being shall assess the property for the year or years in which said failure shall have occurred. Such assessment shall be made at the same time as is now provided by law for the assessment of property, the assessment for each year to be in a separate book. In making the said assessment, and in

> all subsequent proceedings thereon, the assessor, county court, clerk of the county court and collector shall be governed by the same law as is now in force for the assessment and collection of taxes, and shall receive the same compensation as is now provided by law for similar duties,"

gives to the Assessor the "same compensation as is now provided by law for similar duties".

Under the caption of "Taxation of Incomes", Sec. 10133, R.S. Mo. 1929, the compensation of assessors is fixed for assessing incomes, said section being as follows:

> "Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

It is the opinion of this department that in as much as you are entitled to compensation for property which is omitted for any year or years, as stated under Secs. 9810 and 10133, R.S. Mo. 1929 stating that you are to be compensated "as for the assessment of other taxes", you should be entitled to your regular fees for additional assessments.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

COUNTY COLLECTORS: When Sec. 9885, Laws of Mo. 1933 become effective as to bond.

October 13, 1933.

10-14

FILED.
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Hon. R. Wilson Barrow,
Prosecuting Attorney,
Macon, Missouri.

Dear Mr. Barrow:

This department acknowledges receipt of your letter addressed to General McKittrick under date of September 13, 1933 relating to your County Collector's Bond. Your letter reads as follows:

> "The last Missouri Legislature passed Senate Bill 254 relating to the bonds of County Collectors in the various counties, etc. This bill was approved May 12, 1933 and provides for the lowering of County Collectors' bonds in counties under 75,000 population where the County Courts order Collectors to make daily deposits of collections in specially selected depositories. In such cases the Collector's bond may be fixed in a sum equal to the largest week's collection of prior term plus ten per cent.
>
> I have advised Mr. J.T. Holman, Macon County Collector that the above law, Laws of Missouri for 1933, page 464, or Section 9885 R.S. Mo. 1929 as amended, took effect ninety days after the adjournment of the Legislature and that same applies to the local Collector's bond now and any premium payments which may be due on said bond inasmuch as the Macon County Court has complied with provisions of the new law. It has been my understanding that said law was passed to relieve County Collectors from taking out surety bonds in excessive amounts and that same would apply in any year remaining in the present Collector's term of office.
>
> As there seems to be some doubt as to when the new law will take effect and apply to Collectors' bonds, I am requesting an opinion from your office upon the question."

The Constitution of Missouri, Sec. 36, Art. IV, p. 87, relating to the time when laws shall become effective, provides as follows:

> "No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

The section under consideration is Sec. 9885, Laws of Mo. 1933, p. 464, which is as follows:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties. Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court purusant to the provisions of Sec. 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund'; provided further, that when

> such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars ($100.00); and provided further the collector shall not check on such 'County Collectors' Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories.'"

A careful reading of the above section does not disclose that the terms of the section are not to be effective until some future date; neither does it exempt the persons who are holding office at the present time. It is therefore the opinion of this department that said section is now in force and became effective ninety days after the final adjournment of the Legislature.

By referring to Sec. 9892 R.S. Mo. 1929, which is as follows:

> "The county court shall, at the end of the first year, carefully examine the bond given as collector, and may again examine the same at any time before the tax book of the second year of his term shall be delivered to him, and by such examination ascertain if the bond be sufficient, and the sureties thereto still solvent and sufficient, and upon such examination, if found to be necessary, the court shall require an additional bond, as collector, with good security, to be approved by the court, as in the taking of the original bond",

we find that the County Court has the authority at various times to examine the bond of the Collector, and we infer from this section that the sufficiency of the bond is wholly in the hands of the County Court. Therefore, whether it be before the Collector enters upon his duties or while he is carrying out his duties, the County Court has the authority to change or demand a different bond from the Collector.

The copy of the orders which accompanied your letter appear to be in regular form with the exception of Record Y, page 283, Order No. 2, which is as follows:

> "Now at this day, the same being the 19th day of July, 1933, the Macon County Court takes up the matter of selecting the depositories for the County Collector's Fund and after due consideration the Court designates The State Bank of LaPlata, Missouri, Atlanta State Bank of Atlanta, Missouri, and the First National Bank of St. Louis, Missouri, effective on and after August 1st, 1933. This order is made pursuant to an Act of the Legislature of the State of Missouri in 1933."

It is the opinion of this department that this order is not sufficient and does not disclose the fact that the terms and conditions of Sec. 12184 R.S. Mo. 1929, relating to the county depository, have been carried out, said section being as follows:

> "It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county. For the purpose of letting such funds such county court shall, by order of record, divide said funds into not less than two nor more than ten equal parts, and the bids herein provided for may be for one or more of such parts. Notice that such bids will be received shall be published by the clerk of said court twenty days before the commencement of said term in some newspaper published in said county, and if no newspaper be published therein, then such notice shall be published at the door of the courthouse of said county: Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety: Provided also, that in all cases of the letting of township funds, three notices, posted in three public places by the township clerk, will be a sufficient notice of such letting."

The new section contemplates that the Collector's Fund, if he complies with the conditions mentioned therein, is to be kept in the same manner as the funds in the hands of the County Treasurer, and that the county depository shall be used by him. Your order does not disclose whether or not proper notice has heretofore been had and that the banks mentioned therein are now and have been the original banks selected as depositories of county funds.

In the case of State ex rel. Cravens v. Thompson, 22 S.W. (2d) 196, l.c. 198, the Court, passing upon this question, said:

> "Money to be kept in Farmers Trust Co. was not sufficient in law to designate a depository for the moneys of the district and to authorize Thompson to place the money there, because not in conformity with the provisions of sections 9582-9586, Rev. St. 1919 governing procedure in respect to county funds; and that, when the power of an inferior body to do a thing depends upon a condition precedent prescribed by statute, all the world must take notice of that limitation of its power and authority, and determine at their own peril whether or not the condition has been complied with and the authority granted; and that the act of the board of education in directing by minute entry only that the funds of said district be kept in the Farmers' Trust Company of Grant City, without first advertising for bids, and without requiring a bond of the depository selected, was void and of no effect, and not binding on the district; and that it was the duty of the treasurer before depositing the funds with the Farmers' Trust Company to see and know that said depository had been properly and legally selected and designated, and that a bond of said trust company had been properly approved and filed, and his failure to do so renders him and his sureties liable."

We trust the above sufficiently answers your question.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

OFFICERS:--Under Section 6853, individual cannot be member of board of public works of city and at the same time hold any other public office, whether membership on board occurred prior or after the appointment to other office.
(Sec. 7853 RSMo 1929)

C
O
P
Y

October 21, 1933.

FILED NO. 5

Mr. R. Wilson Barrow,
Prosecuting Attorney,
Macon, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I have been requested by Mr. C. O. Powell, Mayor of Macon, Missouri, to obtain an opinion from your office as to the application of Section 6853, R.S. Mo. 1929, to a member of the Board of Public Works of this City who also holds other official (not City) positions.

Mr. Powell wishes me to inquire relative to the status of one W. C. Brown, a member of the present Board of Public Works of Macon, Missouri, who has recently been appointed as a federal examiner under the new National Banking Act and who is also a member of the Macon School Board.

The Macon Board of Public Works, consisting of four members, was created three or four years ago, under Chapter 38, Article 31, R. S. Mo. 1929, and has control and supervision of the municipal electric light and water works plant in the City of Macon.

If your office can furnish me with an opinion on this matter soon, it will be appreciated."

Section 7853, R. S. Mo. 1929, provides as follows:

"Any member of said board of public works, who shall accept a nomination or appointment for any other office during his official term, shall be deemed thereby to have resigned as a member of said board, and his said membership shall thereby be ipso facto vacated."

As we construe the above section we believe that the Legislature intended that a member of the board of public works should not at the time of holding a position upon said board hold

any other office, whether it be city, county, state or federal. The above section provides that the holding of another office shall ipso facto vacate his membership upon said board. This is not an instance where the holding of two offices is dependent upon said offices being incompatible, but is an example of where it is prohibited to hold any other office while said individual is a member of the board of public works.

In 29 Cyc. 1383, it is said:

> "But incompatible offices must be distinguished from forbidden offices, that is, offices for which the incumbents of certain offices are disqualified by statute. In such case the incumbent of the first office cannot accept the second office and the attempted acceptance of the second office will not be treated as a resignation of the first."

Under the provisions of Section 7853, it is unquestionably forbidden that the member of a board of public works should not hold any other office while being a member of that board. If, at the time of his acceptance of the appointment to office he was holding another office, then we believe that he did not become a legal member of the board of public works. The statute expressly provides that if he has already become a member of the board of public works and accepts another office, that his membership on said board shall ipso facto be terminated. If he could not, as a member of said board, accept another office and hold the position on said board, then it would be unreasonable to assume that while holding another office he could become a member of the board of public works of your city.

In view of the quotation above, the holding of any other office is forbidden, if the individual was holding an office at the time that he was supposed to become a member of the board of public works. He did not, as a matter of fact, become such member because the acceptance of the membership on said board will not be treated as a resignation of any previous office which he held.

It is therefore the opinion of this Department that if the member of the board of public works of your city held other public office at the time he was appointed as a member of the board of public works, that he did not legally become a member of said board. If a member of said board did not hold public office at the time of his appointment upon said board of public works and afterwards accepted any other office during his official term, he is thereby deemed to have resigned and his membership upon said board to be ipso facto vacated.

Section 7853 makes no distinction as to the nature of importance of the office accepted, whether it be municipal, state or federal, but is express in its terms that "the nomination or appointment for any other office" shall ipso facto remove him from said board.

Very truly yours,

_____

Assistant Attorney General.

APPROVED:

_____

Attorney General.

NEWSPAPERS: Must be published in county in order to qualify for publication advertisements and orders of publication under Sec. 13775, R.S.Mo. 1929; not necessary that mechanical printing be done in county.

Sec 13775 R.S.Mo 1929 v Laws 31

November 2, 1933.

11-3

FILED

5

56

Mr. E.T. Barnes, Publisher,
The Brashear News,
Brashear, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 14, 1933 wherein you make the following inquiry:

> "The Probate Judge of Knox County insists that administrators' notices cannot be legally published in The Knox County News because the paper is printed outside of the county. I should like to have your opinion on this point. We have been publishing the ballots for elections, which were paid for by the county and the proposed amendments to the Constitution paid for by the State."

Your question involves a construction of Section 13775, Laws of Mo. 1931, p. 303, which is as follows:

> "All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regular and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided that when a public notice required by law to be published once a week for a given number of weeks, shall

> be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777, 13778, 13779, 7631, 7632 and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

I.

It is necessary that a newspaper shall be published in the county in order to qualify for publication advertisements and orders of publication under Sec. 13775, R.S. Mo. 1929, but it is not necessary that the mechanical printing be done in the county.

We assume from your letter-head that you live and edit the Brashear News at Brashear, Missouri in Adair County, and also edit the Knox County News at Hurdland, in Knox County, Missouri, and that the printing for both newspapers is done at Brashear. The statute above quoted states that the notices "shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located." This involves the construction of the word "publish".

Words & Phrases, Volume VI, p. 437 defines "publish", as follows:

> "'The word 'publish' means primarily to make known, and has the same significance as 'circulate'.
>
> The word 'publish' is defined as 'to make public; to make known to people in general'; 'to issue; to put into circulation.'"

The decisions of the various states differ widely on the construction of the word "publish", some states holding that when the word "publish" is used in a statute similar to the one quoted above, it also implies and includes the word "print". In State v. Board of County Commissioners, et al, 77 Montana, 316, l.c. 324, the Court, in passing upon the question, said:

"'It is true that our statute employs only the word 'published', but the meaning of the word depends upon the subject with which it is connected. It may mean merely made known. (North Baptist Church v. Orange, 54 N.J.L. 111, 14 L.R.A. 62, 22 Atl. 1004). Slander is published by word of mouth; Libel is any sort of writing given publicity; a legal notice may be published by posting, and a newspaper may be published at a given place, within the meaning of one statute, while it does not at all meet the requirements of publication under a different statute. To publish a newspaper is, by common understanding, to compose, print, issue, and distribute it to the public (Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 37 A.L.R. 898, 92 South. 193), and, in our opinion, this was the understanding of the term intended by the legislature in passing the Act under consideration. The clear purpose of the Act was to compel the letting of printing contracts to local newspapers, in order that local capital and local labor should secure the benefits of the expenditure of money derived from local taxes, including their own; the closing paragraph of the Act emphasizes this purpose by providing that, where the newspaper holding the county printing cannot perform a part of the contract, it must sublet that part of the contract to an establishment which will do the work within the state and with Montana labor.

We have heretofore held that the word 'published', as used in the statute, evidently means printed and published. It refers to a newspaper having its home in the county (Strange v. Esval, 67 Mont. 301, 215 Pac. 807), and, whether such declaration was or was not necessary to a decision in that case it correctly interprets the statute and expresses the legislative intent in its passage. To hold otherwise would defeat the purpose of the Act by permitting a large concern situated in a city within the state, or even without the state, to control the county printing in any number of counties by establishing therein and furnishing such offices with papers for distribution within the counties.'"

The courts of Missouri have not passed directly upon this question but by arguendo in the case of In Re Publishing Docket, 266 Mo. 48, l.c. 50, the Court said:

> "'The only words of the above section which concern us, because they are the only words having any reference to the matter in hand, are: 'A copy of the docket shall be printed in the county wherein such Supreme Court ....is held'. If we can read into this section by construction the additional requirement that such printing shall be 'in a newspaper published' in the county wherein the Supreme Court is held, then such publication must be so had. We must give to the word 'print' as used by the law-making power, its ordinary meaning, when used as a verb (and it so occurs in this statute), which is 'to make an impression with inked type.' The word 'publish' ordinarily means 'to make public'. A book, a paper or a pamphlet might be 'printed' but never 'published'. A paper might be 'printed' in St. Louis and 'published' in Chariton County.'"

In the above statement made by the court it appears that there is a distinction between the word "print" and the word "publish", and that "publish" does not include "print". This distinction was first made in the case of Julian v. Kansas City Star, 209 Mo. 35.

In the case of State v. Morgan, 144 Mo. App. 35, l.c. 42, same bearing indirectly upon the question, the Court said:

> "The objection that the Times-Democrat was not a proper newspaper to publish the notice for the reason that its office is in the City of Macon and, therefore, not in the territory affected by the notice, is not well taken. The paper is published at the county seat and the evidence shows it has a general circulation in the county. It is published in the county within the meaning of the statute."

CONCLUSION.

Section 13775, supra, has been amended several times in recent sessions and was evidently designed by the Legislature to compel an editor to conduct a bona fide newspaper before being eligible to receive notices and publications. While the decision

in the Montana Case, supra, is direct in point and would disqualify you under your statement of facts from accepting orders of publication and notices because the Knox County News is printed in Brashear, however, we do not believe that the courts of Missouri, under the decisions quoted above, have placed as broad an interpretation on the word "publish".

It is therefore the opinion of this department that if the Knox County News complies with all the requirements of the statutes, and is a bona fide newspaper, it is entitled to accept for publication regular notices as set forth in Sec. 13775, Laws of Mo. 1931, p. 303, even though the mechanical work of printing is done outside the county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

IN RE, SALE NON-INTOXICATING BEER TO PATRONS OF BARBEQUE STAND IN PARKING

April 10, 1933

Mr. H. L. Cunningham
Bolivar, Missouri

Dear Sir:

You have submitted to me the following questions:

> First - "Can I sell non-intoxicating beer to patrons who drive into a parking lot which I own or have leased and which is adjacent to and used by me in connection with the barbeque stand I operate"?

In reply to this question I will say if you have a permit from the state to sell non-intoxicating beer and you own or have leased a parking lot adjacent to the barbeque stand you operate, and the parking lot is entirely enclosed by a fence which is attached at two places to your barbeque building, and the amount of ground enclosed is not unreasonably large for purpose for which you use same, and you use the parking space as a part of the premises on which you operate your barbeque stand and for serving customers, and you use the parking lot for no other purpose and no charge is made for parking therein at any time, then you may serve the patrons in their car provided the patrons consume the non-intoxicating beer in the car and in the parking lot and not otherwise. You cannot, under a permit to sell non-intoxicating beer on your premises, sell to anyone and allow it to be taken from your premises and if you do sell and allow the non-intoxicating beer to be taken from your premises and consumed you forfeit your permit and cannot procure another permit of any kind for 12 months.

You also ask:

> "If I build lattice work on my ground adjacent to my barbeque stand building can I under my permit to sell non-intoxicating beer in my barbeque stand serve same outside my building and between the building and the lattice work to customers seated at tables."

My reply to this last question is, you cannot sell non-intoxicating beer under your permit to sell for consumption on the premises at your barbeque stand in the space you would have between the lattice work and your building. You made no application for a permit to operate a beer garden and you have no permit so to do.

Yours very truly,

Edward C. Crow
Assistant Attorney General

ECC:SW

APPROVED

Roy McKittrick
Attorney General

BEER PERMIT - Authorization of applicants having paid fee and not receiving permits account printer's delay, to sell pending issuance of permit.

VV

FILED
6

April 10, 1933.

Mr. C.H. Manville,

Food & Drug Commissioner,

Jefferson City, Missouri.

Dear Sir:

You have submitted to me the following Question:

"On account of the printer not furnishing us with permits in sufficient number to issue to the applicants who have paid us their money, would I be taking too much authority, in your opinion, by making a statement to the public through the press and by radio stating that the fact that they had applied for a permit was sufficient for them to buy and sell beer at retail?"

In reply to your question I will say all those who have applied for a permit under what is commonly known as the "Beer Bill" and paid the statutory fee to you, have thereby shown their desire to comply with the law and have done all in their power to do so. These applicants are suffering loss from inability to secure a permit. They have shown a complete desire to obey the law and no intent to violate it. Under the circumstances you should advise all who have filed application with you on the form you prescribed and have paid to you the fee for a permit that they may proceed to carry on the business authorized by the particular permit for which they have applied, and that you will, as soon as practicable, send each one a permit.

This reply to your question is, of course, limited to those only who have filed application for a permit and paid you the fee therefor.

Yours very truly,

EDWARD C. CROW.

APPROVED:

Attorney General

ECC:AH

TAXATION: Procedure to collect delinquent taxes in suit but not in judgment prior to effective date of Senate Bill 94.

See 9962 B Laws 33

June 24th, 1933 7-4

FILED 7 31

Hon. D. B. Bibb, Collector
Bowling Green, Missouri.

Dear Mr. Bibb:

Acknowledgement is herewith made of your letter of June 8th, 1933 wherein you request an opinion of this Office in regard to Senate Bill 94, portions of your request reading as follows:

> "I would appreciate it very much to have an authoritative opinion from you as to the interpretation of Section 9962b of Senate Bill 94, in respect to suits for delinquent taxes which may be instituted prior to the effective date of the new law, which, as I understand takes effect on July 25th, 1933."

Section 9962b of Senate Bill 94 provides that all taxes levied and assessed prior to the taking effect of the Act, which are delinquent on the effective date of the Act shall be deemed to be delinquent under the provisions of the Act and payment shall be enforced for such delinquent taxes as provided for in Senate Bill 94, all of which is subject to the following provision:

> "Provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lienunder the provisions

> of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

It is therefore seen that the county collector is privileged to follow either of two courses in the collection of these delinquent taxes, upon which suit is filed prior to the effective date of the act which is July 24th, 1933. The collector may either proceed to final judgment of the tax suit and foreclose by means of a special execution or he may dismiss his suit retaining all rights to valid costs accrued up to that time and proceed to enforce the State's lien for taxes by sale as provided in Senate Bill 94.

It is the opinion of this Office that if you desire to dismiss your delinquent tax suits upon the taking effect of Senate Bill 94 and to proceed in the collection of these delinquent taxes under the provisions of Senate Bill 94, that by doing so you will not prejudice your rights to these valid costs and commissions that had already attached under the law as it existed prior to the passage of Senate Bill 94,keeping in mind however, that your right to these valid costs and commissions is subject to the operation of Senate Bill 80.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW/mh

PUBLIC SERVICE COMMISSION:-- Exemption of certificate of convenience and necessity for trucks operated on the highway.

Sec 5272 Laws 1931
Sec 5280 Laws 31 8-24

August 23, 1933

FILED
7
40

Mr. A. J. Bielly
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We hereby acknowledge your request for an opinion dated August 17, 1933. Your request was as follows:

> "For example A has a Ford model A one ton and half truck, that is the way the title reads, and the rated capacity is 1 1/2 ton truck. Lawler Grant Co., here states that the manufacturer's rated load capacity means just what it says, for instance, that the ton and one-half ton is the loading capacity of that truck. Now then A has such a ton and half truck, he hauls freight for hire from St. Jospeh to other points east. He has not secured a permit to haul, contending that he is exempted under section 5280 because he owns and operates what is known as a ton and half truck. The Commission has not as yet determined the actual load or weight carrying capacity, because he has not asked for a permit. Is it necessary for this truck driver to have a permit before he can haul in this ton and one half truck?"

Laws of 1931, page 312, paragraph 3, of Section 5272 provides in part as follows:

> "In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual

> weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued."

Page 316, Section 5280, provides in part as follows:

> "* * * *Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

It is our opinion that a trucker furnishing service as a common carrier in this State, by using a For model A ton and one-half truck, does not need a certificate of convenience and necessity from the Public Service Commission which is provided for by this Act, where the manufacturer's rated load capacity of said truck is one and one-half tons, and where the actual load at any one time on the highway does not exceed in actual weight one and one-half tons. The man in your hypothetical case does not bring himself within the provisions of Act unless his load be in excess of one and one-half tons.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

TAXATION AND REVENUE: Interpretation of Sec. 1, Laws of Mo. 1933, p. 423

August 25, 1933.

FILED

Hon. M. Bingham,
Attorney at Law,
Galt, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of July 26, 1933 wherein you request an opinion as to the "Penalty Law", recently passed by the Legislature. Your letter is as follows:

> "There are two points in connection with the 'Penalty Law' recently passed, which Big Medicine Drainage District No. 1, of Sullivan and Grundy Counties, Missouri, desire your opinion on.
>
> 1st. Does this law mean that where a party is sued for delinquent taxes for the year 1931, that before August 31st the delinquent can settle the case by paying the original tax and one-fourth of the penalties, interest, and costs?
>
> 2nd. Despite the wording of the section what effect does this law have on the judgment of delinquent taxes rendered prior to the passage of the law?
>
> If the delinquent can settle with one-fourth of penalties, interest, and costs, would the plaintiff be liable for the remainder of court costs?"

The penalty section which you refer to is Section 1, Laws of Mo. 1933, p. 423, which is as follows:

> "In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any

> real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for the year 1932, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; provided however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1933; if paid after June 30, 1933, and not later than August 31st, 1933, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31st, 1933, and not later than October 31, 1933, such remission shall be 50 per cent of such penalties, interest and cost; if paid after October 31, 1933, and not later than December 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs: Provided, further, that after December 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

Referring to your first question, "Does this law mean that where a party is sued for delinquent taxes for the year 1931, that before August 31st, the delinquent can settle the case by paying the original tax and one-fourth the penalties, interest and costs?", in the very recent case of State of Missouri, at the relation of Roy McKittrick, Attorney General, vs. Frank W. Bair, Collector of Revenue of Jasper County, Missouri, No. 33115, which is as yet unprinted, Judge Hays speaking for the Court, said:

> "****All questions necessary to be discussed having been determined, it seems advisable, before closing this opinion, to observe briefly the effect of the change in the law upon the back-tax suits that have been filed, or may be filed, subsequently to the date, April 13 of the current year, when this new law became effective. Owing to the alternative options granted the taxpayer, with periodically and increasingly reduced advantage to him in the avoidance of penalties, a

> question of some difficulty is presented pertinent to the effect upon suits pending during any part or all of the entire period covered by the Act. Concerning this matter it is our view (1) that none can proceed to final judgment before the expiration of the Act on January 1 next; (2) a taxpayer exercising the first option, may pay the original tax without more and all penalties are thereby discharged and his pending tax suit, if any, will be abated; (3) exercising the second option, the taxpayer, if suit be pending against him, must in addition to the original tax pay one-fourth of all penalties formerly chargeable, in full discharge of the whole and the suit will likewise abate; and (4) the same process and result will apply in a general way to the remaining options. We think this mode of procedure seems practical and just, and accomplishes the legislative purposes, as we have determined it."

Under this decision, if the delinquent will pay before August 31st, the amount of the taxes and one-fourth of all penalties, interests and costs, the suit shall be abated.

As to your second question, "Despite the wording of the section what effect does this law have on the judgment of delinquent taxes rendered prior to the passage of the law?", you will note that the opinion referred to above does not refer to a judgment which was rendered prior to the enactment of the penalty law and does not take care of that situation. We are therefore confronted with the question as to whether or not the penalty law could by its scope extend to the remission of penalties, costs, etc. and the taxpayer pay the amount of the original tax and the judgment abated. In the case in which the excerpts are quoted above there are additional portions which might throw light on this question. Judge Hays, speaking in the opinion, says:

> "****From the statute itself it is obvious that the attorney's right to fees does not accrue pari passu with the rendering of each act of service in a given case, but accrues as a whole after collection made or judgment rendered. ***"

We would conclude from the above that the attorney's right to a fee in a delinquent tax suit would be vested as soon as judgment was obtained. Further in the opinion Judge Hays says:

> "****The contract entered into between the collector and his attorney, and approved by the county court, imposes no liability upon either the state, county or the collector. It only fixes the status of the attorney as to his right to compensation and the amount thereof when in the tax suit the liability therefor becomes fixed upon the taxpayer's property by the final judgment in the case. ****"

Again, the learned Judge says:

> "****Unlike the latter the former conditioned the remission, in instances where suits had been filed, upon the taxpayer's paying the costs together with attorney's fees. In construing the latter provision this court in State ex rel v. Edwards, 162 Mo. 660, held, that the Act simply gave the taxpayer an opportunity to avoid the costs and penalties by tendering the amount of the original tax before suit was brought and before the act expired by limitation. We think that under a proper construction of the statute assailed in the instant case the filing of suits for delinquent taxes and penalties is not prevented, but that penalties are remitted, in the manner provided in No. 80, upon proper tender of payment of the original taxes, without penalties, fees or costs, before judgment rendered (exeppt as noted) ****"

It is therefore the opinion of this department that if the judgment was rendered prior to April 13, 1933, and is in regular form, the delinquent taxpayer would be liable for judgment, including the penalty and costs.

We are further guided in this conclusion by Article IV, Sec. 51 of the Constitution of Missouri, which is as follows:

> "The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any county or other municipal corporation therein."

As to your last question,

> "If the delinquent can settle with one-fourth of penalties, interest, and costs, would the plaintiff be liable for the remainder of the Court costs?"

under the above decision and the plain wording of the statute, the delinquent, after paying the original tax plus one-fourth penalties, costs and interest, would under no circumstances be liable for the remaining three-fourths, nor would the plaintiff be liable for the three-fourths. Section 9969 R.S. Mo. 1929, omitting parts which are not pertinent, expressly states:

> "****that in no case shall the state, county or city be liable for any such costs, nor shall the county court or state auditor allow any claim for any costs incurred by the provisions of this article."

We are therefore of the opinion that no part of the costs, interest or penalties could lawfully be assessed against the plaintiff.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

ALIENS - Method of Prosecution

A. 98 U.S. Rev 1929

September 12, 1933

FILED
7
9-20
444

Hon. Lampton Berry,
122 East 22nd Street,
New York, New York

Dear Sir:

This department acknowledges receipt of your letter requesting opinion upon the following question, to-wit:

"Mr. A. comes to the United States from Italy and settled in your state. He leaves his family, consisting of a wife and three minor children, in Italy. After coming to the United States Mr. A. refuses absolutely to send maintenance to his family. Would it be possible for the wife, through power of attorney, to bring an action for a maintenance order in the proper court in your state even though she is physically a resident in Italy? If your answer is in the negative, will you kindly refer me to the Statute or Court decision upon which you base your opinion?"

Section 698 Revised Statute 1929 reads as follows:

> "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

Now in view of the expressed provision in the foregoing statute, a suit for maintenance by A's wife could not

be maintained in the name of an attorney-in-fact, or agent. If this right existed under the common law it has been abrogated by express statute.

Vol. 2 C. J., Page 1070, Paragraph 37, reads as follows:

> "It may be laid down, as a general rule, that aliens, except alien enemies, who are sui juris, and not otherwise specifically disabled by the law of the place where the suit is brought, may maintain suits in the proper courts to vindicate their rights and redress their wrongs. This right is not affected by the fact that a similar remedy is not afforded to aliens in the country to which plaintiff belongs."

21 Cyc., Page 1603, Paragraph C. reads as follows:

> "The inherent right claimed by many courts of equity to grant separate maintenance, and the right as confered by statute have been considered in preceeding sections. Generally, to give jurisdiction, at least one of the parties must be a bona fide resident of the state in which the suit is brought."

In Tolman v. Tolman, 1 App. Cas.(D. C.) 299, the court said:

> "It is not necessary that a wife be a resident of the state in order to maintain a bill against the husband for alimony, where the husband is a resident."

Also the same doctrine is announced in Shrader v. Shrader, 36 Fla. 502.

In our state we have no statute which precludes an alien, except an enemy alien, from maintaining suits in the proper courts to vindicate his rights and redress his wrongs.

In view of the rule, as announced in other jurisdictions

we therefore conclude that a suit for separate maintenance could be maintained by the wife, even though an alien and physically a resident of a foreign country, in the proper court, with cost secured, in her own name.

We regret that you have been delayed in receiving this opinion, but your request came at one of our busiest seasons, by reason of the preparation necessary in briefing cases coming up for hearing in the September term of our Supreme Court.

Yours very truly,

W. W. Barnes
Assistant Attorney General.

APPROVED

Attorney General.

BLIND PERSON, bona fide resident and who may have lost his or her sight while such -- discussed.

Sec 8893-94 RSMo 1929

March 18,1933

FILED
8

Mrs. Blanche T. Matteson
Pension Secretary
Missouri Commission for the Blind
1722 Olive Street
St.Louis, Missouri

Dear Mrs. Matteson:

This is to answer your letter of February 9th, 1933, requesting an opinion concerning the following:

> "In accordance with your letter of February 6th advising us that you will furnish legal advice when needed, we are writing to ask for an opinion on a matter which is of considerable importance in blind pension work.
>
> Section 1 of the Blind Pension Law states that "every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive*** an annual pension".
>
> It occasionally occurs that applications are made by persons who have come to Missouri or returned to this state, after residence in other states, who are virtually blind but who claim eligibility for pension because they had more vision than the limit fixed by the pension law at the time of their entrance into or return to this state. For example, a person who can detect hand motion at a distance of two feet from his eyes is ineligible for pension but is practically blind. If his vision decreases after coming to Missouri, so that he is eligible for pension, can he claim to have lost his sight in this state, irrespective of length of residence?
>
> A decision on this point will affect many of our cases, as persons with extremely defective vision

> move into Missouri and claim to have lost their sight here in order to receive the benefit of the Missouri blind pension.
>
> We shall be most grateful for an early reply on this matter."

Section 8893 R. S. Mo. 1929, in part pertinent to answer your inquiry reads as follows:

> "Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the State of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, and annual pension as provided for therein, payable in equal quarterly installments.***"

It will be noted that Section 8893 supra provides:

> "Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the State of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided,***"

The above quoted provision of said section is to our mind so plain that it is susceptible of but one construction, namely, that even though blindness occurred in some other State, if an adult blind person, twenty one years of age or over, of good moral character becomes a bona fide resident of this State and remains as such for a period of ten consecutive years next proceeding the time of making his or her application for a pension, when enrolled under the provision of said article, shall be entitled to receive the benefits as therein provided.

The next portion of said section is as follows:

> "***and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive,***"

This provision in our opinion is likewise self explanatory. If a person as in said section described while a resident or after becoming a bona fide resident of this State, loses his or her sight and continues thereafter to remain blind as hereinafter described and continues as a bona fide resident, upon application such person shall be entitled to the benefit of the Statute.

Section 8894 R. S. Mo. 1929, defines the requirements or conditions that must exist with reference to an applicant's eye sight to entitle them to the benefits of a pension and which section is as follows:

> "No person shall be entitled to a pension under this article who has vision with or without proper adjusted glasses greater than what is known as light perception; that light perception as used in this section means not more vision than is sufficient only to distinguish light from darkness and recognize the motion (not the form) of the hand of the examiner at a distance not greater than one foot from the eye; and no person shall be entitled to receive a pension except upon scientific vision test supported by the certificate of a competent oculist, approved by the commission, that such person does not possess a greater vision than that provided above in this section; and every person passing the vision test and having the other qualifications provided in this article shall be entitled to receive a pension of three hundred ($300.00) dollars per annum, payable quarterly."

The mere fact that a person's eyes might be weak or effected prior to his becoming a bona fide resident of the State would not

and should not deprive him of the benefits of the law unless his condition had reached the point of blindness as defined by the Statute, if the facts show that the acquiring a residence in this State was bona fide, that it was acquired honestly and in good faith, and not fraudulently asserted or claimed merely for the purpose of practicing a fraud thereby inducing favorable action upon his or her application, we are of the opinion such person would be entitled to the pension benefit. In other words, if prior to acquisition of residence there was an impairment of sight that facts alone would not defeat the claim if the loss of sight occurred in this State.

The perplexing part of your inquiry is that portion relating to bona fide residence. 'Bona Fide' means good faith without fraud or deception (Corpus Juris Words and Phrases). What is and what is not'residence' is dependent upon the intention of the party and the facts connected with such party in the establishment of residence. Residence is defined in Section 655 R. S. Mo. 1929, clause 17, as follows:

> "The place where the family of any person shall permanently reside in this State, and the place where a person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respective."

Residence is defined by Webster to be a dwelling place for some continuance of time.

> "There must be a settled fixed abode and an intention to remain permanently at least for a time for business or other purposes, to constitute a residence within the legal meaning of the term."

In discussing the word "residence" in the case of In re Ozias' Estate, 29 S. W. (2d) 240 l.c. 243, the court had the following to say:

> "The ruling herein depends upon the proper construction of the word domicile. Our Supreme Court held in Re Estate of Lankford, 272 Mo. 1, 197 S. W. 147, that residence is largely a matter of intention, to be deduced from the acts of a person.

> Residence and domicile are used interchangeably, and in so far as they apply to the situation here presented are synonymous.
>
> "Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."
>
> Bouv. Law Dict., Vol. 1, page 915. Proof of domicile, or legal residence, does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile there, though not conclusive. Hayes v. Hayes, 74 Ill. 312; Inhabitants of East Livermore v. Inhabitants of Farmington, 74 Me. 154. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile, and (3) an intention of acquiring a new one. Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706. It has been held a wife's removal into another state for the benefit of her husband's health and a residence there for twelve years will not change the original domicile. In re Reed's Will, 48 Or. 500, 87 P. 763; Ensor v. Graff, 43 Md. 291.
>
> A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact which is often difficult to determine."

The blind pension law is for the benefit of deserving blind people. It enables a person who is unfortunate in that respect to receive an annual pension quarterly provided said person has the necessary residential and other qualifications.

The fact that you state that persons with defective vision move into Missouri and claim to have lost their sight here in order to receive the benefit of the pension act are questions for the consideration of the General Assembly. The commission for the blind has no

discretion in the matter other than to properly apply the law. Of course, the Commission for the blind should investigate and ascertain if the applicant was a bona fide resident of the State at the time he lost his sight and if he has been a continuous resident of this State ever since then, just the same as they investigate the moral character, the age and the property owned by such applicant.

Trusting that this answers your inquiry. We are,

Yours very truly

JAMES L. HORNBOSTEL
Assistant Attorney General.

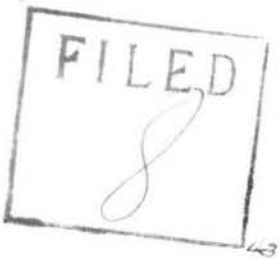
APPROVED
ROY McKITTRICK
Attorney General

JLH: MM

AGRICULTURAL ADJUSTMENT ACT: Processing tax on cotton goods used by Mo. Commission for the Blind.

Sec 9 15 agriculture adj act

9-12



September 12,1933

Missouri Commission for the Blind.
2832-34 Washington Avenue,
St. Louis, Missouri.

Attention: Mr. Lawrence J. Murphy, Jr.
Accountant.

Gentlemen:

This Department acknowledges receipt of your letter of August 24, 1933 relating to the processing tax on cotton goods, We herewith quote your letter:

> "We are in receipt of a form from the Collector of Internal Revenue for reporting our inventory of cotton goods as of August first for the purpose of assessing us with the processing tax on cotton goods of .044184 per pound. Our Home Work Department make such items as aprons, towels, rugs, bath mats, etc. from cotton goods and it is for this reason that this form was sent to us, but we were of the opinion that being a State organization we are exempt from all Federal tax."

Section 9 (a) of the Agricultural Adjustment Act is as follows:

> "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity

> whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: Provided, that upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid."

In paragraph (2) of subsection (d), the following definition of "processing" is given:

> "'In case of cotton, the term 'processing' means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term 'cotton' shall not include cotton linters.'"

You state in your letter "our Home work Department makes such items as aprons, towels, rugs, bath mats, etc. from cotton goods and it is for this reason that this form was sent to us, but we were of the opinion that being a State organization we are exempt from all Federal tax". From our interpretation of the first section, and from the definition of the term "processing" as quoted above, we are of the opinion that the Commission for the Blind should not be subject to the tax, as you are not engaged in the spinning and manufacturing of cotton.

We do not know the ruling of the Secretary of Agriculture in instances such as you present, but suggest to you that in the event

it becomes necessary for you to pay the processing tax an exemption might be had under Sec. 15 (a), which is as follows:

> "If the Secretary of Agriculture finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that any class of products of any commodity is of such low value compared with the quantity of the commodity used for their manufacture that the imposition of the processing tax would prevent in whole or in large part the use of the commodity in the manufacture of such products and thereby substantially reduce consumption and increase the surplus of the commodity, then the Secretary of Agriculture shall so certify to the Secretary of the Treasury, and the Secretary of the Treasury shall abate or refund any processing tax assessed or paid after the date of such certification with respect to such amount of the commodity as is used in the manufacture of such products."

A hearing might be had under Section (d), which is as follows:

> "The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in the competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered

> or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary, upon the basic agricultural commodity."

A careful examination under the exemption clauses fails toreveal that State organizations are exempt from the tax.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

OWN/ah

JUSTICE OF THE PEACE must be elected at a general election of county officers held each four years from 1882. Sec. 2136, 2138, 2140, 2144, R.S. Mo. 1929.

January 13, 1933

FILED
9

Hon. Joseph M. Bone, Jr.
Prosecuting Attorney
Mexico, Missouri

Dear Sir:

I acknowledge receipt of your letter of January 4, 1933, which reads as follows:

> "Prior to the last six years there has been three Justice of the Peace at Mexico, Salt River Township, Audrain County. There are at present two Justice of the Peace. S.A.Weaver of Mexico, Mo., asked for an appointment to fill the vacancy of the third place for Justice of the Peace, which the County Court did not do. Weaver filed his declaration of intention as a candidate and received the nomination at the August primary. His name was placed upon the ballot for the general election and he was duly elected. The County Court has not issued a commission to him as Justice of the Peace, for the reason that they think the application and election and entire procedure is not proper.
>
> "Under Sec. 2140 R.S. of Mo., 1929, it would seem that his election is proper and that he should be commissioned as a Justice for a two year term, until the next general election which is the regular time for electing Justice of the Peace under Sec. 2136 and 2138 of the R.S. of Mo., 1929. The only case relating to the appointment or election of Justices that might have some bearing on the construction of the statutes in question is the case of State Ex Rel Walker vs. Powles, 136 Mo. 376 lc. 380, 381.
>
> "I would appreciate your opinion as to the regularity of the above election of S.A.Weaver, so that I might further advise with the County Court on this matter."

Sec. 2136, R.S. Mo. 1929, provides that in municipal townships containing an incorporated town or city of over 2,000 inhabitants, and less than 10,000 inhabitants, said town shall be entitled to an additional Justice of the Peace, etc.

Sec. 2138, R.S. Mo. 1929, provides:

> "Justices of the peace, as herein provided for; shall be elected at the general election, to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

Sec. 2140, R.S. Mo. 1929, provides:

> "When a vacancy occurs in the office of justice of the peace, the county court of the county in which such vacancy occurs may supply the same by appointment of some person competent and qualified, who shall hold his office until the next general election of county officers, and until his successor is elected, commissioned and qualified."

Sec. 2144, R.S. Mo. 1929, provides:

> "Justices of the peace are to be commissioned by the county court, and shall hold their offices for four years, and until their successors are elected and qualified."

In the case of State ex rel Walker, Attorney-General, vs Powles, 136, Mo. 376, the Attorney-General instituted a proceeding by quo warranto to oust the respondent from his office of Justice of the Peace of Howell township, Howell County, Missouri. The respondent answered that he was appointed August 9, 1889, by the County Court as Justice of the Pease for the City of West Plains under what is now Sec. 2138, R.S. Mo. 1929.

The facts were that on August 9, 1889, Powles was appointed by the County Court for Howell township, to serve until the next general election of county officers, or until his successor was elected, commissioned and qualified. Powles served in this capacity until 1892. That on November 14, 1892 in pursuance to an election held November 8, 1892, the County Court commissioned Powles a Justice of the Peace for a term of two years, and until his successor was elected, commissioned and qualified. The next general election, November 6, 1894, three residents of the City of West Plains were elected Justices of the Peace for Howell township, in accordance with what is now Sec. 2136, R.S. Mo. 1929.

The court, after citing the sections herein referred to, stated on page 381:

> " *** The first general election of county officers and Justices of the Peace occurring after the appointment of the respondent, by the County Court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification, the term of the respondent would have ceased. But it seems that no successor was chosen at that election, and as the respondent under his appointment by the County Court, was authorized to hold and exercise the functions of said office, not only until the next general election of county officers, but until, 'his successor was elected, commissioned and qualified.' He thereafter continued lawfully the incumbent to said office and was authorized to exercise the functions thereof, until a successor for him should be chosen for him at the next general election of county officers and Justices of the Peace in November, 1894. State ex rel vs Ranson, 73 Mo. 78. *** "
>
> " *** As there was no law in force authorizing the election of a Justice of the Peace in 1892, the respondent acquired no title to that office by virtue of that election, *** Judgment of ouster will therefore be entered against the respondent and writ issued accordingly. All concur."

The foregoing case is the last expression of the Supreme Court on this matter, therefore, there is no "two-year term" for a Justice of the Peace, or that any justice can obtain a valid title to the office of the Justice of the Peace at any election of county officers except such an election as is held every four years subsequent to 1882. The general election of 1932 was not such an election, while it is true that it was a general election of county officers under a select definition of that term, it was not an election of Justices of the Peace under the Justice of the Peace statute. The term of the office of Justices of the Peace is four years, and under the statutes above cited, the four years shall run from a definite date to a definite date, State ex rel vs Spitz, 127 Mo. l.c. 252:

"The scope and purpose of the statute was to secure uniformity both in the date of their election, and in the term of their office."

In view of the foregoing authority, the election referred to in your inquiry was irregular and that the county court is acting properly in refusing to issue the commission.

Yours very truly,

H. G. WALTNER, JR.
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney-General

HGW:ER

IPAL CORPORATIONS: Officer directly or indirectly interested in a contract with the city, or in work done by the city, makes himself criminally liable and subject to forfeiture of office.

Sec 4406-6750 RS Mo 1929

September 27, 1933.

FILED 9 49

10-2

Mr. L. B. Boicourt,
Carterville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"The undersigned is a green member of the Carterville City Council, elected last spring, never having held any kind of public office before. A matter has come up that gives me much uneasiness. I do not wish to do anything that is against the law but do not know what the law is in some regards.

Kindly let me know the answers to the following questions: Can we as a Council legally hire the Mayor or members of the Council to work for the City (say at repairing streets) at so much per hour or day? Does the employing by the hour or day make the matter legal? If the member who is to profit does not vote, does that mend matters where it might be illegal if he casts the deciding vote?

If it should be against the law for members of the Council or the Mayor to be given such employment, and if the majority of the Councilmen vote to so employ a fellow member, would those who vote against the said employment be guilty in the eyes of the law, along with those who vote for it?

What, if anything, is the further duty of a Councilman if he known that his Council is breaking a State law although he himself votes against such law breaking?"

Section 4406, R. S. Mo. 1929, of our criminal statutes provides as follows:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the

facts to the council, whereupon the council, as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council, he be found so interested, he shall be immediately dismissed from such office."

Section 6750, R. S. Mo. 1929, dealing with municipal corporations, provides as follows:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; and upon the city council, or any member thereof, becoming satisfied that any officer of the city is so interested, the council shall, as soon as practicable, be convened to hear and determine the same, and, if, upon investigation, such officer be found so interested, by a majority of all the members elected to the council, he shall be immediately dismissed from office."

In State v. Kelly, 103 M. A. 711, the court held that a member of a municipal assembly of a city was a city officer, saying at page 715:

"No reason can be assigned for exempting a member of a municipal assembly of a city from the punishment prescribed for a violation of the statute. Certainly that he may be removed from office is no sufficient reason, or any reason at all, that he should be exempted from criminal punishment. The statute has not made the exemption and is not within the power of the courts to engraft one upon it in favor of this class of municipal officers."

In State ex rel. v. White, 282 S. W. 147, the court held that a contract entered into by a contractor of which the Mayor was a partner was illegal. The court says at page 148:

"His direct interest in the contract as a partner of relator was found by the chancellor, to whose finding we ought and do defer. The contract was malum prohibitum if not malum in se. Equity will not assist a party to reap the rewards of a contract prohibited by the statute."

Under the foregoing sections of the statute, any city officer who shall directly or indirectly be interested in any contract under the city or in any work done by the city, or any of its

institutions, makes himself criminally liable and at the same time is liable to dismissal from office. Under the Kelly case above, a member of a city council is a city officer within the provisions of said sections, and under the White case above the Mayor is also within the prohibition of the statutes.

The statutes prohibit the city officer from directly or indirectly having any interest in a contract with the city or any work done by the city. Any city officer who is directly or indirectly interested in a contract of the city or who does work for the city comes within the prohibition of the statutes. It is not necessary that the contract be written, or that it be for any particular purpose, and the employing of a person for the repairing of streets, whether such employment is to be paid for by the hour or day, brings into existence a contract between the employe and the city. A person working by the day or by the hour is directly or indirectly interested in a contract under the city and in work done by the city.

It is therefore our opinion:

First: That the city council cannot legally hire the Mayor or the members of the city council to work for the city at repairing streets for so much per hour or per day.

Second: That the employing by the hour or day does not make the employment legal, nor relieve the officer from the prohibition of the statutes.

Third; Under the statutes it is immaterial whether the officer contracting with the city voted to hire himself, as the prohibition of the statute is not that he shall not vote to hire himself but is that no officer shall be directly or indirectly interested in any contract or work with the city. Such officer may be employed by the other members of the council, he himself not voting, and still his employment would be illegal under the foregoing sections.

Fourth: We do not understand that the statute makes it a crime or a forfeiture of office for the council to employ others in violation of the above sections. The prohibition of the above sections is that the employed official will become criminally liable and be removed from office. He cannot, if he does the work for which he was employed, recover from the city for his services, for the contract is illegal. The officers, however, might make themselves individually liable by paying out to the employed officer funds under the illegal contract.

Fifth: If a member of the council has knowledge that

the above section is being violated, we believe it is his duty to inform the Prosecuting Attorney of the County so that he may take such action as in his judgment the matter requires.

Very truly yours,

Frank W. Hayes.

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

County Collectors Bond;

October 27, 1933.

Where an additional or new bond is required of the present County Collector the amount thereof is to be calculated as prescribed by Laws 1933 page 464, Section 1, which law repeals and reenacts the old Section 9885 R. S. Mo. 1929 which was heretofore applicable.

FILED

Mr. Joseph M. Bone, Jr.
Prosecuting Attorney
Mexico, Missouri.

Dear Mr. Bone:

We have received your letter of October 24, 1933, in which was contained a request for an opinion as follows:

"The present collectors bond of Audrain County, as required by the County Court was set at approximately $430,000.00. He gave a personal bond to qualify. Since giving this bond, two of the sureties are deceased, some have made assignments of their property, and others have become insolvent.

"The County Court wishes to require an additional Bondsman. As I understand the law, this requires the giving of a new bond. The sections applicable are sections 9885, 9892 and 9893, R. S. of Mo. 1929.

"Also, section 9885 R.S. of Mo. 1929 was amended by the laws of 1933, page 464, which makes the minimum requirement of the bond, to be "in a sum equal to the largest total collections made during any one month of the year proceeding his election or appointment, plus ten percent of said amount". This amendment makes the minimum requirement less than that required in the original section 9885 R.S. of Mo. 1929.

"Kindly advise me whether if an additional or new bond is given, the original or the amended section is applicable."

We have no hesitation in holding that the amended section Laws 1933, page 464, is the section to be followed in ascertaining the amount of the collector's bond required.

Section 1, Laws 1933, page 464, reads in part as follows:

"Section 1. Repealing and reenacting Section 9885: That Section 9885 of Article VIII, Chapter 59, Revised Statutes of Missouri for 1929, be and the same is hereby repealed and a new section enacted in lieu thereof to be known and numbered Section 9885 and to read as follows:

Section 9885 Collectors bond - Conditions - Every Collector of revenue in the various counties of this state, etc., etc."

The new law is then set out changing the requirement as to the amount of the bond. This law, in accordance with Article IV, Section 36, of the Constitution of Missouri, went into effect ninety days after the adjournment of the session at which it was enacted. The old law ceased to exist and only the new law remained. The County Court in its requirements as to these bonds is limited to the letter of the present law as it stands in the statutes.

The above is true whether it has to do with the accepting of new bonds from new collectors or the requiring of additional security from old ones. In this connection we quote from the opinion of the Supreme Court of Missouri in the case of State vs. Ward, 40 S.W. 2nd 1074 at page 1078 as follows:

"In Brown vs. Marshall, 241 Mo. 707, 145 S. W. 810 l.c. 815, this court ruled:

'A subsequent act of the Legislature repealing and reenacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel vs. Mason, 153 Mo. 23, l. c. 58-59, 54 S. W. 524; State ex rel vs. County Court, 53 Mo. 128, l. c. 129-130; Smith vs. People, 47 N. Y. 330.'

And this is true even though the new section 8246 of Rev. St. 1929 contained modifications of the repealed sections. State vs. Bradford, 314 Mo. 684, 285 S. W. 496."

The above quoted case decided on July 3, 1931, is, we feel, controlling on this question. In addition, the obvious intent of the legislature in reenacting the above section was to give some relief to the collectors in the matter of giving bonds. One of the basic principles of law in this state as in all states is that all rules of interpretation of statutes are subordinate to that of requiring determination of the legislative intent. See State vs. Schwartzmann

Service Inc. 40 S. W. 2nd 479, l. c. 480.

Very truly yours,

Charles M. Howell, Jr.,
Assistant Attorney General.

Approved:

_____
Attorney General.

COUNTY TREASURER-- Under Township Organization, two bonds required.

April 7, 1933

Filed
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FILED
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Mr. Herbert M. Braden
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

Your inquiry for an opinion from this office has been received and contains the following:

> "This time I should like to know whether or not a County Treasurer and Ex-Officio collector in counties under Township Organization is required under Sections 9266, 12133 and 9886, Missouri Revised Statutes for 1929, to give three bonds for the faithful performance of his duties, or if not, just which of these bonds he is required to give, also if the County Treasurer is permitted to charge in addition to the other fees allowed him by law, the one-half of one percent of all school money disbursed by him, as set out in Section 9266, Missouri Revised Statutes for 1929."

The County Treasurer must give a bond as such treasurer under the provisions of Section 12133, R. S. 1929. This applies to all county treasurers, regardless of what other duties they may perform in addition to the duties as treasurer.

In counties where the Township Organization plan has been adopted, the County Treasurer occupies the status of a dual officer, namely, County Treasurer and Ex-Officio Collector. Sec. 12312 R. S. 1929. A person occupying this dual capacity must give a bond covering his duties as collector. Sec. 9886 R. S. 1929.

Section 9266, R. S. Mo. 1929, does not apply to counties which have adopted the Township Organization law.

Hon. Herbert M. Braden April 7, 1933

It is, therefore, the opinion of this office that the County Treasurer must give a bond under Section 12133, R. S. Mo. 1929, and also give an additional bond under Sections 9986 and 12312, R. S. Mo. 1929; and that the County Treasurer under Township Organization is not entitled to any compensation provided for in Section 9266, R. S. Mo. 1929.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

FER:mh

COUNTY SURVEYOR AND COUNTY HIGHWAY ENGINEER -- Sections 8009, 8019 and 8020, R. S. Mo. 1929, - Duties and salary when office of Highway Engineer abolished.

April 10, 1933.

FILED
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Hon. John M. Bragg
Prosecuting Attorney
Douglas County
Ava, Missouri

Dear Mr. Bragg:

We are in receipt of your letter of March 24th, 1933, in which you request an opinion on Sections 8009 and 8020, R. S. Mo. 1929. In connection with your request you state the following:

> "The provisions of the Highway Engineer have been suspended in this county under section 2019. We now have a surveyor who contends that he is authorized to go out and do any work on the roads which to him seems necessary and that the County would be liable to him for his compensation. The County Court takes the position that the surveyor is not authorized to do any work as Ex-Offico Highway Engineer, unless ordered to do so by the Court, and thereby hangs the bone of contention.
>
> Now, what I want to know. Is the County liable to the Surveyor for work done on the roads without the order of the County Court. I am taking the position, that the County is not liable unless he is ordered to do the work by the County Court."

Upon the authority of Spurlock, Surveyor, etc. v. Wallace et al., County Judges, 218 S. W. 890, a decision by the Springfield Court of Appeals, it is the opinion of this department that the Surveyor as Ex-officio Highway Engineer is entitled to compensation as such, when authorized by the county court to receive same for services which the court orders to be done, and not otherwise.

Your attention is called to the language of the court in this opinion, last paragraph under subdivision "(1)":

> "If the contention made by appellant should be upheld,

then we must necessarily hold that to vote under section 10571, and to thereunder abolish the highway engineer act meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed, even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, R. S. 1909, was to permit the people of a county to abolish the office of highway engineer, yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and directions of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer and to obolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation."

We believe a careful reading of the above case will furnish a satisfactory analysis of the statutory provisions relating to the subject of your inquiry. If, however, there remains some question, which in your judgment is not covered by this opinion and upon which you desire further advise, we shall be pleased to go into the matter further.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:EG

IN RE: RIGHT OF TREASURER IN COUNTY HAVING TOWNSHIP ORGANIZATION TO COMMISSION FOR HANDLING INCOME TAX.

April 14, 1933

FILED
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Hon. Herbert M. Braden
Prosecuting Attorney of Livingston County
Chillicothe, Missouri

Dear Sir:

Your letter states as follows:

"I am writing you for an opinion as to whether or not County Treasurers and Ex-Officio collectors under counties having township organizations, are entitled to a two per cent commission under Section 12316, Missouri Revised Statutes for 1919, on taxes paid direct into the State Treasury and prorated to the counties, thereafter."

Section 10133 R.S. Mo., 1929, provides as follows:

"Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

Section 9969 R.S. Mo., 1929, gives collectors four percent on back taxes and delinquent taxes except in the City of St. Louis and other cities of similar size.

Section 9935 R.S. Mo., 1929, provides compensation of collectors in all counties and cities and the percentage retained as commissions on collected taxes is graduated according to the amount of taxes <u>levied</u> in any one year. The amount of commissions that can be retained is limited by Sub-Sections 14 and 15 of Section 9935, Sub-Section 14 providing that in all counties or cities where the levy of taxes in any one year exceeds

$2,000,000, collector may retain not to exceed $10,000, while Sub-Section 15 of Section 9935 limits all other collectors to $9,000 as compensation in full.

My construction of these various sections of the statute, together with Section 12316 R.S., Mo, 1929, providing for salary to be allowed county treasurer, is that county treasurer in a county having township organization for handling income tax would be allowed the percentage he would be entitled to under Section 9935 and that as I have stated is governed by the amount of the tax levy in any one year. You do not say, and, of course, I do not know what the amount of the tax levy, including license taxes, is in Livingston County for any one year, but this, of course, you can readily determine.

Yours very truly,

EDWARD C. CROW

APPROVED:

_____
Attorney-General

ECC...iac

RE: When similar trade mark can be registered.

April 29, 1933.

FILED
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19

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Mo.

Dear Sir:

It is my opinion a trade mark "BESTMADE", submitted by Best Malt Products Company is not entitled to registration in this state in view of the fact that the name is now registered for Bestmade Malt Syrup.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AH

P.S. I return you herewith letter, draft and application for registration of trade-mark from Best Malt Products Co.

MOTOR VEHICLES: Registered Operators discussed.

May 17, 1933

FILED
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Hon. Herbert M. Braden
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This is to answer your letter of May 2, 1933, which is as follows:

> "I am writing for an opinion as to whether or not, under the Motor Vehicle Act, and particularly under Section 7766, Missouri Revised Statutes for 1929, a boy of the age of 17 years, who claims to own a half interest in a garage business which is operated by his father and himself, and who operates motor vehicles as a part of his duties in operating this garage, is guilty of violating the Registered Operators section under the definitions of "persons and Registered Operators" as defined by Section 7759, Missouri Revised Statutes for 1929, where he operates a motor vehicle without either a chauffeurs license or a Registered Operators license.
>
> The highway patrolman made an arrest of such a person and he was fined in the Justice Court, and appealed to the Circuit Court, and it is the defendant's contention that he is not required under the law to have a Registered Operators license.
>
> I have searched the Statutes and Digest, but without success in finding any authority for this contention and on the suggestion of the Circuit Judge, I am writing for your opinion under these facts.
>
> I trust that this is a statement sufficient on which to base an intelligent opinion."

Section 7758 R. S. Mo. 1929 reads in part as follows:

> "This article shall be exclusively controlling on the registration, etc.," * * and upon the registration and regulation of chauffeurs, operators, and other drivers of motor vehicles," * * "

Section 7766 R. S. Mo. 1929 is divided into two parts. Part 'A' in the portion pertinent to the matter under consideration reads as follows:

> "Every person desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement containing his name, age, etc. * * "

And part 'B' of the same statute is as follows:

> "* * "No certificate as a registered operator shall be issued to any person under the age of eighteen years."

Section 7783 R. S. Mo. 1929 provides:

> "(a) Display of registration certificates: Chauffeurs and registered operators shall at all times carry, subject to inspection, the registration certificate furnished by the commissioner." * * "

Section 7786, part 'D' provides the penalty for violations.

It will be seen from the grouping of the above statutes that a registered operator must obtain a certificate of registration and have such on display at all times.

Section 7766-b, R. S. Mo. 1929, provides that a person must be of the age of eighteen or over before a certificate will be issued to him

You state the person charged with being a registered operator is seventeen years of age. Therefore, he could not have obtained a certificate of a registered operator if he desired. However, this does not mean he could violate the above provisions of the statutes that bar him on account of his age. The question then being what is a registered operator?

Section 7759 R. S. Mo. 1929 defines it as follows:

> "* * *'Registered Operator'. An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle.* * * *

This definition in our mind is plain and unambiguous, and the words used therein should be given their ordinary and usual meaning. You will thus see it is a matter of applying this definition to the facts in your case.

In view of the fact that this matter is now before the court for determination, we reserve our opinion as to whether said person as mentioned in your letter is guilty of violating the registered operator section. We merely say that in our opinion if the facts show a person is a registered operator within the meaning of the definition of the statute, as above set out, then such person should have such license and keep same on display and his failure to have one or to display it would subject him to the punishment prescribed.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

SCHOOLS:- TOWN, CITY or CONSOLIDATED District can dissolve if two-thirds of the RESIDENT VOTERS and TAXPAYERS, PRESENT and VOTING shall so vote.

May 19, 1933.

FILED
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Hon. Herbert M. Braden
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Braden:

Your letter of May 6, 1933, received, wherein you requested an opinion regarding the following:

> "I would be pleased to have an opinion construing Section 9331, Missouri Revised Statutes for 1929, as amended by Session Acts of 1931, at page 351.
>
> The part that I should like to have an opinion on is that provision which provides that 'If two-thirds of the resident voters and tax payers of such school district present and voting, shall vote to dissolve such town, city, or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved.' That is, whether to dissolve a consolidated district shall require two thirds of all of the voters and tax payers of said district, or whether two-thirds of those attending said meeting are all that is required to dissolve the district."

Section 9331, R. S. 1929, before being amended, created a great deal of strife and even bitterness among neighbors and friends in Clay County in an effort to dissolve the consolidated school district. The court even said:

> "It is to be deplored that considerable feeling and factional differences appear to have been aroused in the consolidated district and possibly to have controlled the result of the meeting. Those matters are truly most unfortunate and tend to cripple seriously the cause of education. But they are not

> matters which affect the merits of this case in any way. They concern only the parties and those living in the consolidated district. The question of who is right and who is wrong has no bearing in the decision of the case before us. Right or wrong, two-thirds of the resident voters and taxpayers of any consolidated school district have the unquestioned power, under due and orderly statutory procedure, to disorganize such district. * * * * * Two-thirds of the resident voters and taxpayers of the district have spoken for disorganization. It becomes the duty of this court to hold that the will of such majority, as thus expressed, must prevail."
>
> State ex rel. Clements, 305 Mo. 297 l. c. 307, 308.

The people in the community had gone to an expensive trial or hearing and 273 people had taken the witness stand etc., to say nothing of the bitterness and ill feeling that had been engendered by having to go into and investigate under the OLD LAW (Sec. 9331 R. S. 1929). So as to obviate and avoid such lengthly and expensive proceedings the Legislature in 1931 inserted three words in the section, to-wit, "PRESENT AND VOTING".

> "If such had been the intent it could have been easily and plainly expressed by saying that the result should be determined by a majority of those PRESENT AND VOTING at such meeting.'"
>
> State ex rel. Sheridan Consolidated School District, 310 Mo. 258 l. c. 265, 266.

So that, the statute as amended and simplified by the suggestion in the last cited case, now reads as follows:

> "Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the school house in said school district and at said meeting, if two-thirds of the resident voters

and taxpayers of such school district PRESENT AND VOTING, shall vote to dissolve such town, city or consolidated school district, then FROM AND AFTER THAT DATE the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under article 3 of this chapter."

Answering your question as to "whether to dissolve a consolidated district shall require two-thirds of all of the voters and tax payers of said district, or whether two-thirds of those attending said meeting (and voting)", will say that it is our opinion that, "if two-thirds of the resident voters and taxpayers of such school district PRESENT AND VOTING, shall vote to dissolve such town, city or consolidated school district, THEN FROM AND AFTER THAT DATE the said town, city or consolidated school district shall be dissolved."

Very respectfully,

Geo B Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

GBS:EG

TAXATION--Delinquent taxes--interest and collector's commission as provided for in Senate Bill 94. This opinion should be cross-referenced under county collector's commission.

June 3rd, 1933

FILED
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Hon. F. M. Brady,
Prosecuting Attorney,
Warsaw, Missouri

Dear Mr. Brady:

I acknowledge receipt of your request for an opinion of this office respecting interest on delinquent taxes and county collector's commission thereon, which request reads as follows:

> " I would like to have you advise me what the interest will be on 1933 taxes after January 1, 1934, and what commission the county collector will be entitled to receive on such taxes."

During the past session of the Legislature, the General Assembly enacted Senate Bill 94 which was approved by the Governor on April 7th, 1933 and will become effective July 24th, 1933. This Act among many other things repealed the present section 9952 and enacted a new section 9952 parts of which read as follows:

> "Section 9952--Between the first of January and the first of July of the year 1934 and annually thereafter and immediately upon the effective date of this Act, the county collector shall make out and record * * * a list of lands and lots returned and remaining delinquent for taxes * * * and charging them with the amount of delinquent tax * * * and in addition thereto a penalty of 10 per centum on such tax delinquent from the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year * * * providing however if

> taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof * * * the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually * * *"

Accordingly, penalty interest on 1933 taxes after January 1st, 1934 will be 1% per month with a maximum penalty interest charge of 10% for a year or fraction thereof.

The General Assembly in Senate Bill 94 also repealed section 9969 Revised Statutes of Missouri 1929 and enacted in lieu thereof a new section to be known as section 9969, which reads as follows:

> "Fees shall be allowed for services rendered under the provisions of this article, as follows; to the collector, except in such cities, 2% on all sums collected; in such cities, 2% on all sums collected -- * * *"

It is accordingly apparent that under this new law the collector's commission on delinquent taxes has been reduced from 4% to 2%.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW/mh

Taxation: Collection of delinquent railroad tax; suit to enforce payment not barred by Senate Bill 80. Laws 33

June 3rd, 1933

FILED
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Hon. F. M. Brady,
Prosecuting Attorney,
Warsaw, Missouri.

My dear Mr. Brady:

I acknowledge receipt of your letter requesting an opinion of this office respecting the collection of delinquent railroad taxes parts of which r ad as follows:

> " The Missouri Pacific Railroad Company has failed to pay its 1932 taxes in Benton County and we would like to bring suit for them and would appreciate any suggestions as to any new method of proceedings if there is any change from the former law.
>
> Have also heard that some sort of Bankruptcy or Receivership was in effect as the Missouri Pacific Railroad Company and would appreciate any information you may have as to this and if it would affect a suit against the Company for taxes."

In the last Session of the Legislature, Senate Bill 80 was passed by the General Assembly and approved by the Governor on April 13th, 1933. This Bill among other things provided that the collectors of revenue of the counties and cities of the State are authorized and directed to accept the original amount of the taxes due from any taxpayer on a delinquent personal list or assessed against any real estate contained in the back tax book without the payment of penalties, interest and costs provided the payment of the original amount of the tax is made prior to June 30th, 1933. While this Act permits the taxpayer to pay the face amount of his taxes without any penalty, interest and cost, it does not prevent or bar the institution of any action upon the delinquent tax. Accordingly, while you are not prohibited from instituting the suit, the Missouri Pacific Railroad Company is permitted under this law to tender and pay to your collector the original amount of the tax without penalty, interest or cost, providing such payment is made before June 30th. If such payment is made between June 30th and August 31st, 1933

the collector is authorized and directed to accept the original amount of the tax plus 25% of the accrued interest, penalties and costs. If payment is made between August 31st and October 31st, 1933 the collector is authorized and directed to accept the original amount of the tax plus 50% of the accrued interest, penalties and costs. If paid between October 31st and December 31st, 1933 the collector is authorized and directed to accept the original amount of the tax plus 75% of the accrued interest, penalties and costs. If not paid on or before January 1st, 1934 the taxpayer is required to pay the original amount of the tax plus all accrued interest, penalties and costs as though Senate Bill 80 had not been enacted.

I am attaching hereto a copy of Senate Bill 80 for your information. I am enclosing to you a copy of an opinion of this office respecting the applicability of Senate Bill 80 to delinquent railroad taxes.

In reply to the matter contained in your second paragraph above quoted, I advise that conservators have been appointed for the Missouri Pacific Railroad as provided by the recently enacted amendment to the Federal Bankruptcy Act, which may be found in the May 1933 Cumulative Pamphlet of the United States Code Annotated. If you desire to prosecute your suit for taxes regardless of Senate Bill 80 and desire information as to the effect of the receivership on your suit, kindly make a further request to this office setting forth the particular matters upon which you desire information.

Yours very truly,

HARRY G. WALINER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW.mh

PROSECUTING ATTORNEY: Duty to enforce anti-nepotism section of the Constitution

Sec. 1618 R.S. Mo 1929

7-4

June 21, 1933.

FILED
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Hon. Herbert M. Braden,
Prosecuting Attorney,
Chillicothe, Missouri.

Dear Sir:

We are in receipt of your letter dated June 10, 1933, the first paragraph of which is as follows:

> "I am writing you for an opinion as to whether or not it is the duty of a prosecuting attorney to bring ouster proceedings against a member of a school board who appoints a member of his family as a judge of a school election, under section 13 of article 14 of the Constitution of the State of Mo."

In answer to the above interrogatory, it is the opinion of this department that the Prosecuting Attorney may, in the exercise of his discretion, bring ouster proceedings for a violation of the anti-nepotism section of the Constitution where the office which has been forfeited is within the county. In other words, if the anti-nepotism section of the Constitution applies to school boards, then if a director violates same within your county, you have ample authority under the statutes of the state, as will be hereinafter disclosed, to bring Quo Warranto proceedings against him in the Circuit Court of your county.

Sec. 1618 R.S. of Mo. 1929 provides:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of quo warranto,

at the relation of any person desiring to prosecute the same. ****"

Under the above section of the Constitution, in view of the case of State ex inf. Norman v. Ellis, 325 Mo. 154, l.c. 159, it is the opinion of this department that either the Prosecuting Attorney may, in his capacity as Prosecuting Attorney, file such proceeding, or a private individual in the name of the Prosecuting Attorney may do so.

Since this section has been adequately discussed in the above decision at the page there mentioned, we will not copy the same here but refer you to said opinion, as well as the annotations found in the official statute book under Sec. 1618 hereinabove referred to.

For your convenience, we are inclosing you herewith a copy of a Quo Warranto Petition which we have filed in the Supreme Court relating to a matter concerning a school board. This form may be used also in the Circuit Court.

As to the second paragraph of your letter and the question therein included, this department, in view of the case of State of Missouri v. Whittle, which has recently been filed in the Supreme Court and which will be decided before August 15, is rendering no opinion as to whether or not a school director is such an officer falling within the contemplation of the anti-nepotism section of the Constitution so as to make said section applicable to him.

When the above case is decided by the Supreme Court, which we understand will be shortly, we will forward to your office a memorandum as to the court's ruling.

Trusting that the above sufficiently answers your inquiries of said date, we are

Yours very truly,

POWELL B. McHANEY,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

PBM:AH

ST. LOUIS COUNTY--Salaries of County Judges, clerks and prosecuting attorneys--how determined.

June 22nd, 1933

FILED
10

Hon. William H. Bray,
County Counselor,
St. Louis County,
Clayton, Missouri.

Dear Sir:

We received your letter of June 14th, 1933 requesting an opinion from this Office upon the subject of salary to certain county officials in your county. Your request is as follows:

> "A question has arisen in St. Louis County as to the population of this County. Owing to the fact that the various officers in the County are now contending that they are entitled to salaries which apply to Counties of 300,000 inhabitants.
>
> The Section under which they are basing their claim is Section 11808 of the Revised Statutes of 1929, and Section 11786. In the 1928 Presidential Election there was a total vote cast of 76,732 in this County, and in accordance to the method provided in Section 11786 the population of St. Louis County for the purpose of fixing the classification of said County for salary purposes was 383,665."

In passing upon this matter it will be necessary to draw a distinction between the effect to be given to a general law, and a special law. In State v. Imhoff, 238 S. W. l.c. 125, the Supreme Court in an opinion by Judge Walker, said:

> "We have said, not once, but a number of times, that where there are two acts, and the provisions of one has special application to a particular subject and the other is general in its term, and its standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as accepted out of the provisions of the general act, and hence not affected by the enactment of the latter."

At the outset, there is directly involved in this question, Section 12, Article 9 of the Constitution of Missouri which reads as follows:

> "The General Assembly shall, by law uniform in its operation, provide for and regulate the fees of all county officers and for this purpose may classify the counties by population."

As what is meant by the term "fees" as contained in the above constitutional provision, the courts of this State do not seem to be in harmony. In State ex rel. v. Patterson, 152 App. 264, a mandamus suit was brought to recover for the services rendered by a special prosecuting attorney for Jackson County. The prosecuting attorney for Jackson County at that time was paid a salary. The statute provided that persons appointed as special prosecuting attorneys should possess the same power and receive the same fees as the prosecuting attorney received. The Court held that as the prosecuting attorney received a salary, and this statute referred to fees, and that such salary did not mean fees, that the special prosecuting attorney would not be entitled to any compensation. The Kansas City Court of Appeals in this case, l.c. 268 said:

> "But relator argues that the term 'fees' in section 1014 should be defined to mean the salary of the prosecuting attorney in counties where the law gives him no other compensation than a salary. This section appears in the Article of the Statutes relating to 'Circuit and Prosecuting Attorneys' and we think it sufficiently discloses the legislative intent that its provisions should apply only to those counties mentioned in section 1005 and that, even where applicable, it does not authorize the payment of any salary to the special prosecutor."

However, in a more recent case, State ex rel. O'Connor v. Riedel et al, 46 S. W. (2d) 131, the Supreme Court said that this constitutional provision "fees" was broad enough to include the term "salary".

At the outset there appeared to be three separate statutes under which a circuit clerk may be paid in the State of Missouri, namely Section 11786, 11820 and 11833, R. S. 1929. We shall take them up in their order.

Section 11786 applies to counties having a population of less than

300,000. It provides:

> "For the purpose of this section the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination."

The vote cast in the presidential election in your County is given by you at over 76,000. This would make the population of your County over 300,000 and therefore Section 11786 would be inapplicable.

Section 11820 is a part of Article 2, Chapter 84, R. S. 1929. This Section applies only to counties having a population of 300,000 or more. The population under this Section is determined by the provision in Section 11811, which reads as follows:

> "For the purpose of Articles 2 and 3 of this Chapter the population of any county shall be determined by multiplying by three and one-half the total number of votes cast in such county at the last presidential election prior to the time of such determination."

When the vote of your county is multiplied by three and one-half, the population of your county is less than 300,000 and the provisions of Section 11820 are therefore inapplicable. In this connection it may be urged that Section 11808 would apply so that the population of your county would be determined by multiplying by five the votes cast at the last general election in your county. However, Section 11808 is a general statute applicable to all officers, while Section 11811 is a special statute applicable only to clerks of courts. Under such circumstances, as heretofore pointed out, the special statute controls when its provisions are in conflict with the general statute.

Section 11833 R. S. 1929 applies to all counties in this State which now contain or may hereafter contain a population of 150,000 and less than 500,000 inhabitants. This Section is a part of Article 3, of Chapter 84. The population under this Section is determined by the special provisions contained in Section 11811, heretofore set out in full, namely, that the population is to be determined by multiplying the total number of votes cast in the last presidential election by three and one-half. Therefore the only provision made in either Article 2 or Article 3, Chapter 84, R. S. 1929, that fixes the salary of the county clerk and circuit clerk in your county is Section 11833 as amended by the Laws of 1931, p. 323.

It is therefore the opinion of this office that the county clerk and circuit clerk of your county are to be paid under the provisions of Section 11833, upon a population basis as determined by the provisions of Section 11811. It may be urged that the provisions of

Section 11811 R. S. 1929 refers and applies only to clerks that are paid upon a fee basis, and that such Section fixes the amount of fees that they may retain, and for this reason that the method of determining the population as set out in that Section, would not apply to and control the provision of Section 11833, as amended by the Laws of 1931, p. 328, for the reason that one Section refers to fees, and the other Section refers to salary.

However, it was said in State ex rel. v. Riedel, supra, that in the beginning an officer may be paid on the fee basis, but that when he receives the maximum amount of fees that is allowed him by law, that such ipso facto becomes a salary. We quote from that case, l.c. 133.

> "Practically all county officers (with whom alone the constitutional provision was dealing) were compensated by fees, but, when a limit was placed on the amount of fees an officer might retain, that maximum was regarded as his salary, and therefore, in a generic sense, the word 'fees' implied compensation or salary, since it was the source of these."

Prior to the decision in O'Connor v. Riedel, supra, the term "fees" did not include salary, and the above provision of Section 11811 R. S. 1929 would have been inapplicable to determine the population for the purpose of paying the clerks, and the general provisions of Section 11808 R. S. 1929 would have governed and determined the method for arriving at the population. However, since the O'Connor case, supra, the provisions of Section 11811 R. S. 1929 govern for the purpose of determining the population because first, the term "fees" includes salary, and second, the provisions of a special statute such as Section 11811, govern over the provisions of a general statute such as 11808.

In the O'Connor case, supra, the Supreme Court said that the uniformity provision of the Constitution meant that the law applicable to one county office must be uniform throughout the State. But whatever construction may be placed upon the uniformity provision of the Constitution, we call your attention to the facts that under Section 11786, and Section 11833, and Section 11811, the Circuit Clerks of this State although they constitute one class of officers are paid upon a population basis determined by two methods, namely, five times the presidential vote in Section 11786 and by three and one-half times the presidential vote as set out in Section 11811. Whether or not these two statutes violate the uniformity provision of the Constitution, and just what the Supreme Court would say when this matter is properly presented, we venture no opinion.

Under the provisions of Section 11314 R. S. 1929, as amended by the Laws of 1931, p. 301, the salary of the prosecuting attorney is fixed upon a population determined by the last Federal census. Thus it appears that the population of your county for the purpose of paying the clerks will be fixed at one figure, and for the purpose of paying the prosecuting attorney will be fixed at another and different figure. This would appear to violate the uniformity provision of the Constitution, namely, Section 12, Article 9. Prior to the O'Connor case, supra, such a situation would have violated the uniformity provision of the Constitution. We quote from State ex rel Summers v. Hamilton, 279 S. W. 33, l.c. 36:

> "At the threshold of this case relator challenges the constitutionality of the act approved April 1, 1921 (Laws of 1921, p. 606 and following), relied on as a defense by respondents in their return. Section 12 of Article 9 of our present Constitution provides that:
>
> > "The General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population."
>
> Under the above requirement, it was the duty of the Legislature to pass a law that would regulate the fees of all county officers, including circuit clerks, county clerks, prosecuting attorneys, etc., and which should be uniform in its operation. The above provision of the Constitution is mandatory in its terms, and no law should pass muster which does not comply with its requirements."

The Court at p. 37 further said:

> "Passing, but without deciding, the question as to whether the framers of the Constitution contemplated, that Section 12 of Article 9 supra, might be carried into effect, by the passage of separate and distinct acts relating to each county officer in respect to his salary, <u>yet we have no hesitation in holding, that different laws, if enacted, must be uniform in their operation, in providing for and regulating the salaries</u> of county officers."

However, the above opinion from the Summers case, does not seem to have been either overruled or criticized in the O'Connor case, and

since the O'Connor case is the last word of the Supreme Court we feel, until it is overruled, that it should be followed.

The salaries of county judges in 1929 and 1930 in your county were to be determined by Section 2588, R. S. 1919 and by either Section 10684 R. S. 1919 or 6515 R. S. 1919, depending upon which of the latter applied to your county. Section 10884, R. S. 1919 (now 7892 R. S. 1929) applies to counties of under 200,000 population, and Section 6515 R. S. 1919 (now 7897 R. S. 1929) applies to counties of over 200,000 population. Section 10684 provided a salary of $1,200 per year, and Section 6515 provided for salary of $3,500 per year, both statutes providing salaries for the county judges for acting as road overseers.

Under either of the above statutes, the population of the county, for the purpose of fixing the salaries, was to be determined, under the provisions of Section 11016 R. S. 1919 (now 11808 R. S. 1929), by multiplying by five the highest number of votes cast at the last previous general election and the product thereof shall be considered and held as the true population of such county.

If the county as a result of an intervening election passed from a classification of less than 200,000 population, to a classification of over 200,000 population so as to increase the pay of the county judges as road overseers from $1,200 per year to $3,500 per year would such an increase violate the provisions of Section 8, Article 14 of the Constitution which is as follows:

> "The compensation of fees of no state, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

The answer to the above query is found in the opinion of that late learned and distinguished jurist, Graves, J., in State ex rel. Moss v. Hamilton, 260 S. W. 467, l.c. 469. Quoting from that opinion:

> "The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So, too, if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher,

but it was definitely fixed at the date of his election."

Quoting further from that decision, l.c. 70:

"The salary of each class was fixed, and as said no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed too, at a time long prior to relator's election. In our judgment Section 8, Article 14 of the Constitution does not preclude a recovery by relator."

The amendment by the 1929 Legislature of Section 2586, R. S. 1919, Laws 1929, p. 151 could not operate to fix the pay of county judges then in office. In the first place, this would be changing the law during the term of office of the county judges, as referred to in the opinion in the Moss case, and would be a violation of Article 14 Section 8 of the Constitution, for the reason that the amended statute increased the compensation of the county judges. Furthermore, the Constitution of Missouri, Article 6, Section 33 has specifically prohibited the increase or diminishing of the compensation paid to a judge of a court of record during his term of office.

It is therefore the opinion of this office that first, county clerks and circuit clerks are paid upon a population basis determined by Section 11811, under the compensation provided for in Section 11833 R. S. 1929; second, that the prosecuting attorney is paid upon the population as determined by the last Federal Census, under the compensation provided for in Section 11814 R. S. 1929 as amended by the Laws of 1931, p. 301; and third, the county judges for 1929 and 1930 were paid upon a population basis as provided for in Section 11016 R. S. 1919 and are entitled to the compensation provided for under Section 6515 R. S. 1919.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

BOARD OF HEALTH--Duty of Secretary under Section 9118.
Complaint by Secretary not exclusive.

June 23rd, 1933 6-29

FILED
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Hon. Russell T. Boyle,
Second Ass't. Prosecuting Attorney
Kansas City, Missouri.

My dear Russell:

Your letter of June 14th to General McKittrick, requesting an opinion of this Office as to the construction of Section 9118, Revised Statutes of Missouri 1929, has been referred to me for reply. Your request reads as follows:

> " Complaint has been made to this office by several doctors in Jackson County, Missouri, asking that complaints be filed against several persons who are alleged to be practicing medicine in Jackson County without having obtained a license from the State Board of Health.
>
> Under Section 9118, Revised Statutes - 1929 it is an offense to practice medicine in the State of Missouri without having obtained a license from the State Board of Health. That section also specified that the Secretary of the State Board of Health shall file complaint with the Prosecuting or Circuit Attorney in the county or state where the alleged offense occurred.
>
> Please advise me whether or not in your opinion anyone else but the Secretary of the State Board of Health can file the complaint under the above section."

Section 9118 provides for the criminal prosecution of persons practicing medicine without proper licenses duly issued, portions of which are as follows:

> "SEC. 9118. PRACTICE OF MEDICINE AND TREATMENT OF SICK, ETC., WITHOUT LICENSE PROHIBITED--PENALTY.-- Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or other afflicted with bodily or mental infirmities and any person representing or advertising himself

> by any means or through any medium whatsoever or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, * * *. Upon receiving information that any provision of this section has been or is being violated the secretary of the state board of health shall investigate the matter and upon probable cause appearing, shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney in the county or city where the alleged offense occurred. Any person filing or attempting to file as his own, a license of another or a forged affidavit of identification, shall be guilty of a felony and upon conviction thereof, shall be subjected to such fine and imprisonment as are made and provided by the statutes of this state for the crime of forgery in the second degree: * * *"

It is to be noticed that aside from the portion underlined, the Section undertakes to define criminal offenses and by examining the history of this Section, we find that this portion above underlined was ingrafted upon this statute by an amendment passed in 1927. The principal object of this amendment was to place upon the secretary of the board of health, the mandatory duty of investigating any violation of the Section, then if satisfied that this Section is being violated, the secretary on order of the board shall "file a complaint with the prosecuting or circuit attorney". This Section does not authorize the secretary of the board to file a complaint before a Justice of the Peace or before any other officer which complaint would be the basis for a criminal prosecution. It, in fact, permits the secretary when duly authorized by the board to present such facts, information and evidence as he may have at hand to the prosecuting attorney, upon which the prosecuting attorney may act if in his judgment action is advisable.

The definition of "complaint" as set out in Bouvier's Law Dictionary, seems applicable.

> "Compaint. In criminal law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated

> offense, with an offer to prove the fact, and a request that the offender may be punished."

This Section in no way limits or restricts the powers or duties of the prosecuting attorney to act in such cases. It doesn't require the prosecuting attorney to act upon such complaint.

We find a somewhat similarly worded statute in Section 4522 R. S. Mo. 1929, which reads as follows:

> "Sheriffs * * * and all other police or enforcement officers are hereby authorized and directed to apprehend and arrest any person or persons found violating any of the provisions of this chapter, which are herein described, and to immediately file the necessary complaint for such violation before the prosecuting attorney of the county in which such violation of the law occurs."

Because the foregoing Section requires the law enforcement officers to lay such information as they may have at hand before the prosecuting attorney of the county in which the violation has occurred, does it seem possible that any other person, any citizen, would be precluded from taking up with the prosecuting attorney, matter of the violation of any of the provisions of Chapter 31, R. S. Mo. 1929? We think not, the reason being found in the case of City of Richmond v. Mull, reported in 174 Mo. App. 176. In this case, defendant had been convicted upon a complaint sworn to by private citizens. The complaint was made under Section 9932, R. S. of 1909 which read as follows:

> "The complaint, when made by the marshall or any policeman against any person arrested without process and in custody, shall be reduced to writing and sworn to by such officer before such person shall be put upon his trial."

No other statutory enactment touching cities of the fourth class, the class in which the City of Richmond was at that time, made any provision for the filing of any complaint by a private citizen either orally or in writing, and the defendant took the position

that the affidavit of a private citizen was insufficient to begin and maintain a suit on behalf of the City. The Court in upholding the validity of this affidavit stated as follows at p. 182:

> "If a private individual knows of a violation of a city ordinance we can think of no harm that can be done if he be permitted by complaint to submit to the proper officials a basis for a prosecution. The city's interests can be protected by the proper officials. The complaining party has no such control over the prosecution as will enable him to assume complete and exclusive control of the case. The purpose and definition of the term "complaint" is not so extensive. On the other hand if this construction were not adopted opportunities might be more readily offered for impositions on the city and its inhabitants. If the action of some officer who might be absent or dilatory could not be obtained offenders would be given an opportunity to escape if a warrant could not be procured on the complaint of a private citizen."

And the Court further remarked on p. 183 as follows:

> "* * *in the case at bar we do meet the point urged and hold that a warrant and a prosecution for the violation of an ordinance of a city of the fourth class may be based on a complaint of a private person. To so hold is no more reading into the statute than is contemplated in the construction contended for by defendant that a city official is the only person upon whose complaint a warrant and prosecution may be based. By our construction no right claimed for the city is violated and greater latitude is given for the enforcement of the ordinances of the city 'enacted for the better promotion of peace and good order within its limits.' "

For the reasons herein stated it is therefore the opinion of this Office that the portion of Section 9218 R. S. of Mo. 1929 referring to the secretary of the board of health, does no more

than prescribe the duties of the secretary in respect to violations of that Section of the statutes and in no way limits or restricts the rights of any person to prefer a charge or complaint to the proscuting attorney against any violator of said Section.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW/mh

Osteopath.- Right to practice osteopathy within the terms of the Workmen's Compensation law.

Sec 13514 - 3311 RS Mo 1929

August
Fourth
1 9 3 3.

8-5

FILED
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Hon. H. J. Boyle,
Presiding Judge of the County Court,
Buchanan County,
St. Joseph, Missouri.

Dear Mr. Boyle:

We hereby acknowledge your request for an opinion. The pertinent part of your letter was as follows:

> "At the request of part of my constituency here in Buchanan County, I, as Presiding Judge of the County Court desire an interpretation of Section 3311 of the Missouri Workmen's Compensation Law, which reads as follows:"
>
> (Omitted, as it appears later in opinion).
>
> Trusting I may receive your interpretation at an early date, whether or not one licensed to practice osteopathy in Mo. is a physician within the meaning of the above law?"

Section 13514, R. S. Mo. 1929, provides as follows:

> "The system, method or science of treating diseases of the human body, commonly known as osteopathy, and as taught and practiced by the American School of Osteopathy of Kirksville, Missouri, is hereby declared not to be the practice of medicine and surgery within the meaning of Article 1 of Chapter 53, and not subject to the provisions of said article."

Our Supreme Court in discussing the above section of law, together with all the other sections found in Chapter 102, R. S. Mo. 1929, entitled "STATE BOARD OF OSTEOPATHIC REGISTRATION AND EXAMINATION" in the case of Atkinson v. School, 240 Mo. 338, l.c. 353, 144 S.W. 816, said:

> "Our statute, already referred to (R.S. 1899, Section 8537-8539, now Chapter 102 R.S.Mo. 1929), expressly recognizes osteopathy a system, method or science of treating diseases of the human body, and the defendant's school as the exponent of its method and practice. It also expressly authorizes persons having diplomas from that or any other legally chartered or conducted school of osteopathy to treat diseases of the human body, according to such method. In so doing, it necessarily permits and authorizes persons to contract for such treatment. It is true that Section 8537 (now 13514) provides that osteopathy is 'not to be the practice of medicine and surgery within the meaning of article one of this chapter) now Chapter 53, and not subject to the provisions of said article;' but the purpose so expressed is simply to segregate this particular system from those for which the regulation of which article one was enacted. All these systems, methods or sciences are directed to the treating of diseases of the human body, and each stands upon the merits of its own system."

Thus we see that our Supreme Court in discussing the provisions of the above section, together with all other sections found in Chapter 102 R. S. Mo. 1929, touching upon osteopathy, held, by way of dictum, that osteopathy in Missouri is one of several methods of sciences directed to the treating of diseases of the human body, and like other systems directed to the same objective, osteopathy stands upon the merits of its own system. I find no decisions in the appellate courts of this state touching squarely on your question, but in many states of the Union, and by the federal government, I find that osteopaths are recognized as physicians, either by statute or by the courts taking judicial knowledge. In the above case our supreme court did not so declare them to be physicians, in so many words, but they did say that a practicing osteopath is permitted and authorized in Missouri to contract for the treatment of the diseases of the human body, according to their method. I do not find the terms osteopath or physician defined in the statutes of this state. Noah Webster defines the term "physician" thus:

> "A person skilled in physic or the art of healing."

Section 3311, R. S. Mo. 1929, of the Workmen's Compansation Act, provides in part as follows:

> "In addition to all other compensation, the employee shall receive, and the employer shall provide, such medical, surgical and hospital treatment, including nursing, ambulance and medicines, as may reasonably

be required for the first sixty days after the injury or disability, to cure and relieve from the effects of the injury, not exceeding in amount the sum of Two Hundred Fifty Dollars ($250.), and thereafter, such additional similar treatment within one year from the date of the injury as the Commission, by special order, may determine to be necessary. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where such requirements are furnished by the public hospital or other institution, payment therefor shall be made to the proper authorities.

If it be shown to the Commission that such requirements are being furnished in such manner that there is reasonable ground for believing that the life, health or recovery of the employee is endangered thereby, the commission may order a change in the physician, surgeon, hospital or other requirement.

All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the commission, and shall be limited to such as are fair and reasonable for similar treatment of injured persons of a like standard of living. The commission shall also have jurisdiction to hear and determine all disputes as to such charges.

No compensation shall be payable for the death or disability of an employee, if and in so far as the same may be caused, continued or aggravated by an unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the commission, inconsiderable in view of the seriousness of the injury. If the employee dies as a result of an operation made necessary by the injury, such death shall be deemed to be caused by the injury.

The testimony of any physician who treated the employee shall be admissible in evidence in any proceeding for compensation under this chapter.

Every hospital or other person furnishing the employee with medical aid shall permit its record to be copied

> by and shall furnish full information to the commission, the employer, the employee or his dependents and any other party to any proceedings for compensation under this chapter, and certified copies of such records shall be admissible in evidence in any such proceeding."

Section 655, R. S. Mo. 1929, provides in part as follows:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood, according to their technical import;* * *"

In the case of Lovell v. Williams Brothers, (App.) 50 S .W. (2nd) 710, in interpretating the Workmen's Compensation law, the court said:

> "The cardinal principle of the compensation act is to insure the employee against accidental injury arising out of and in the course of his employment." To this end the act should be liberally construed.

In the case of Elsas v. Montgomery Elevator Co. (App.) 50 S. W. (2nd) 130, l.c. 133, this court said:

> "The language actually used (language in the Workmen's Compensation Act) is so plain as to leave no room for construction. In such case we could not read into the enactment words that are not found therein, either by express inclusion or by fair implication." (Parenthesis ours.)

The Workmen's Compensation law, provides for medical, surgical and hospital treatment, etc., and provides for a physician or surgeon, not the school to which said physician or surgeon is an exponent, it does not set out the qualifications of the physician or surgeon practicing under said act, but does provide that, at the discretion of the commission, the physician or surgeon chosen may be changed.

For the definition of the term physician or surgeon herein used, reference must necessarily be had to the other sections

of the act, general laws, and the decisions of the courts in this state and other states.

25 R. C. L. pp. 920-970, Section 233 says:

> "Since it is the duty of the courts to ascertain the meaning of the legislature from the language of the statute, general words are to have a general operation, unless the manifest intention of the legislature affords grounds for qualifying or restricting them."

In the instant case the legislature afforded grounds for a liberal construction of the term physician by the provisions of the same act. Our courts have held that the act should be construed liberally. To construe it technically would be against the context of the statute and repugnant to the intent of the legislature which is the recognized method of statutory interpretation.

It is the opinion of this office that the provisions of Section 3311, R. S. Mo. 1929, while insuring the employee against accidental injury, and while using the term physician and surgeon, that said statute and related statutes do not provide an instance where any particular method or science of care or cure, from several classes of eligibles recognized in this state, is exclusively named or implied.

It is our opinion that one licensed as an osteopath in this state is permitted to treat diseases of the human body by that method, under the laws of this state, and that he is a physician within the meaning of said term as used in the Workmen's Compensation Act.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

TAXATION AND REVENUE: Highway Bonds issued by the State are not exempt from taxation in the hands of individuals.

Sec 9742-43 RS Mo 1929

9/12

September 11, 1933.

FILED
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48.

Mr. Herbert M. Braden,
Prosecuting Attorney, Livingston County,
Chillicothe, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I am writing you for an opinion as to whether Highway Bonds of the State of Missouri in the hands of private individuals are taxable for State and County purposes or are such Bonds exempt from taxation?"

Article 10, Section 6 of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Article 10, Section 7 of the Constitution of Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Section 9742, R. S. Mo. 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743, R. S. Mo. 1929, provides as follows:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public structures and buildings with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls, and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States of this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county and local purposes."

Under the foregoing constitutional and statutory provisions taxes must be levied on all property within the territorial jurisdiction of the state, except that expressly enumerated as exempt. State v. Baker, 293 S. W. 399, where it is said at 401:

> "It is a well settled policy of our law that taxes shall be levied and collected for public purposes on all property within the territorial jurisdiction of the state, except that expressly enumerated as exempt."

In State ex rel. v. Gehner, 294 S. W. 1017, the court, reaching the same conclusion, says at page 1018:

> "The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation. Sections 6 and 7, Article 10, Constitution of Missouri; Section 12753, R. S. Mo. 1919."

It is apparent from the above that Highway Bonds issued by the State of Missouri are subject to taxation unless they be expressly exempted.

Section 44a of Article 4 of the Constitution of Missouri providing for the State Highway system and the issuance of Bonds, does not exempt Highway Bonds from taxation. We fail to find any constitutional or statutory provision exempting Highway Bonds from taxation.

It has been further held that the Legislature could not increase the list of tax exemptions contained in Sections 6 and

7 of Article 10 of the Constitution. State ex rel Tompkins v. Shipman, 234 S. W. 60, where it is said at page 63:

> "These exemptions are not taxed at all, and the law making power cannot increase the list of exemptions. Section 7, Article 10 of the Constitution."

In State ex rel. St. Louis County v. Gordon, 188 S. W. 160, the court had for consideration the act authorizing the county court to issue bonds for the building of roads. The act also provided that such bonds should be exempt from taxation for any purposes. The court, in disposing of this proposition, says at page 163:

> "It is also urged that the provisions of Section 3 of this act, which provides that 'no bond shall bear a higher rate of interest than 5 per cent, and all bonds shall be exempt from taxation for any purpose,' is, as to the attempted exemption from taxation, null and void, because contrary to the provisions of Sections 6 and 7, Article 10, of the Constitution. We think this is to self-evident that discussion of it would not clarify but merely muddle. However commendable may be the spirit of the Legislature in attempting to make the state a partner with the buyer and holder of these road bonds, it is obvious that the effort must prove abortive, because it is in the very face of the Constitution. We do not hesitate then to hold as utterly void so much of the said sentence which we quote, as seeks to make this exemption from taxation."

It is apparent, therefore, from the foregoing that the Legislature cannot increase the list of exemptions contained in Section 6 of Article 10 of the Constitution. Section 6 of Article 10 of the Constitution and Section 44a of Article 4 of the Constitution do not contain any provision exempting Highway Bonds in the hands of individuals from taxation. It is, therefore, the opinion of this Department that Highway Bonds in the hands of individuals are taxable for state and county purposes in view of the constitutional and statutory provisions above and the decisions of our Supreme Court construing them.

Very truly yours,

Frank W. Hayes

Assistant Attorney General

APPROVED:

Attorney General.

FWH:S

FAIR ✓)
Appropriations) Accounts of State Fair filed with Auditor and payment by state warrants on funds drawn therefrom.

September 14, 1933.

9-20

FILED
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Hon. J. C. Breshears
Commissioner
State Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of August 31st, 1933, which is as follows:

> "This is informal request for your opinion as to how the new State Department of Agriculture should henceforth handle the filing for payment the expenses of the State Fair. The State Fair has heretofore paid out both its 'general Revenue' and 'earned' appropriations through a Sedalia bank in which its State Fair treasurer was located. Should we now file accounts directly with the State Auditor for payment by state warrants?"

Laws of Missouri, 1933, Section 1, page 63, reads as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the State Revenue Fund the sum of Sixty thousand dollars ($60,000) to pay the salaries, wages, and per diem of the officers and employees, and other expenses of the Missouri State Fair, as follows: "
> (An itemization of the $60,000 then follows, applying proportionate parts thereof to the classifications specified therein.)

Section 2 of the same act, in part reads as follows:

> "There is hereby appropriated to the use and for the support of the state fair for the years 1933 and 1934 from the moneys that may be received and collected from the sale of concessions, or privileges and from entrance fees and from all other source of income of the state fair, including all gifts, donations, for special purposes and premiums, and all incomes and receipts of the state fair not to exceed the sum of three hundred and fifty thousand dollars ($350,000.00) to be used by the commissioner of agriculture as said commissioner may deem to the best advantage, for the support, maintenance and upbuilding and improvement of the state fair; etc, * * * subject to the following rules and regulations, viz.: * * * Provided all funds received from the collections herein specified shall be deposited in the state treasury the day following their collection and shall be paid out for the purposes herein specified as provided by law."

Section 2a reads as follows:

> "Before any such funds shall be paid out for the purposes specified herein the sum of twenty thousand dollars ($20,000.00) in each of the years 1933 and 1934, shall first be set aside yearly to the credit of the general revenue fund of the state as a reimbursement of said sum to said fund for that amount of the appropriation provided for by Section 1 of this Act."

You will note that sixty thousand dollars is appropriated out of the State Treasury, chargeable to the State Revenue Fund (Sec. 1, page 63, supra). And, a further fund of three hundred fifty thousand dollars created (Sec. 2, page 64), which must be earned from concessions, entrance fees, etc., and to be deposited in the State Treasury the day following receipt of moneys derived from such sources. Section 2a provides that the

first twenty thousand dollars of such fund is set aside to the credit of the general revenue fund as a reimbursement to the amount appropriated by Section 1, supra.

Section 1, Laws of Missouri, 1933, page 415, provides in part as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose for fund for which collected, * * * * *. The unexpended balance remaining in all such funds * * * * * * * * * * * shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer."

You state that, "The State Fair has heretofore paid out both its 'general revenue' and 'earned' appropriations through a Sedalia bank in which its State Fair Treasurer was located." The Legislature probably had this in mind when it wrote the present law, and intended to stop this practice.

From the foregoing, it is our opinion that you should file the State Fair accounts with the State Auditor and payment of same should be by state warrants drawn on the funds applicable to their payment.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

Trespass - Hunting and fishing on Lake of Ozarks.

September 16, 1933

9-20

FILED
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Mr. F. M. Brady,
Prosecuting Attorney of Benton Co.,
Warsaw, Missouri

Dear Sir:

We acknowledge your letter as follows:

"I would like to have your opinion on the following proposition."

Is it a violation of the law for a person to hunt or fish on lands along the Lake of the Ozarks on lands that are flooded part of the time by waters from the lake, but when lake is at lower stage is out of the water? This would be unenclosed lands along the lake shore where folks might fish in the lake or hunt ducks, but before the Dam was built was not covered by water from the river, and if so what section should a prosecution for such trespass be under.

Also would it be a violation of the law for a hunter or fisherman to go from main stream of Osage River as it was originally before Dam was built and lake formed out over lands that are now covered with lake water, or could the person owning the land under the water have such hunter or fisherman prosecuted for trespass, and if so under what section would the prosecution lie?

I may not have made myself clear as to the information I want, but I want to know how far the owner of lands along the Lake of the Ozarks can go to keep people from hunting and fishing along the shores of the lake and upon the overflowed lands as it is a question which is constantly up and I am not certain

if it is a violation of any law, unless it be under section 8312 R. S. 1929, which does not seem to cover these lands that are overflowed a part of the time and not cultivated or improved.

Your opinion will be greatly appreciated."

The section that you cite in your letter, namely, section 8312 R. S. 1929, which reads as follows,

"Every person who shall be found hunting with a gun or dog upon the enclosed improved or cultivated lands of another, or shall enter the same to catch or kill game of any kind without the consent of the owner or person in charge of such lands shall, on complaint of such owner or person in charge of such lands and upon conviction thereof, be fined not exceeding ten dollars."

in our opinion is the only statute relating to criminal trespassing which is available. Our statutes are full of sections relating to civil trespass but we find none other than section 8312, Supra, that would in anywise justify a prosecution under the facts contained in your letter.

I assume the electrical company which constructed the Bagnel Dam owns all of the real estate on either side of the shore line--if so, it would be private property. It may be the grant or authority for constructing the dam was given with reservations. I have not taken that into consideration, therefore treating the ownership simply as any other privately owned real estate, the section above would apply.

Yours very truly,

H. H. Bassett

Assistant Attorney General.

APPROVED

FILED
10

47

September 26, 1933.

10-2

Prosecuting Attorney, Livingston Co.

Township Clerks Fees:- Township Clerk is entitled to the fees set out in Section 12310 R.S. Mo. 1929 as amended Laws 1931, page 377 in addition to the $2.50 per day salary for services performed.

Sec 12310 Laws 31

Mr. Herbert M. Braden
Prosecuting Attorney
Chillicothe, Missouri.

Dear Mr. Braden:-

We acknowledge receipt of your letter of August 8, 1933, as follows:

> "I am writing you for an opinion as to whether or not a township clerk in counties under township organization, under section 12310 Missouri Revised Statutes for 1929 as amended, laws 31, page 377, is entitled to fees as set out in said section in addition to the $2.50 per day salary for services performed as such clerk, in preparing and issuing warrants ordered by the Board."

The courts of Missouri have never passed on this question, hence this opinion is merely an interpretation of the above mentioned section by this office. We are of the opinion that the above mentioned section provides that a township clerk is entitled to the fees mentioned therein in addition to the daily salary of $2.50 also mentioned therein. In the first place the "township clerk, as clerk" is specifically mentioned in the first lines of the section, among other township officers, as being entitled to the daily salary. This compensation is to be paid him for the regular and routine administration of his duties as clerk. The proviso clause following can only mean that the fees provided therein for the township clerk are to be in addition to the daily salary.

The words "and not per diem" contained in the first part of the proviso clause are there for the purpose of taking the fees provided therein out of any possible per diem classification. The reason for this is that double per diems are in general not favored by the courts. An annotation in 1 A.L.R. at

page 294 discusses this matter adverting to the following cases:

Wilson vs. Bleloch, 109 N.Y. Supp. 340;
Montgomery County vs. Bromley, 108 Ind. 158,

and others. It was the apparent intention of the Missouri legislature therefore to clarify, by the above words, any possible ambiguity of construction that might arise from the fact of two separate compensations being awarded to the township clerk.

Many states have statutes similar to our own and allow the township clerk fees for doing certain things and a per diem as well. Ross vs. Collins, 106 Ill. App. 396. In addition it has been held that a "per diem" is not a "fee". Seiler vs. State, 160 Ind. 605; State ex rel Tippecanoe County vs. Flynn, 161 Ind. 554; Comer vs. Morgan County, 32 Ind. App. 477. With this distinction in mind it is clear that the Missouri legislature intended to provide compensation for the township clerk in two ways. In the final analysis the legislature intended that the township clerk should receive the set salary of $2.50 for his services, and that in addition he should receive certain fees for the doing of certain things enumerated in the proviso clause of the section. To construe the section in any other way would tend to make the wording thereof seem equivocal.

Very truly yours,

Charles M. Howell, Jr.,
Assistant Attorney General.

Approved:

_____
Attorney General.

CITIES, TOWNS AND VILLAGES: **Under statute, cities, towns and villages are expressly prohibited from exacting license, taxes or fees from any farmer for the sale of produce raised by him when sold from his wagon.**

September 30, 1933.

10-3

FILED 10 48

Mr. J. C. Breshears,
Commissioner of Agriculture,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "The question bobs up, from time to time, as to the constitutional right of the farmer in Missouri to market or peddle the products of his farm or garden. Herewith are references to this question, as to Missouri and one other State. Enclosed is an old Missouri ruling, but we desire the opinion of our own present legal authority, the office of Attorney General Roy McKittrick, instead of quoting a predecessor.
>
> In short, what are the rights of the Missouri producer of farm products and livestock, as to marketing or peddling same?
>
> This is not a rush inquiry, and it may give way to questions of emergency character, temporarily, thanking you in advance. We need to have this on file, and may on occasion give it credited publicity, in case your office does not make it public."

Section 7179, R. S. Mo. 1929, provides as follows:

> "No incorporated city, town or village in this state shall have power to levy or collect any tax, license or fees from any farmer, or producer or producers, for the sale of produce raised by him, her or them, when sold from his, her or their wagon, cart or vehicle, or from any person or persons in the employ of such farmer or producer in any such city, town or village."

The word "produce" has been defined in the case of City of Higbee v. Burgin, 197 M. A. 682, 683, to mean as follows:

> "The word 'produce' may have a variety of meanings dependent upon the connection in which it is used. In reference to the produce of a farmer the court

of appeals of the District of Columbia said:

> 'But the common parlance of the county, and the common practice of the country, has been to consider all those things as farming products or agricultural products which has the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contra-distinguished from manufacturing or other industrial pursuits.'"

The above definition of "produce" includes all sorts of grain, vegetables and meats. It is immaterial whether the meat be in the form of unbutchered stock, or whether it be butchered and ready for sale to the consumer. In the case of City of Higbee v. Burgin above, the City of St. Louis sought to collect a license tax from the defendant for selling meat within the city limits. The court at page 684 says:

> "While the distinction between agricultural pursuits and those of an artisan or manufacturer is not an easy one in all cases, we cannot see why the killing and dressing by the farmer of fresh meat raised by him can be said to be any more the work of a manufacturer or an artisan, than the killing and dressing of poultry. The raising, killing and dressing of the latter has become one of the greatest industries of agricultural America. If instead of selling the sausage and spare-ribs of the hogs defendant had sold the lard rendered from their fat, could it be said that the lard was not 'farm produce?' Or would it do to say that when a farmer is making his butter and cheese he is engaged in the creamery business? We think not. Similar comparisons could be made ad infinitum. Whatever might have been said in the beginning as to the farmer being engaged in the pursuit of slaughtering, slaughter house operation or meat packing, when he butchered stock raised on his farm, such as the hogs involved in this case, the usages and practices of generations on American farms has in this day made such a practice one of agriculture or farming."

"We are unable to see how it can be said that fresh meats do not come within the definition of agricultural produce as that term is used in Section 10382 of the statutes."

Under Section 7179, quoted above, no city, town or village can levy or collect any license fees or tax from any farmer or producer. That Section is a prohibition by the State of Missouri to all cities, towns and villages. In St. Louis v. Bernard, 249 Mo. 51, l. c. 56, the court says:

"We think it is perfectly clear that the plaintiff city

> cannot by ordinance authorize the doing of any act which the general laws of the State have prohibited; and where the statutes of the State expressly restrict or limit the power of a city to legislate upon a given subject, such city cannot legally overstep the boundaries marked out for it by the General Assembly."

By reason of the foregoing decision, no city, town or village or Missouri shall be able to levy or collect any tax, license or fees from any farmer or producer for the sale of produce raised by him so long as Section 7179, R. S. Mo. 1929, is upon the statute books. Municipal corporations can only exact fees and license where their charter expressly provides. While Section 7179 is in existence it is a part of the municipal charter of every city, town and village. The situation thus existing is, therefore, that the charter of every city, town and village of this State contains an expressed prohibition against levying or collecting such tax.

We have certain statutes authorizing the exaction of license fees from peddlers. A farmer, however, in selling his own produce is not a peddler. In St. Louis v. Meyer, 185 Mo. 583, the question was whether or not the farmer was a peddler in selling produce from his farm. The court, in denying that the farmer is a peddler, at page 599 says:

> "The facts upon which this case was tried conceded that the defendant was a farmer, residing in St. Louis County, and that he simply loaded his wagon with products from his farm, and took them into the city of St. Louis for sale; that in disposing of his products, he went from place to place among the inhabitants of the city, offering them for sale and selling them.
>
> It will be observed that section 2097 or ordinance 19703 is directed against persons who carry on the business of a peddler or hawker; in other words, a license must be obtained by those persons who engage in the business of peddling or hawking. In order to subject the defendant to the penalties imposed by the ordinance, it must be manifest that his business was that of a peddler or hawker. This proposition is simply narrowed down to the question: Was the defendant a peddler or hawker, within the common and well-understood signification of those terms? We have reached the conclusion that he was not. The agreed statements of facts upon which this cause was submitted to the trial court leaves no doubt as to the character of business in which defendant was engaged. It was that of a farmer, and the mere fact that he went from place to place, similar to that of peddler or hawker, to dispose of the fruits of his business, by no means is sufficient to warrant the adding to his name as farmer that of peddler or hawker. The disposition of the products of his farm in the manner indicated by the facts

in evidence must be treated as a mere incident to his business of farming. The statute recognizes this distinction."

We do not mean, however, to give the opinion that every seller of produce is a farmer. If an individual sells produce which he himself has not produced, he may thereby become a merchant and be subject to license, taxes and fees. Nor do we think it is necessary that the farmer raise his live stock from birth in order that he may come within the protection of the statute exempting him from taxation. He may buy stock from another and add to its value by feeding and caring for it, and then when ready for market may butcher it and in selling the meat resulting therefrom, he is within the protection of the statute. He is no less a farmer because he acquires produce and in managing his farm adds to their value and sells the finished product. However, if he is in fact a butcher or conducts another business not exempted under the statute, the mere fact that he lives upon the farm would not exempt him from such tax. We have called your attention to these suggestions because before the individual can be exempted under Section 7179 he must be in fact a farmer engaged in the farming industry as generally understood and accepted. He cannot by the mere fact that he resides upon a farm bring himself within the favored class, if in fact he is carrying on the business of a peddler or hawker, butcher, etc.

It is therefore the opinion of this Department that a farmer cannot be taxed as a peddler or hawker; that if the farmer is actually engaged in the business of farming as is generally understood and accepted, that under Section 7179 above, he may not be required by any city, town or village to pay a license tax or fee for the sale of produce raised by him when sold from his or her wagon or cart. Your question is general and we believe the foregoing fully answers it. If, however, a particular situation should arise involving this question, we should be pleased to answer the particular question involved.

Very truly yours,

Frank W. Hayes
Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

COMMISSIONER OF AGRICULTURE:

Legislature did not appropriate funds out of which premiums for various kinds of automobile protection and protection on property can be paid.

October 5, 1933.

107

FILED
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49

Mr. J. C. Bresheare,
Commissioner of Agriculture,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your two letters in which you inquire as follows:

"I. Desirous of keeping within the full spirit and interpretation of the laws and appropriations, please give your opinion on the following questions:

1.- Is the State, i. e., the State Department of Agriculture, within its rights to insure its state-owned automobiles used in official field work?

To be more exact, please add to your general opinion the following supplementary questions, as to the legality under our 1933-34 appropriations and the State Department of Agriculture laws, as to payment of automobile insurance premiums along the following lines:

1a--Liability insurance,
1b--Property damage insurance,
1c--Collision insurance,
1d--Fire and tornado,
1e--Theft,
1f--Glass damage.

2. - If unwarranted at law under available appropriations, would it be equitable and right to (a) pay up premiums on unpaid policies to date and discontinue insurance, and (b) should policies already paid in advance be cancelled and refund of premiums in any such case applied for? This is not a large proposition, since we have only ten state-owned light cars.

The question of state-owned automobile insurance is a factor in government costs, and we desire to be right on this question. We have certain pending bills for automobile insurance, under our new law, but we shall hold same until we hear from you, and for same this is to thank you, in advance."

"II. Please permit the following request for an opinion, serving as a rule in relation to the general

matter as to the Department of Agriculture, now starting and seeking to get started rightly:

1st--Is the Department of Agriculture warranted in carrying fire and tornado insurance in equipment or buildings, for instance, (a) rather valuable chemical laboratory equipment in rented quarters on 3rd floor of old 1st National Bank building, or (b) buildings at State Fair, under present laws and appropriations?

2nd--If unwarranted at law under available appropriations, would it be suitable and right to (a) pay up premiums on unpaid policies to date and discontinue insurance, and (b) should policies already paid in advance be cancelled and refund of premiums in any such case applied for?

In passing, outside this request, permit the remark that Mr. Jewell Mayes and I are strongly convinced that the chemical laboratory is badly located and that it should soon be moved into the old postoffice building, saving rental expense and avoiding the present rather bad risk as to fire and storm."

In as much as both of your inquiries deal with the same subject matter and depend upon the same appropriation for solution, we shall answer them together. Article 10, Section 19 of the Constitution of Missouri provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Section 11421, R. S. Mo. 1929, provides as follows:

"No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, exceed the amount appropriated by law for that purpose."

In 36 Cyc. 895, it is said:

"Appropriation Acts specify the purposes for which the

> appropriation shall be used, and appropriations made for one purpose cannot be used for any other purpose."

Whether or not you may insure personal property and buildings which belong to the State and are under the jurisdiction and control of your Department depends on whether or not the Legislature has appropriated funds specifically providing for the payment of such items. In construing an appropriation measure the courts say that such appropriation must be strictly construed. In Meyers v. Kansas City, 18 S. W. (2d) 900, the court was considering an appropriation made by the Council of Kansas City and said at page 901:

> "Another general rule in the construction of statutes, applicable as well to municipal ordinances, is that acts of the character here under review are to be strictly construed. The limitation upon the use of the appropriation in proposition 8 is such, by reason of its terms, that the invoking of the general rule is not necessary."

The Legislature in Laws of Missouri 1933, page 65, Section 3a made an appropriation in the total amount of $21,250.00 for your Department. The appropriation is divided into four divisions: A. Personal Service, B. Additions, C. Repairs and Replacements, D. Operation. The only subdivision which, according to our judgment, could throw any light upon whether or not you have the right to take out the insurance in question is found in Section D, title "Operation," which is as follows:

> "General expenses, including communication, printing and binding, transportation of things, travel, stationery, office supplies, special material and supplies, and other general expense . . . . . $5,000.00."

We believe that the above Section is the only one under which such expenditures might possibly come. We are of the opinion, however, that this Section of the appropriation Act is not broad enough and specific enough to entitle you to take out insurance on the personal and real property in question, for the following reasons:

It is true, at the outset, that the Legislature used the term "general expense." Immediately after the use of this term, however, it said that such term would include various items and proceeded to enumerate such items. The term "general expenses" is a broad term and used by itself would have been broad enough to include all of the items enumerated in Section D. When the Legislature, however, followed the words "general expenses" by the enumeration of the expenses found in Section D, we believe that such enumeration limited and qualified the scope of the term "general expenses." If the Legislature had not intended to limit the term "general expenses" and to confine it to the enumerated items, then it would have been use-

less for the Legislature to have made such enumeration, because the term "general expenses" unrestricted would have been sufficiently broad to cover all of the items listed in Section D.

At the close of Section D appears the words "other general expenses." We do not believe that the words "other general expenses" found in this Section, are of any assistance in making the appropriation cover the questions of insurance. The general rule is that where general words are followed by particular words, the general words will be restricted and limited to the particular words used. This rule has been applied in the construction of appropriations. In State ex rel. v. Dierkes, 314 Mo. 578, the Supreme Court had for consideration an appropriation under the St. Louis charter. The words in that appropriation which the relator relied upon were; "other expenses of the House of Delegates." The court, in discussing the matter, said at page 591:

> "Now take either of the two appropriation ordinances in evidence, for they are both the same in words, except as to the last clause, we have no specific appropriation for this work or for this relator. Relator contends that the words 'other expenses of House of Delegates,' are sufficient to authorize the payment of this money out of the unexpended balance in that fund. The whole clause of the ordinance reads:
>
> 'Publishing proceedings, printing, stationery, office expenses, furniture, rent of telephone and other expenses of House of Delegates . . . . . $8,000.00.'
>
> To our mind the rule of ejusdem generis fully applies here. The term 'other expenses' means <u>expenses of the character theretofore mentioned in that clause of the appropriation act</u> and does not include an appropriation for work of the character performed by relator. To hold that it did include such would be to nullify the provisions of Section 14, Article 5, of the city charter, supra."

Following the above decision, therefore, we are of the opinion that money appropriated by Section D can only be used for the purposes enumerated in Section D, or for items by reason of the similarity of which can be said to come within the enumerated classes under the rule of ejusdem generis. We do not believe that premiums for insurance, whether it be fire, liability, theft or otherwise, is similar enough to the enumerated items to bring it within the provisions of the appropriation. It does not come within the classification "transportation of things, travel" or any of the enumerated items. "Transportation of things" means the expense of transporting property of the

State back and forth, and "travel" means the expense of traveling in the furtherance of the business of the State, including the expense of transportation, gasoline, oil, etc., as well as other items of travel. Whether or not the automobiles of your Department are insured has no connection with the transportation of things or travel. It may be that private enterprises, with a good business, might require that automobiles be insured against all of the contingencies contained in your letter. However, the State has not and does not always insure its personal and real property. The failure of the State to appropriate money for the purposes about which you inquire seems to indicate an intention in this instance that the State desires to carry its own insurance.

We are therefore of the opinion that the State has not appropriated funds out of which you may pay for the insuring of automobiles and other personal property or buildings. If we are correct in this view, then it would not be proper for you to pay premiums on unpaid policies because such premiums would not be properly chargeable to the appropriation in question. If the premiums have already been paid in advance out of this appropriation, we think it would be quite proper to cancel said policies and seek a refund of the premiums.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

DEPARTMENT OF AGRICULTURE: Employees entitled to what salary?

Dec 12 375 Laws 33
HB 649 p. 4 Laws 33

FILED
10

11-3

November 1, 1933

Mr. J. C. Breshears
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated August 31, 1933, was as follows:

> "Enclosed is a letter from former Dairy Commissioner E. G. Bennett, accompanied by a claim of salary and expenses for services rendered after July 23rd,1933.
>
> Does the State Department owe this, and if so, from what parts of what appropriation?"

The letter which you inclosed from Mr. E. G. Bennett reads as follows:

> "I am herewith handing you statement of amount for my time in awaiting the appointment of my successor, and expenses in taking case of State business as suggested by Governor Harris.
>
> My expenses, while in Jefferson City during this period, as you will note, are not included.
>
> You will, also, find enclosed application for cream buyers license from Mr. Homer Owen Auxvasse, Mo. with remittance of $2.00 in currency."

The claim for salary and expenses which you inclosed is as follows:

"THE STATE OF MISSOURI,
to E. G. Bennett, Dr.
To salary as Dairy Commissioner for the month ending the 24th day of July to August 10, 1933 at $2,500 per annum - - $120.96,payable out of; (salary for time spent in office waiting for commissioner of Agriculture to take over office.) Appropriation."

To this voucher was attached a monthly expense account signed by Mr. Bennett for a trip from

"Jefferson City, to Columbia, to Springfield, to Lebanon, and back to Jefferson City, which started on July 26 and ended on July 31, and which included his meals, lodging and traveling expenses at five cents per mile, in the total amount of $28.90."

It will be noted that the voucher which he presented for salary is for a salary as Dairy Commissioner, while the Laws of 1933, at page 171 abolished said office for the terms of said account, provide as follows:

"* * The intention of this act is to abolish the state bureau of dairying and the office of State Dairy Commissioner, and his assistants, and to transfer their duties to the Commissioner of Agriculture, and his assistants."

As Dairy Commissioner for the period of time claimed,Mr. Bennett is entitled to nothing as the above act was approved on March 22, 1933, without an emergency clause, and by virtue of the law became effective July 24, 1933, on which date the office of Dairy Commissioner with all of the emoluments of said office, ceased to exist.

It will be noted that in Mr. Bennett's letter he states that Governor Harris suggested that he stay in the office of the Commissioner of Agriculture until the appointment of his successor.

If this be a fact then Governor Harris must have appointed him as an assistant in your office for the determinate period which

he is claiming for, and it may be that Governor Harris stipulated with him the salary which he was to receive during that period. If such be the case he was functioning not in the office as Dairy Commissioner but as an assistant in the State Department of Agriculture and would be entitled to a reasonable amount for his services or the contractual amount that Governor Harris agreed to pay him.

His expense account during that period of time if he was regularly employed, should be considered and approved as the expense account of any other assistant is considered and approved in your Department. On the other hand, if he was not employed by Governor Harris and merely stayed around the office after his office expired for no good reason at all, he is entitled to nothing for salary and nothing for expenses.

The Laws of 1933, page 65, Section 4, provide as follows:

"There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of Five thousand eight hundred thirty-three dollars and thirty-one cents ($5,833.31), to pay the salaries, wages and per diem of the officers and employees and other expenses of the bureau of dairying of the state board of agriculture, for the period beginning January 1, 1933, and ending not later than July 31, 1933, as follows:

A. Personal service:
For salaries of state dairy commissioner and other necessary employees. $3,983.31

D. Operation:
General expense, including communication, printing and binding, transportation of things, travel, stationery, office supplies and other general expenses. 1,850.00

Total bureau of dairying, out of revenue. . . . . $5,833.31 "

If you determine that he was regularly employed then his salary should have been deducted from the $3,983.31 appropriation for salaries above set out and his expenses should be deducted from the $1,850.00 appropriation above set out.

If Governor Harris appointed him as he claims but with no stipulation as to salary, then he would be entitled to a reasonable amount for his services and what is a reasonable amount would have to be determined by the Commissioner of Agriculture after considering the value of the services which he rendered during this period of time.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General,

APPROVED:

_____

ROY McKITTRICK
Attorney General.

WOS:LC

TAXATION AND REVENUE: Liability of improvements on real estate omitted from assessment in previous year or years to assessment and taxation.

November 2, 1933.

FILED
10

Honorable William H. Bray,
County Counselor,
Clayton, Missouri.

Dear Sir:

Your letter of September 18, 1933 has been received which letter enclosed a request for an opinion from Honorable Martin L. Neaf, Assessor of St. Louis County as follows:

> "A building is on a certain tract of land; the land has been assessed for taxation and taxes paid, including the year 1932. However, the building upon said land has not been assessed although the building was erected 10 or more years ago. Can this building be assessed for the years omitted? How would assessment be made, for what years and what notice if any given to the owner?"

I.

TAXABILITY

The collection of taxes for back years during which any real property has been omitted from assessment and taxation is provided for by Revised Statutes of Missouri of 1929, Sections 9788 and 9789, which are as follows:

> "Sec. 9788. Assessment of property omitted.--If the assessor discovers any real property, presumed to be subject to taxation, which has not been returned to him by the clerk, he shall assess such property and enter the same on the assessment list. And if, upon the return of such list to the clerk, it shall appear that any such real property has not been returned by the auditor, it shall be the duty of the clerk to advise the auditor of the facts, describing the property so returned by the assessor, and the auditor shall ascertain the true condition of such real property, and advise the said clerk thereof, who shall correct the records of his office in accordance with the facts in the case."

> "Sec. 9789. Lands or lots not previously assessed.--If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court,

> with all arrearages of tax which ought to have been assessed and paid in former years charged thereon."

In speaking of such statutes the Supreme Court of Missouri in the case of State ex rel Hudson v. Carr, 178 Mo. 229, 77 S. W. 543 (1903), said:

> "If the assessor discovers other property of the taxpayer which he failed to list, or which was omitted from taxation, it is his duty to assess it, even if it is discovered years afterwards." (178 Mo. 233, 234.)

This statement of the court was repeated with approval in State ex rel Teare v. Dungan, 265 Mo. 352, 367, 177 S. W. 604 (1915) and in the case of Cape Girardeau v. Buehrmann, 148 Mo. 198, 49 S. W. 985 (1899) the court remarked "No doubt if specific real property is overlooked or omitted it can be subsequently assessed for the previous omitted years * * *" (148 Mo. 203).

While Revised Statutes of Missouri Section 9810 might seem to apply to the situation under discussion it was held in the case of State ex rel Ford Motor Co. v. Gehner, 325 Mo. 24, 27 S. W. 2d 1 (1930) that such section only applies to a failure to assess the entire property in the county and does not apply to individual omissions of property from assessment.

> "Section 12819 provides a scheme for subsequent assessment and collection of taxes where 'there has been a failure to assess the property in any county for any year or years.' This section covers the situation where the entire assessment for the county has been omitted for any year or the assessment sought to be made has been held void for some reason. The section has no application to the omission of assessable personal property from the return of an individual taxpayer." (27 S. W. 2d, 4). (Sec.12819 of 1919 is Sec. 9810 of 1929.)

There is little doubt that the term "real property" in Section 9788 above and the terms "tract of land" and "town lot" in Section 9789 above would include a building, assuming such building to be of a permanent nature. By Revised Statutes of 1929, Section 655 which fixes certain rules of construction for statutes it is provided that "the terms 'real property' or 'premises' or 'real estate' or 'lands' shall be deemed to be coextensive with lands, tenements and hereditaments and the latter three terms are defined in the case of Orchard v. Wright-Dalton-Bell Anchor Store Co., 225 Mo. 414, 125 S. W. 486 by a quotation from Chancellor Kent as follows:

> "Things real consist of lands, tenements and hereditaments. The last word is almost as comprehensive as property, for it means anything capable of being inherited, be it corporeal, incorporeal, real, personal or mixed. The term real estate means an estate in fee or for life in land, and does not comprehend terms for years or any interest short of a freehold. A tenement comprises everything which may be holden, so as to create a tenancy, in the feudal sense of the word, and no doubt it includes things incorporate, though they do not lie

in tenure." (225 Mo. 440).

Likewise, in Revised Statutes of Missouri of 1929, Section 9977, which is a part of Chapter 59 entitled "Taxation and Revenue" it is provided as follows:

> "The term 'real property', 'real estate', 'land' or 'lot', whenever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon * * *."

Furthermore, the fact that taxes have been assessed against and collected from the persons whose property will now be charged with the taxes in question for the years for which such charges are about to be made would be no defense to the assessment and collection of the taxes in question. This question was presented in the case of State ex rel Steel v. Phillips, 137 Mo. 259, 38 S. W. 931 (1897) wherein defendant in a suit for such taxes raised the point as follows:

> "And for further answer herein defendant says that he is not indebted to the plaintiff in any sum whatever, for the reason that he called upon the collector for the several years he is supposed to be charged with the delinquencies and paid all taxes that were charged against him, and took receipts therefor, and now pleads these facts as well as said payments in bar of any further tax, and again prays for judgment." (137 Mo. 263)

but the court decided against this contention and held that the taxes must be paid.

II.

LIMITATIONS

The statute of limitations on taxes against property previously omitted from assessment does not begin until the assessment is made and the tax based on such assessment becomes delinquent which would be computed just as if the assessment were being made for the current year instead of for a back year.

> "The suit is not barred by the statute of limitations. No right of action accrued until the taxes were assessed and had become delinquent. The assessment was made in 1896, the taxes were therefore not delinquent until January, 1897. The five years' limitation expired January 1, 1902. The suit was brought December 16, 1901.
>
> The case of State ex rel. v. Fullerton, above referred to, was a suit under this statute to collect taxes on land that

had been omitted from the assessor's books in former years, just as was the defendant's land in this case, and the court in that case held that the statute of limitations did not begin to run during the years the land was omitted from the assessor's books and not until after the discovery of the omission and the assessment of the taxes as required by section 7562, Revised Statutes 1889, and until they became delinquent after that assessment. And so we now hold." (State ex rel Hammer v. Vogelsang, 183 Mo. 17, 24, 81 S. W. 1087 (1904).

To the same effect see State ex rel Lehner v. Fullerton, 143 Mo. 682, 44 S. W. 741 (1898).

It is provided in Revised Statutes of Missouri Section 9791 that "no assessment of property or charges for taxes thereon shall be considered illegal * * * on account of the assessments not being made or completed within the time required by law."

For the reasons above in the absence of exceptional circumstances an assessment could be made on property previously omitted from taxation for any past year or series of years, absent strong circumstances which might work an estoppel.

III.

The procedure to be followed would as appears from the foregoing authorities be the same as if the tax were being assessed for the current year. Notice should be given as if the person against whose property the tax is to be charged had failed to return such property for the current year and if notice had already been served on a taxpayer for him to make out his tax statement and he had failed to make any statement the assessor could make the assessment in accordance with Revised Statutes of Missouri Section 9760, or if a return had been made which failed to include this property the assessor should likewise make out the assessment list and book.

In conclusion, it is our opinion that real property which has not been assessed and taxed for any previous year or years is subject to taxation and that the method of assessing and collecting taxes on such property is provided for by Chapter 59 of the Revised Statutes of Missouri Article 2, and especially by Sections 9788 and 9789.

Yours very truly,
EDWARD H. MILLER,

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

SCHOOL DISTRICTS:-School District not liable for negligence in operation
TORTS: tion of bus hired by it to transport athletic teams; school superintendent, as agent for school board, would not be liable.

11456

11-10

FILED
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58

November 9, 1933.

Mr. B. W. Bradley, Superintendent
Peculiar Consolidated Schools,
Peculiar, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I should like to know:

(1) Can a school board be held liable if they hire a school bus, which is insured and approved by the state, to haul basket ball teams to and from games;

(2) Can a Superintendent of Schools be held liable if he hires a school bus, which is insured and approved by the state, to haul basket ball teams to and from games?

This school bus is used every day by our adjoining school district to bring their students to and from school."

I

SCHOOL BOARD NOT LIABLE FOR NEGLIGENCE IN THE OPERATION OF BUS HIRED BY IT.

In Dick v. Board of Education, 238 S. W. 1073, the Supreme Court says:

"There can be no doubt that when the state establishes and provides for the maintenance, operation, and management of public schools for the education of all children alike, at the expense of the public, it is acting in pursuance of a governmental policy founded solely in the public good. When these duties are, as in this case (section 11456, R. S. Mo. 1919), confided by law to a quasi corporation created for that purpose, such corporation is charged with the use of public funds devoted by law to that object. To that extent it is simply an instrument of the state government, and is entitled to no pecuniary profit from its services, which are devoted solely to the public.

> We discussed this principle in the light of numerous authorities cited in our opinion, in Zummo v. Kansas City, 285 Mo. 222, 225 S. W. 934, and held, in substance, that, while a municipal corporation in this state is generally liable for damages resulting from its negligence in the construction and maintenance of the public highways within its limits because the power and duty of the municipality in that respect is conferred upon it largely for the pecuniary profit of the owner and dedicator of the land to such uses and his successors as members of the corporation, there was no such ground for liability in the operation of a hospital under a special provision of its charter, as well as a general power relating to the public health. That the same principle applies to the liability for negligence of the quasi corporate instrumentalities charged by law with duties respecting public education has, since this appeal was taken, been upon full consideration decided by this court in Division No. 2 in the case of Cochran v. Wilson et al, 229 S. W. 1050. This leaves nothing further to be said. The judgment of the circuit court for the city of St. Louis if therefore affirmed."

In the Dick case above a school board in the district was held not to be liable for injury to a student resulting from the operation of its motor truck.

In Cochran v. Wilson, 229 S. W. 1050, referred to above, it is said at page 1053:

> "These conclusions are sufficiently indicative of the nature of school districts to authorize their classification as instrumentalities engaged in the performance of governmental functions, and hence subject to the same rules as to nonliability for negligence as other subdivisions of the state charged with the performance of like duties."

In recent years the trend of public opinion has been such as to conclusively make recreation of the students a part of the functions of public education. Athletics are a very necessary part of that division of public education, and football and basketball teams of institutions are recognized as a proper field of recreation. When the school district therefore is transporting its teams, we believe that it may be safely said that they are engaged in carrying out one of the functions of education, as is today generally recognized, and such acts would be acts done by it in its proper public and corporate capacity. Such being true, we are of the opinion that the school board would not be liable for negligence in the operation of a bus which they hired to transport their teams.

II.

SUPERINTENDENT OF SCHOOLS WOULD NOT BE PERSONALLY LIABLE

FOR THE HIRING OF BUS TO TRANSPORT TEAMS.

Much has been said by the courts as to the liability of agents for non-feasance, misfeasance and malfeasance. The rule which is applicable to this case we believe is expressed in Canfield v. Railroad Company, 59 M. A. 354, l. c. 364, where it is said:

> "No action will ordinarily lie against an agent for the misfeasance, or for the negligence of those whom he has retained for the service of his principal by his consent or authority, any more than it will lie against a servant who hires laborers for his master at his request, for their acts; unless, indeed, in either case, the particular acts which occasion the damage are done by the orders or directions of such agent or servant. The action, underother circumstances, must be brought either against the principal or against the immediate actors in the wrong."

If you, as Superintendent, employ a bus to transport teams of your school, you are acting as the agent or servant of the school board or district of which you are superintendent. These acts are done by you in your official capacity as school Superintendent and as agent for your principal, the school board. The bus is hired by you for and on behalf of your principal, the school board, and under the above case the hiring of a bus for and on behalf of the board would not create any personal liability upon you because your act in so hiring is the act of your principal. This principle is well-recognized as applicable to private corporations as well, and in the Canfield case above the Superintendent of the Railroad Company was held not liable because he had employed, for and on behalf of the corporation, the individuals who were guilty of the wrong.

It is therefore the opinion of this Department that if you, as Superintendent of Schools, hire a bus for and on behalf of the school board, that you would not be personally liable for the negligence of the driver of the bus.

CONCLUSION.

It is therefore the opinion of this Department that the school board would not be personally liable for the negligent operation by the driver of the bus which they had hired to transport their athletic teams, and that the Superintendent of Schools, acting for and on behalf of the school board, would not be personally liable for the negligent operation of the bus hired by him to transport athletic teams.

Very truly yours,

Stanley W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

CORONERS: The county in which the body is found is liable for the cost of the inquest, and not the county where the felony is committed.

11-23

November 13, 1933.

FILED
10

Hon. Herbert M. Braden,
Prosecuting Attorney,
Livingston County,
Chillicothe, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 28, 1933, which is as follows:

> "I am writing you for an opinion as to where the costs are chargeable in a Coroner's Inquest case, which inquest is held in one county and the finding of the jury was that the deceased came to his death by a felony committed in an adjoining county other than the one in which deceased died, and the inquest held, where prosecution is instituted in the adjoining county for the homicide."

I.

The county in which the body is found is liable for the cost of the inquest, and not the county where the felony is committed.

There is no statute covering the costs in a situation such as your letter presents. There are, however, several statutes which bear indirectly on this question. Section 11612, R.S. Mo. 1929 is as follows:

> "Every coroner, so soon as he shall be notified of the dead body of any person supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township, where the dead body is found, requiring him forthwith to summon a jury of six

> good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Section 11608, R.S. Mo. 1929 appears to be definite to the extent that we believe it answers your question, same being as follows:

> "A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

The expression "where the body of any person coming to his death shall be discovered in his county" appears to place the liability on the county where the body is found, regardless of how or where the cause of the death of the deceased took place.

Section 11627, R.S. Mo. 1929 refers to floating dead bodies, and is as follows:

> "If a dead body be floating in the river, the coroner may, in his discretion, pay to some person for bringing it to the shore a sum not exceeding one dollar, which shall also be allowed to him by the court."

We quote the above section for the probative force it might have on your question. By way of argument under this section, the body may remain in a stream for days and even months and float through numerous localities, counties and states, and if found and taken from the stream, the county in which the body is found will be liable for the costs of the inquest.

Applying the above argument to the facts as stated in your letter, the felony may have been committed in the adjoining county or any other county, but the words of the statute "where the body of any person coming to his death shall be discovered in his county" places no such restriction; in other words, the venue of the crime is not necessarily the venue of the coroner's inquest. A coroner's inquest is no part of a prosecution, and is separate and distinct from the same.

CONCLUSION

The words of the statute are to be interpreted literally, and if a person receive a mortal wound (feloniously) and then as a result of the wound be taken to a hospital in an adjoining county, and death ensue, the county wherein the mortal wound be received should hold the inquest and the costs be adjudged against said county.

It is therefore the opinion of this department that the county in which the deceased's body is found, attended by violence or casualty, should be liable for the costs.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

MARSHALL OF SUPREME COURT: Not duty of Marshall, when criminal case is dismissed to carry out judgment; it is the duty of the local sheriff to convey the prisoner to the penitentiary or carry out the judgment of the court.

12-11 Acc 3749 RSMo 1929

December 5, 1933.

FILED
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62

Hon. Herbert M. Braden,
Prosecuting Attorney,
Livingston County,
Chillicothe, Missouri.

Dear Mr. Braden:

This department acknowledges receipt of your letter of November 28 relative to Case #3611, which was recently dismissed in the Supreme Court. Your letter is as follows:

> "Please advise me by return mail whether or not the Marshall of the Supreme Court will attend to the apprehension and commitment of E.B. Hane, whose appeal to the Supreme Court, Case No. 3611 M D, was dismissed by the Supreme Court on the 28th day of October, 1933, for failure to perfect the appeal within a year.
>
> I can find nothing in the Statutes touching this point, and it just occurred to me that it might be the duty of the Sheriff to attend to this, and if so, should like to know about it at once, so he can be taken to the Missouri Penitentiary, or his bond forfeited if he does not surrender himself, as he has left this county."

You are correct in stating that there is no statute to guide you in a situation such as you present. Section 3749, R.S. Mo. 1929 is as follows:

> "In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the supreme court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the supreme court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary."

This section is very plain as to the duty of the marshall when a case is affirmed, and as the office of marshall is purely a creature of the statute and his duties are defined therein, he cannot act beyond his duties as prescribed by the statute.

The appeal having been dismissed, a mandate will be mailed to your Circuit Clerk showing that said appeal has been dismissed, and as a result, the Circuit Court of Livingston County again acquires jurisdiction, and the defendant is in the same position as if no appeal had been taken. Therefore, it devolves upon the local court of your county to carry out the judgment. As was said in the case of State ex rel. v. Broaddus, 234 Mo.358, l.c. 367:

> "The cause was before the court of appeals on a writ of error and when it affirmed the judgment and transmitted its mandate to the trial court, the cause was no longer before it, and any further action in the enforcement of the judgment must necessarily have been exercised by the latter court."

There are several cases holding that in a misdemeanor case, when the same is affirmed, the sheriff and not the marshall executes the judgment of the trial court.

CONCLUSION

We are therefore of the opinion that when a criminal case is dismissed, either at the option of the defendant or for failure to perfect the appeal, it is the duty of the local sheriff to convey the prisoner, in case of a felony, to the penitentiary or to carry out the judgment of the court.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

AGRICULTURE - STATE BOARD - ICE CREAM MANUFACTURERS - WHOLESALE AND RETAIL manufacturers of ice cream required to have permit to manufacture for sale at reail.

Sec 13069-71 Laws 33

12-11

December 5, 1933

FILED
10
63

Honorable J. C. Breshears
Commissioner Department of Agriculture
Jefferson City, Missouri

Dear Mr. Breshears:

This Department acknowledges receipt of your letter dated October 21, 1933, as follows:

> "We kindly ask your opinion on Missouri Ice-Cream Law, pertaining to the following question:
>
> Would an ice-cream manufacturer who has a permit to manufacture ice-cream for wholesale, and in addition to his wholesale trade has some retail trade, be required to have a permit for retail? "

Section 13069 Laws Missouri 1933, page 253, provides:

> "After the taking effect of this article it shall be unlawful to make, manufacture, or in any manner produce any ice cream, without first obtaining a permit from the Commissioner of agriculture as in this article required. This article shall not be construed to prohibit the resale of ice cream by persons purchasing the same from any lawful holder of such permit, or to prohibit the sale of ice cream by persons purchasing the same from any manufacturer in any other state, whose factory, plant, building, premises, equipment and method of

conducting business, conforms to the schedule adopted under authority of this article for inspecting and grading ice cream factories, plants, buildings, premises, equipment and method of conducting business. Provided, however, that all permits for the manufacture of ice cream heretofore issued by authority of the laws of this state shall, unless sooner revoked by authority of law, be valid, for the period for which issued."

Section 13071 Laws Missouri 1933, page 254, reads:

"Each manufacturer of ice cream in cities or towns in this state which now have or may hereafter have a population of five thousand or over who manufacture ice cream for sale at wholesale shall pay an annual fee of one hundred dollars for a permit to conduct his business, and each manufacturer of ice cream in cities or towns in this state which now or may hereafter have a population of five thousand or over who manufacture ice cream for sale at retail shall pay an annual fee of five dollars for a permit to conduct his business. Each manufacturer of ice cream in cities or towns of less than five thousand and more than two thousand population and in any suburban or rural part of the state of Missouri who manufacture ice cream for sale at wholesale shall pay an annual fee of forty dollars and in cities or towns of a population of two thousand and less twenty dollars for a permit to conduct his business and each manufacturer of ice cream in cities or towns of less than five thousand population and in any suburban or rural part of the state of Missouri who manufacture ice cream for sale at retail shall pay an annual fee of three dollars for a permit to conduct his business; such fees shall be paid into the state treasury, to the credit of the general revenue fund of the state. For the purpose of this article, the term 'wholesale manufacture' shall include every manufacturer of ice cream who sells at wholesale for resale, and the term 'retail manufacture' shall include every manufacturer who

manufactures and sells ice cream at retail: Provided, that nothing in this article contained shall be so construed as to require a permit to authorize persons or committees not otherwise engaged in the manufacture of ice cream, to manufacture and make ice cream for their own use or for the purpose of sale at picnics, church socials, or other entertainments of like character. All manufacturers of ice cream shall be subject to inspection by the commissioner of agriculture or his inspectors during all reasonable hours, or any other officers under any law now or hereafter in force in this state."

Section 13069, above quoted, makes it unlawful to make, manufacture or produce ice cream without first obtaining a permit so to do.

Section 13071, above quoted, may be subdivided or analyzed as follows:

1. (a) Manufacturers of ice cream in cities or towns in this state which now have or may hereafter have a population of 5,000 or over, who manufactures ice cream for sale at wholesale shall pay an annual fee of $100.00 for a permit to manufacture ice cream at wholesale.

(b) Each manufacturer of ice cream in the city or towns in this state which have or may hereafter have a population of 5,000 or over who manufactures ice cream for sale at retail shall pay an annual fee of $5.00 for a permit to manufacture ice cream for sale at retail.

2. (a) Each manufacturer of ice cream in cities or towns of less than 5,000 and more than 2,000 population, and also each manufacturer of ice cream in any suburban or rural part of the state of Missouri who manufactures such ice cream for sale at wholesale shall pay an annual fee of $40.00 for a permit to manufacture ice cream for sale at wholesale.

(b) Each manufacturer of ice cream in cities or towns of a population of 2,000 and less, $20.00 for a permit to conduct the business of manufacturing ice cream.

(c) Each manufacturer of ice cream in cities or towns of less than 5,000 population and in any suburban or rural part of the state of Missouri, who manufactures ice cream for sale at retail shall pay an annual fee of $3.00 for a permit to manufacture ice cream for sale at retail.

3. Section 13071, as to that part referred to in 2-(b) above, provides:

"* * * and in cities or towns of a population of 2,000 and less $20.00 for a permit to conduct his business* * *".

It is clear that the section requires $100.00 for a permit to manufacture ice cream for sale at wholesale in cities or towns having a population of 5,000 or over that number.

It is also clear that manufacturers of ice cream for sale at retail in cities or towns in this state having a population of 5,000 or over must pay an annual fee of $5.00 for a permit to conduct such retail business.

Manufacturers of ice cream for sale at wholesale in cities or towns of less than 5,000 and more than 2,000 population and manufacturers in any suburban or rural part of the state, are required to pay an annual fee of $40.00 to conduct the manufacture of ice cream at wholesale. Then follows that part of the section last above quoted but it will be noted that it is not stated whether the permit for which $20.00 is to be paid is a permit to manufacture for sale at wholesale or retail, but the manufacture of ice cream for sale at wholesale is undoubtedly intended to be covered by this part of the section last above quoted, because the section refers to manufacturers of ice cream in cities or towns of less than 5,000 and more than 2,000 population and in any suburban or rural part of the state who manufactures for sale at wholesale shall pay a fee of $40.00. Both provisions being construed together with that part of the section covering cities having a population of 5,000 or over, would include the entire state. Following that part of section

13071 last above quoted, it is provided that each manufacturer of ice cream for sale at retail in cities or towns of less than 5,000 population, and manufacturers for sale at retail in any suburban or rural part of the state shall pay an annual fee of $3.00 for a permit to manufacture for sale at retail, so that by each of the separate provisions of Section 13071 every manufacturer of ice cream for sale at wholesale in this state as well as every manufacturer of ice cream for sale at retail in this state, is required to have a separate permit to conduct the manufacture of ice cream at wholesale and the manufacture of ice cream at retail.

We are of the opinion that an ice cream manufacturer who has a permit to manufacture ice cream for wholesale is also required to have a permit to manufacture ice cream for sale at retail if such manufacturer does, in fact, manufacture ice cream for sale at retail.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

IN RE: Public Service Commission--

Authority over taxicabs. Sec. 5264 and 5265.
Laws of 1931, p. 304.

APR 10 1933

FILED
11

Mr. Geo. D. Brownfield,
Prosecuting Attorney,
Boonville, Missouri.

Dear Mr. Brownfield:-

I acknowledge receipt of your letter of March 29th wherein you request an opinion as follows:

> " Will you please advise me whether or not the provisions of the Public Service Commission law applies to taxicab drivers who run a motor vehicle with the carrying capacity not to exceed five persons; that is, whether or not such owners of taxicabs have to have a permit granted by the Public Service Commission in order to operate same more than one mile beyond the corporate limits. "

In Article 8 of Chapter 33 Revised Statutes of Missouri 1929 we find the law governing the authority of the Public Service Commission over motor vehicles operated over public highways. This Article was repealed in 1931 and a new Article enacted as set forth in pages 304 to 316, Laws of 1931.

In paragraph "d" of Section 5264, we find the term "taxicab" defined as follows:

> "(d) The term "taxicab", when used in this act, shall mean every motor vehicle designated and/or constructed to accomodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the principal operations of which taxicabs are fre confined to the area within the corporate limits of cities of the state and suburban territory as herein defined."

The exceptions to the operations of the act are set out in Section 5265. The pertinent parts of this Section are as follows:

> "SEC. 5265.EXEMPTIONS--POLICE CONTROL OVER HIGHWAYS.--The provisions of this act shall not apply to any * * * taxicab, as herein defined; * * *."

It is therefore apparent that so long as the taxicabs under consideration operate principally within the corporate limits of Boonville and within one mile beyond said corporate limits, that they would not be required to have a permit granted by the Public Service Commission. The question then arises as to what interpretation is to be placed upon the phrase "principal operations."

Principal has been defined in the case of Kelty v. Burgess, 115 Pac. 583; 84 Kans.678, as being

> "* * the word 'principal' the main, chief, leading, highest in value, character or importance, most considerable or important."

It is defined in Corpus Juris at Vol. 48, p. 1349, as follows:

> "Chief; highest in rank, authority, character, importance or degree; leading; main; most considerable or important."

The definition as above given from Corpus Juris is practically identical to that given in Webster's.

Further observing the wording of the statute, it is apparent that principal operations refer to the taxicab and not necessarily to the scope or type of business done by the owner of the taxicab or taxicab company.

The extent of the operation of a taxicab would logically and necessarily be determined by the mileage traveled and it would follow that if the largest amount of miles or the most considerable part of business done were traveled or done by the taxicab or taxicab company in the limits of Boonville or the suburban territory as described in Sec. 5264, that such motor vehicle would not be subject to the regulations of the Public Service Commission.

It is therefore the opinion of this office that so long as the taxicabs referred to in your request are operated chiefly within

the territorial limits of Boonville and the suburban territory , as defined in the act, that such taxicabs are not subject to the control of the Public Service Commission.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW/mh

INCORPORATION of loan and investment companies can include only one purpose.

May 13, 1933.

FILED
11

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Mo.

Attention: Mr. Neal J. Ross
Corporation Supervisor

Dear Sir:

Your request for an opinion dated May 5th, 1933, is at hand and is in words and figures as follows:

> "A company has made application for incorporation under Articles 7 and 8, Chapter 32, R. S. Mo. 1929, relating to business and manufacturing companies, and loan and investment companies. We understand, of course, that the fee where the capital stock is $50,000, or less, is $50.00 for the incorporation in each case. Section 4985, where a corporation has been organized under the business and manufacturing chapter by filing authenticated copy of a resolution passed by a majority of the stockholders of said corporation and paying a $50.00 fee may be authorized to do business under the loan and investment company Article 8.
>
> The question that is confronting us is whether or not they can incorporate one company under both articles for one fee of $50.00. We have come to the conclusion that they may probably be joined. However, we may not be right about that. Please give us your opinion at any early date as we are holding up an incorporation for this purpose."

Section 4980, R. S. Mo. 1929, of Chap. 32, Art. 8, provides as follows:

> "CORPORATIONS MAY BE ORGANIZED, HOW.--Corporations may be organized under and by virtue of this

article in the same manner as manufacturing and business corporations, under and by virtue of article 7 of chapter 32 R. S. 1929, except as otherwise herein provided."

In Wilder's S S Co. v. Low, 112 Fed. 161 l. c. 165, the United States Supreme Court said:

"Besides, the phrase 'in the same manner' has a well understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means by similar proceedings, as far as said proceedings are applicable to the subject matter."

Then again, in State v. Cook, 14 S. W. 996 l. c. 998, 78 Texas 408; Brown v. O'Connell, 36 Conn. 447; Wells v. Bain 75 Pa. St. 54; the phrase "in the same manner" was held to mean "by the same proceedings so far as applicable to the subject matter".

The phrase, "in the same manner as manufacturing and business corporations" in Section 4980 above set out, interpreted in the light of adjudicated cases above set out (there being no Missouri authority) means by the same process of organization as manufacturing and business corporations are organized, and does not mean that said corporations can be organized to include the same purposes as described in Art. 7, Chap. 32, R. S. Mo. 1929, as the purposes of manufacturing and business corporations.

The fact that the Legislature has established the method of organization by adopting an already workable procedure established in the provisions of article 7 and then proceeding in each succeeding section of said article 8 to define the powers and duties of loan and investment companies so organized, indicates that said purpose of incorporation was not intended to be joined with the other legitimate purposes of incorporation allowed under article 7. The fact that the Legislature provided a $50.00 fee, taking no consideration of the amount of capital stock in establishing said fee, would also indicate that loan and investment corporations were not intended to be joined with manufacturing and business corporations. It would be unreasonable to construe the provisions of article 7 otherwise.

It follows, then, as the opinion of this office that stock holders cannot incorporate a loan and investment company

in conjunction with a manufacturing and business company, but each must be incorporated as separate entities, and each entity must pay its individual incorporation fee as required by law.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:
ROY McKITTRICK
Attorney-General.

WOS:EG

Revocation of commutation of penitentiary sentence restores original sentence to penitentiary.

Sec 8351 RS Mo 1929.

PENITENTIARY SENTENCE:

May 20, 1933.

FILED

23

Mr. George D. Bryant,
Pardon and Parole Commissioner,
Jefferson City, Missouri.

Dear Mr. Bryant:

This Department acknowledges receipt of your letter dated May 13, 1933, as follows:

"Will you kindly render us an opinion on the following question?

We have now confined in the Missouri State Penitentiary a young man who was originally sentenced by the Circuit Court of Jackson County, Missouri for the crime of robbery, first and his punishment assessed therefor, by the Court at imprisonment in the State Penitentiary for a term of twenty-five years from March 11, 1927; at the same term of Court for good cause shown, said sentence was by the Court commuted to ten years in the Missouri Reformatory for Boys at Boonville, Missouri, and said defendant committed to the Missouri Reformatory for Boys at Boonville, Missouri, March 17, 1927.

This young man escaped from the Reformatory November 18, 1927 and was apprehended and returned to the Reformatory July 1, 1931, at which time the commutation was revoked by the Governor, and by reason of the escape, he was transferred to the State Penitentiary to serve out the remainder of his sentence.

Question? Under the law is this to be treated as a twenty-five year or a ten year sentence?

The Board will appreciate it very much if you will let us have an opinion on this subject."

Section 8351, R. S. Mo. 1929, provides as follows:

"The Governor shall have power to commute the punish-

ment of any person under twenty-one years of age who may heretofore have been, or may hereafter be sentenced to the penitentiary, that he may deem suitable to be sent to the Missouri Reformatory, to commitment in said reformatory, for such term as he may think proper, not exceeding the time for which said person may have been or may be sentended to the penitentiary. If any person between the ages of seventeen and twenty-one years who shall have been sentenced to confinement in the penitentiary, and whose punishment shall have been thereafter commuted by the governor, or by any court of criminal jurisdiction, as heretofore provided in this chapter, to confinement in the reformatory, shall be found to be incorrigible and not amenable to reformation by reason of the opportunities and advantages afforded him in such reformatory, the governor may annul, cancel and revoke the commutation granted such person and order and direct the said board to transfer such persons to the state penitentiary where the said board shall confine him until he shall have served the remainder of the sentence in accordance with the terms of the original judgment against him which had not been served upon the date of the commutation of said sentence to confinement in such reformatory."

This convict was sentenced to twenty-five years in the penitentiary and his sentence was commuted by the criminal court having jurisdiction over it to a ten year sentence in the Reformatory. Under the above Section, the governor may revoke the commutation made by the criminal court for the reasons named in the Section and when the commutation is revoked, according to said Section, the original judgment must be carried out.

It is, therefore, the opinion of this Department that after the revocation of the commutation by the governor, that the original judgment of twenty-five years in the penitentiary again became operative, and that this convict should be held in the penitentiary under the original judgment of twenty-five years. Under this Section of the Statutes when the governor revoked the commutation to the reformatory, the effect is the same as if the original judgment of twenty-five years in the penitentiary had not been commuted.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

IN RE: RIGHT OF ST. LOUIS DAIRY COMPANY TO REGISTER TRADE NAME ON MILK AND ICE CREAM RECEPTACLES UNDER SECTIONS 12449 TO 12555 R. S. OF MO. 1929.

June 2, 1933

FILED

Hon. Dwight Brown,
Secretary of State,
Jefferson City, Missouri

Dear Sir:

You have submitted to this Department the following facts and ask a legal opinion thereon as to your duty to officially accept or reject for filing the application of the South St. Louis Dairy Company to register a trade name under Section 12449 R. S. Mo. 1929 relating to name or mark on containers in which milk or cream or both are sold or offered for sale within this State:

On August 4, 1917, the "St. Louis Dairy Company" filed with the Secretary of State of the State of Missouri a statement alleging said company was engaged at 2000 Pine Street, St. Louis, Missouri, in bottling and selling liquids in vessels to-wit; bottles and cans with its name branded, engraved, blown or otherwise produced thereon and that the said company had filed the same statement with the Recorder of Deeds of St. Louis, Missouri, and each of said two statements contained a description of the name so used by it and branded, blown or engraved or otherwise produced on said vessels.

The application for registration in the Secretary of State's Office was accompanied by an affidavit showing publication four times in the "St. Louis Times" (then a daily St. Louis newspaper). This application was duly registered and filed in the office of the Secretary of State of Missouri and was evidently made under the provisions of R. S. of Mo. 1919, Sections 13381 to 13384 inclusive which are now Sections 14347 to 14351, R. S. of Mo. 1929, being Article 4 of Chapter 136 relating to registration of vessels used in bottling or selling liquids.

October 10, 1932, the "St. Louis Dairy Company" filed an application under Section 12449, R. S. of Mo. 1929,

in which it stated as follows:

> "The undersigned has adopted for use a name, mark or device to identify and make known the ownership of cans, bottles and other vessels, owned and used by the undersigned in the manufacture, sale and distribution of milk, buttermilk and ice cream, and has had said name, mark or device printed, stamped, engraved, etched, blown, painted, or otherwise permanently fixed upon said cans, bottles and other vessels."

"A description of said name, mark or device is as follows:

ST. LOUIS

DAIRY CO.

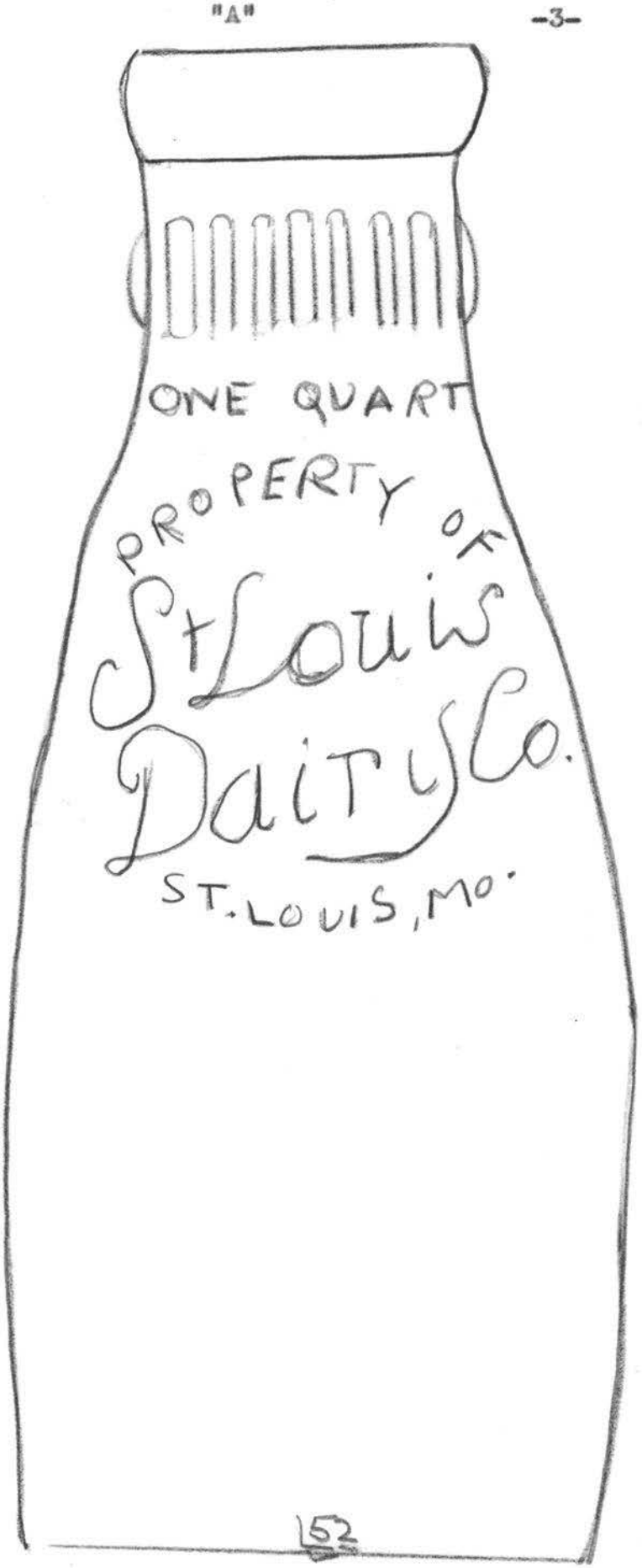
> "And you are respectfully requested to file and record the same in your office in accordance with the provisions of Section 12449, R. S. Mo. 1929."

This application it will be observed was for registering containers used in sale and distribution of milk, buttermilk and ice cream while the application of 1917 was for registration of vessels used in bottling or selling liquids.

The first application covered containers for all liquids including milk, buttermilk and ice cream while the 1932 application is confined to the three liquids, milk buttermilk and ice cream. Each application is made under a separate statute.

The statute under which the later application was made is found under the chapter dealing with "Dairies" while the statute under which the registration occurred in 1917, is in chapter of R. S. of Mo. 1919, dealing with trade marks. Both statutes, under which registration was made, carry provisions making it unlawful for anyone other than the registered owner of the vessels so branded to use said vessels without permission of said person or corporation so registering same, the object being of course to give the owner of said branded and registered vessels the exclusive right to the use of the trade name branded thereon.

The registration by the St. Louis Dairy Company in 1932 was accompanied by the following drawing of a bottle with words engraved, etched or branded on the bottle as same appears in the drawing herein marked "A" and inserted herein at this point.



THE LAMB GLASS CO.
MT. VERNON, OHIO

Accompanying this application was the necessary affidavit showing proper publication of the required legal notice. The application was properly and promptly filed and registration accepted by the Secretary of State.

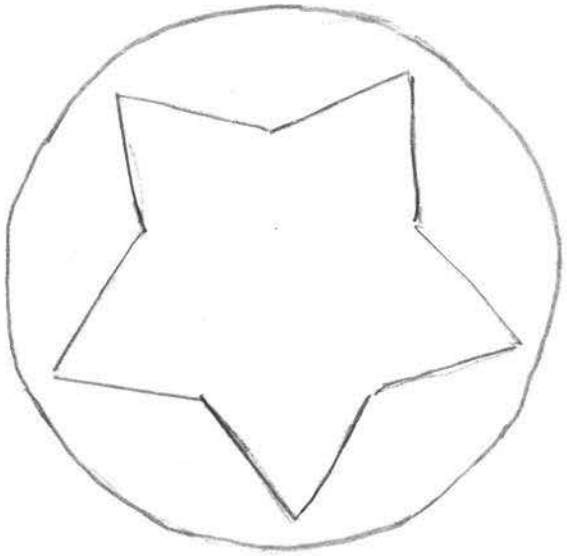
In March 1933, the "South St. Louis Dairy Company" filed an application under section 12449 R. S. Mo. 1929, to register a name, mark and device to be used on cans, bottles and other vessels used in the sale and distribution of milk, buttermilk and ice cream in which the company stated as follows:

> "The undersigned has adopted for use a name, mark or device to identify and make known the ownership of cans, bottles and other vessels, owned and used by the undersigned in the manufacture, sale and distribution of milk, buttermilk and ice cream, and has had said name, mark or device printed, stamped, engraved, etched, blown, painted or otherwise permanently fixed upon said cans, bottles and other vessels.
>
> "A description of said name, mark or device is as follows:
>
> SOUTH ST. LOUIS
>
> DAIRY CO.
>
> "And you are respectfully requested to file and record the same in your office in accordance with the provisions of Section 12449, R. S. Mo., 1929."

This application was accompanied by an affidavit showing required notice in such matters had been published.

The application had attached a drawing called a "Milk Bottle Sketch" which we reproduce herein at this point together with the words thereon as same appears in the sketch attached to the application.

MILK BOTTLE SKETCH -5-



$07

MILK BOTTLE SKETCH FOR
SOUTH ST. LOUIS DAIRY CO.
SCALE FULL SIZE 1-2-33

LIBERTY GLASS CO.
SAPULPA, OKLAHOMA.

SALES REPRESENTATIVE
WERBER DAIRY SUPPLY CO.
ST LOUIS, MISSOURI.

TO BE SOLD

Section 12449 R. S. of Mo., 1929, under which both St. Louis Dairy Companies filed the last two hereinabove mentioned applications, reads as follows:

> "Sec. 12449, RECEPTACLES FOR MILK, CREAM, ETC. -- BRANDS -- CERTIFICATE. Any person engaged in manufacturing, bottling, or selling milk, buttermilk, cream or ice cream in any kind of receptacle, having the name of such person or other mark or device printed, stamped, engraved, etched, blown, painted or otherwise permanently fixed upon the same, may file in the office of the Secretary of State, for record a description of the name, mark or device so used; and cause such description to be printed once each week for three successive weeks in a newspaper published in the county in which the principal place of business of such person is located, or if the principal place of business of such person is located in another state, then in the county wherein the principal office or depot of such person within the State of Missouri is located. It shall be the duty of the Secretary of State to issue to the person so filing for record a description of such name, mark or device in his office, to duly attest a certificate of the record of the same, for which he shall receive the fee prescribed by statute for the issuance of certificates. In all prosecutions under this article such certificate shall be prima facie evidence of the adoption and ownership of such name, mark or device and of the right of the person named therein to adopt and use the same."

Section 12457 makes it unlawful and a misdemeanor for others than the one named in the certificate of the Secretary of State without the written consent of the person named in such certificate, to fill any receptacle bearing the name, mark or device recorded as hereinabove provided with milk, buttermilk, cream or ice cream or any other substance or erase, remove, conceal or obliterate such name, mark or device on such receptacle or to buy, sell, give away, traffic in, or destroy any receptacle having such name, mark or device.

Section 12451, provides any person having in possession or under control any receptacle bearing any name, mark or device recorded as hereinabove provided in Section 12449 and not holding a written transfer or bill of sale thereof

from the person named in the Secretary of State's certificate provided for in Section 12449, shall on demand deliver such receptacles to the person named in the Secretary of State's certificate or to the authorized agent of such person and on failure to so do, the person so failing to deliver said receptacles shall be guilty of a misdemeanor. Other sections of the Act provide for a search warrant in case of unlawful use of said branded receptacles.

This department is of the opinion it may be doubtful whether the courts will hold either the St. Louis Dairy Company or the South St. Louis Dairy Company can legally register either of their respective names and brands under Section 12449, R. S. of Mo. 1929, for the reason, the words "St. Louis" and "South St. Louis" are geographical only and the word "Dairy" is an ordinary English word and descriptive of a particular thing and none of these words can be exclusively appropriated as a trade name.

Trask Co. v. Wooster, 28 M. A. 408;
Reach v. Simons Hardware Co., 155 M. A. 412.

But if it be contended and conceded the "Names" of each company are not ineligible for registration under Section 12449 R. S. of Mo. 1929, because the words used are geographical and descriptive only; still for another legal reason, the "South St. Louis Dairy Company" is not entitled to registration under said Section 12449. It is true the South St. Louis Dairy Company has some words and features, in its name, brand and device, not found in the name and brand and device of the St. Louis Dairy Company but that alone is not sufficient to render the name and brand eligible to registration under existing conditions.

The rule of law is, if the resemblance between the two trade names is sufficiently close to raise the probability the public might mistake one company's product for the other, in such event the latter applicant for registration is not entitled to register his or its trade name, mark or device as the case may be. The name "St. Louis Dairy Company" and "South St. Louis Dairy Company " and the wording on the bottles of the two companies and so far as we can see by the drawings, the shape and size of the bottles of the two companies are so similar and the resemblance between the two trade names and the bottles and the words thereon is sufficiently close in the opinion of this Department to raise a probability of the public mistaking one company's product for that of the other and therefore it is our opinion, as the St. Louis Dairy Company was

registered in October, 1932, and received a certificate of registration from the Secretary of State, that the South St. Louis Dairy Company can not now legally register bottles and the words thereon under Section 12449.

Sanders v. Utt, 16 M. A. 332;
Sanders v. Jacobs, 20 M. A. l.c. 98;
McCartney v. Garnhart, 45 Mo. 593;
Gamble v. Stevenson, 10 M. A. 581.

The question suggests itself whether if registration under Section 12449 was intended only to protect the owner of receptacles having his name or brand thereon from loss of the containers, prior registration of another dealer's name and containers and words thereon so closely resembling applicant's name, receptacle and lettering thereon as to probably cause the public to mistake one brand of milk for the other would legally bar applicant's registration it seeks herein.

We have made diligent search and fail to find in our own or other states a court decision construing a similar statute on this exact question; such decisions may exist but if so we have been unable to find same.

In declaring a similar statute unconstitutional our Supreme Court seems to treat the act then under consideration as registration of a "Trade Mark" and in State v. Baskowitz, 250 Mo. l.c. 94 and 95, used the following language:

> "It selects those whose particular manufacture or stock consists of certain varieties of drink. No other person who manufactures any product or sells it in casks, barrels, kegs, bottles or boxes can avail himself of the privilege of registering his trade-mark or of the consequent protection, but the act denies to him the privileges afforded to those named in the act. The grocer, farmer, fruit dealer, merchant, druggist or other dealer or manufacturer cannot avail himself of the privileges of remedy afforded by this act to protect himself against the loss of his property under the same circumstances."

It occurs to this department that a general law could be enacted that would include persons selling Milk, Buttermilk, Cream, Ice Cream and all other liquids; and

such an act would,as our court says in State v. Baskowitz, 250 Mo. l.c. 100, be in harmony with Section 53 Article IV of our Constitution which provides that,

> "Where a general law can be made applicable, no local law shall be enacted."

We return you herewith the files of each of the above named companies which you forwarded to this department.

Very respectfully,

EDWARD C. CROW

APPROVED:

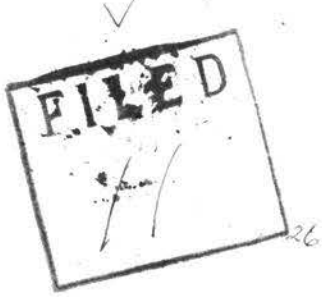
ROY McKITTRICK
Attorney General

ECC/AJ

Non-Resident insane convicts' upkeep paid out of appropriation.

HB 51 Laws 33
Sec 3801-8659
R.S.Mo 1929

June 2, 1933



Honorable George D. Bryant
Pardon and Parole Commissioner
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of May 29th, 1933, which is as follows:

> "Wish you would kindly render this department an opinion on the following question.
>
> Where an inmate is confined in the Missouri State Penitentiary and after having served some time is adjudged insane by the proper officials, and it develops that the board is unable to establish his residence in this State for the purpose of charging his upkeep to any particular county, or where he is a non-resident of the State of Missouri. What provision is made for the upkeep of such inmate?
>
> In other words, to what fund does the Asylum look to for payment for the upkeep of an insane prisoner where residence cannot be established in this State.
>
> The board will appreciate very much an opinion in this matter."

Section 3801 R. S. Mo. 1929, reads as follows:

> "If any person, after having been convicted of any crime or misdemeanor, become

> insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to inquire into the facts, and he may pardon such lunatic, commute or suspend, for the time being, the execution of such sentence, and may, by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, it shall be executed upon him after such period of suspension has expired; and the expense of conveying such lunatic to the asylum shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the asylum for his board and clothing shall be paid as now provided by law in cases of the insane poor: Provided, if such person shall have property, the costs shall be paid out of his property, by his guardian."

Section 8659 R. S. Mo. 1929, reads as follows:

> "If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, become insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor."

From the above two statutes it is evident that the Governor of this state has the authority to transfer convicts to a State Hospital or Asylum when after an investigation in his judgment he finds that convicts confined in the penitentiary are mentally insane.

The rule of law regarding the payment for the upkeep of indigent insane persons convicted of crime when they are residents of the counties of the State of Missouri, was expressed in the case of James R. Walton v. Christian County, 235 Mo. 385 l.c. 389, wherein the court in writing its opinion held:

> "* * *The liability of the counties of the State for insane criminals living and residing in said counties, who were insolvent when convicted and whose sentences have been suspended, as in this case, by the warrant of the Governor, in order that they may be transferred to the State institutions for the insane, is well settled. (Cases and sections of Statutes cited.)"

Your question, however, is what provision is made for the upkeep of an inmate if he be a non-resident of this state? The Legislature by appropriation made a provision to take care of expenses entailed in keeping non-resident convicts in the state hospital or asylum.

House Bill No. 651, approved May 11, 1933, provides among other things in part the following:

> "Section 1. Money for state penal institutions. There is hereby appropriated out of the state treasury, chargeable to the funds herein designated the several amounts for the specific purposes herein expressed to pay the * * * * * * * * * * * * * * * * * * and other expenses for the state prison, board, Missouri penitentiary, * * * * * * for the years 1933-1934.* * * * * * * * * *

And further:

> "For Missouri penitentiary out of earnings funds: (D) (line 111) Support of insane convicts $25,000.00.

You will note from the above that the Legislature appropriated $25,000.00 to the Department of Penal Institutions for use in the support of insane convicts.

It is our opinion that the upkeep of non-resident insane convicts confined in State hospitals should be paid out of the fund appropriated for the support of such insane convicts.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

JLH:MM

PUBLIC PRINTING; "Printing" must include embossing, engraving and lithographing and must be done under "printing" contract.

June 12, 1933. 6-13

FILED
11
30

Hon. Dwight Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

In determining whether or not there is any justification for differentiating between printing from type and printing from plates, the latter called lithographing and engraving, and applying such to the duties of the Commissioners of Public Printing regarding the contract for state printing, I submit the following:

The word "printing" is applicable to a number of things and when used in its broad sense may be said to include every method of producing a copy. The question presented is to determine the meaning to be given the word as used by the Legislature in the statutes providing for the Commissioners of Public Printing and connected statutes. As said by Judge Graves in the Matter of Publishing the Docket of the Supreme Court, 266 Mo. l. c. 56,

> "The word 'printed' has a varied meaning according to the connection in which it is used. If we are referring to an imprint upon calico rags it has a fixed meaning. If we refer to an imprint upon a stone it has a fixed meaning. * * * * But if we go to the word 'print' used as a noun * * * * we find this:
>
> '4. A printed publication, more especially a newspaper or other periodical."
>
> "What I have known
>
> Shall be as public as a print.--Beau. anf Fl., Phillaster, ii. 4'.
>
> " The prints, about three days after, were filled with the same terms.--Addison.'

> There is at least some relation between the verb and the noun, and the definition of the one sheds some light upon the definition of the other. But after all we know that the word 'print' has a varied meaning and its meaning in a particular law must of necessity depend upon the context of the whole act. So after all the real question is, what is the meaning of the word 'printed' in this law." * * *"

So the question to be determined in this instance is the meaning of the word 'printing' under the laws relating to the Commissioners of Public Printing.

Section 13783 provided for the classification of 'state printing'. The 'printing for the state' shall be divided into three classes, to-wit: the 'printing of all bills', 'the printing of all reports' shall constitute one class; the 'printing of the journal' and 'the printing of the general and local laws' etc., shall be the second class; and 'the printing of all blanks,' etc., shall constitute the third class. After providing for these three classifications the Legislature provided for the letting of contracts part of such law being as follows:

> "Section 13784. Contracts for state printing let, when and how.--The commissioners of public printing shall, on or before the first day of July, 1923, and every two years thereafter, enter into a contract with some responsible person or persons for the printing of the several classes of matter required by the state, for the term of two years from and after the date of such contract. Said contracts shall be made separately for each class of printing, and any one person may contract for executing all the different classes, or they may be awarded to different persons," * * *"

It is to be noted that in both of these sections the subject matter is described as 'printing', no restrictions or explanations being made as to what the term shall cover. Section 13799 provided that the Commissioners shall examine the work executed and see that it is

correctly printed in a suitable manner and in accordance with the requirements. Section 13785 provides that 'all printing under this chapter' shall be done at a certain place. Section 13786 provides in detail how 'printing' of the first class shall be done. Section 13787 provides in detail how 'printing' of class two shall be done. In other words the Legislature has carefully outlined in detail certain requirements deemed necessary, but in all these sections they refer to the subject as 'printing'. In all other sections of the article wherein 'print', 'printed', or 'printing' is referred to those words are used without restriction as to the mechanical process by which the result is to be obtained. So it seems apparent that the Legislature, when dealing with this chapter, clearly had in mind printing in its general term. As further evidence of this intention, I refer to the statutes authorizing the various Boards and Bureaus to 'print' their reports and the statutes authorizing and directing the various departments to order their 'printing' through the Commissioners of Public Printing, some of which are as follows:

Section 1656 requires the 'public printer' to place upon the fly leaf of each publication the citation to the statute upon the authority of which 'the same are' printed'.

Section 5343 refers to the biennial report of the Commissioner of Finance and requires the report to be 'printed' and to be 'paid for as other public printing'.

Section 8294 authorizes the printing of blanks and forms under the direction of the commissioner of Fish and Game, and requires that 'the blanks and other printing * * *shall be printed under the direction of the Commissioners of public printing* * *'.

Section 8566 requires that the report of the Eleemosynary Board be 'printed' and states that 'said reports shall be printed in sufficient number* * *' and that 'the cost of such printing shall be not greater than the rate agreed upon with the state printer* * *'.

Section 9450 requires that the forms for the various school officers 'be printed under the direction of the Commissioners of Public Printing', and 'upon the terms as other public printing'.

Section 10023 authorizes the record of the State Board of Equalization and provides that 'said printed copies shall be disposed of as follows:' and that the'cost of printing and distributing same shall be paid* * *.'

Section 13790 provides for the 'printing for the executive department' and requires that the 'printing' be executed in a style consistent with good workmanship.

Section 12366 authorizes the publication of the report of the State Horticultural Society and provides 'the public printer shall' ' 'print such number of reports' ' ' as are deemed necessary by the proper authority.

Section 12465 authorizes the 'public printer' to 'print not to exceed 5000 copies' of the annual report of the State Poultry Board, which shall be 'paid for out of the appropriation for printing state reports'.

Section 12937 authorizes the printing of the report of the Board of Charities and Corrections, and requires 'this report shall be printed as a public document.'

So after an examination of the sections which authorize the printing of various reports, blanks and forms, we find that the printing is described in the same terms as the printing required to be contracted for in Section 13784. Accordingly, it would be impossible to consistently define the printing in Section 13784 without applying a similar construction upon the word 'printing' in the other sections of the statutes. Further, if it be held that 'printing' does not include engraving and lithographing, the various Boards, Bureaus and Departments are without the statute if they order any work lithographed or engraved. In other words, if 'printing' does not include engraving and lithographing, the Boards, Bureaus and Departments are without statutory authority in ordering or permitting their work to be lithographed or engraved. It is apparent that not only did the Legislature have the same thing in mind when dealing with all of these sections but it is further apparent that they were using the word 'printing' in its broadest sense.

The Legislature in creating the Commission of Public Printing had in mind but one thing, to-wit:- the concentration into one agency of the needs of the various boards, bureaus and departments for printing and stationery and to provide for one contract for each class of printing and each quality of stationery needed, and in this manner obtain the benefits of central purchasing. While at first this intent was not reached, as evidenced by the decision of the Supreme Court in the Wilder case, yet promptly after that decision, the legislature amended the statutes and accomplished

this purpose. State v. Hackman, 282 S. W. l.c. 1018. In this case the Supreme Court held that the amendment to what is now Section 13799 had accomplished that purpose, 'Its intention was to include, so far as concerned the regulation of public printing, the executive division of the state government as recognized by the Constitution, and all of its departments and the subordinate branches thereof,* * *'

Just as certainly as it was the legislative intention to include every board, bureau, commission and department within the terms of the act, so it was the intent of the legislature to include every type of printing within the term 'printing', whether such printing be technically known as engraving, embossing, stereotyping, electro-typing, lithographing, or any other type of reproduction.

As to the holdings of other courts as to the import of the word 'printing' the Supreme Court of North Dakota, has held 'printing' to mean the impress of letters or characters upon paper or upon substance and that the term implies a mechanical act. Daily v. Berry, 178 N. W. 104. The Federal Court in the case of MacMillan Company v. King, 223 Federal 863 in considering the copyright act which secures to the owner of a copyright the exclusive right to 'print, re-print, publish, copy and vend the copyrighted work,' the court at page 867 held as follows:

> "The defendant has neither leased nor sold his sheets. Printing I must regard as including typewriting or mimeographing, for the purpose of the act, and he has therefore printed them".

The Federal Court in the case of Ditson Company v. Littleton, 67 Fed. 905, held in construing the copyright law, that the word 'print' included the word 'lithograph' when associated with the words 'engraving, cut.'

The Supreme Court of the United States in 24 Law Edition 1046, construed the tariff law in relation to 'printed matters' and stated as follows:

> "The goods in question were chromo-lithographs, consisting of landscapes, scenery and other figures, printed from oil-stones upon paper with one color printed on top of the other until the picture is finished.* * *

> They are made by means of lithographic st nes, and printed from the stones successfully one after the other according to the number of colors; * * * "

And on page 1047 held:

> "Equally with engraving, copper-plates and lithographs, they are printed and properly fall within the statutory designation of printed matter."

Accordingly under the recognized definitions of printed matter, print and printing, and taking into consideration the intent of the legislature as evidenced by the numerous statutes cited, but one conclusion can be reached and that is, that the 'printing' as used in our statutes was intended to cover every kind of printed matter regardless of the mechanical process used. The Commissioners of Public Printing are required by statute to let contracts for 'printing'. The "printing" of the bills, resolutions, communications, documents, pamphlets, and reports of the General Assembly; the "printing" of the journals of the House and Senate and appendixes thereto, the volumes of public documents, the general and special laws and joint resolutions; the "printing" of the blanks, circulars and other work necessary for the use of the executive departments are all required by the statutes to be done under "printing" contracts let by the Commissioners. The reports, records, forms, blanks, etc., of the various boards, bureaus, commissions and departments are by the statutes required to be "printed". No statute is to be found authorizing engraving, embossing or lithographing unless such work be included in the term "printing". Any engraving, embossing or lithographing ordered must be done under the "printing" contract; if not so done, there is no statutory authority authorizing or permitting engraving, embossing or lithographing, and expense incurred therefor is unauthorized.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

HGW:MM

Printing, State: Printed matter to be bound only on order of Secretary of State under Section 13797 R.S. of Mo. 1929.

June 13, 1934

FILED
11

Hon. Dwight H. Brown,
Secretary of State
Jefferson City, Mo.

My dear Mr. Brown:

We herewith acknowledge receipt of your request of June 7th, portions of which read as follows:

"A question has arisen as to the right of the Commissioners of Public Printing to direct as to whether or not printing now in the process of manufacture, be or not be put through the bindery operations under the existing contract.

As you know, the above commissioners let a contract annually for paper and for stationery supplies and they let a contract for printing biannually. Bindery operations may or may not be covered by a contract. The printing contract expires June 30, 1934, and the contract for binding expires June 30, this year. These contracts are held by the Botz Printing Company.

The Commissioners of Public Printing have exercised an option they believe to be theirs and if in error in the matter, want to be corrected. We have taken the position that there is no question about the right of the Botz Printing Company to handle the printing of the state so long as the contract under which they operate, is held to be valid. We do take the position that a job of printing and binding, the delivery of which may be at a time after the expiration of the binding contract, will undoubtedly have to be printed in the Botz factory, but can be put through the bindery operations elsewhere.

We have given a requisition to the Botz Company to print the Session Acts of the last

> General Assembly but have not given instructions for binding. To the contrary, we have instructed the company not to bind. The Hote Company takes the position that it will be possible for the Session Acts to be printed and bound during the life of the existing bindery contract and that in view of this fact, they have a right and that it is their duty to handle the binding."

Your inquiry resolves itself down to the question as to whether or not the Secretary of State or the Commissioners of Public Printing have any control over the printing and binding of the Session Acts after the copy is delivered to the printer. While the Legislature gives the Commissioners power to contract for the printing, it has also placed certain requirements upon the Secretary of State relative to the printing and binding of the Session Acts and has laid down certain requirements which the printer and the binder must comply with or forfeit their bonds. These requirements will be found in Section 13787 Rev. Statute Mo. 1929, which reads as follows:

> "Duty of secretary of state--printing and binding to be done within that time. The secretary of state shall furnish to the contractor for the printing specified in the second class, immediately after he shall have received from the governor the last enrolled bill after the adjournment of the general assembly at each session, a copy of all acts, memorials and joint resolutions passed at such sessions, and the contractor for the printing shall, within fifty days after such copy shall be furnished him as aforesaid, print all the copies that may by law be required, passed at such session, and deliver the same to the contractor for the folding, stitching and binding, <u>on the order of the secretary of state</u>, and the contractor for the folding, stitching and binding shall, within forty-five days after the receipt thereof, execute the folding, stitching and binding and deliver to the secretary of state the volumes bound, these provisions to be complied with under the penalty of forfeiture of the several bonds."

As to be noted this paragraph requires, first; that the secretary of state furnish the printer with the acts, memorials and joint resolutions passed at the session, second; that within fifty days after the last copy is ~~printed~~ delivered the printer

shall print the acts, memorials and joint resolutions duly passed, third; that on the order of the secretary of state the printer shall deliver to the binder the acts, memorials and joint resolutions printed, fourth; that the binder shall bind the same and deliver the bound volumes to the secretary of state within forty five days of receipt of the printed matter. It is apparent that this statute reserves to the secretary of state the power to order the binding of the Session Acts. To hold otherwise would be to render nugatory the phrase "on the order of the secretary of state".

An examination of the Revised Statutes and Session Acts, shows that this section of the statutes is identical, in so far as the point at issue here is concerned, with the original act enacted 1870, laws of 1871, page 84. This act of 1870 abolished the office of public printer and provided for the letting of contract for the printing in the three classes and for the contract for binding, and provided that these contracts might be let to different contractors. Prior to this act of 1870, we find that the "state printer" did all the public printing and binding, and we find the section corresponding to Section 13797 R. S. No. 1923 to be section fifteen of chapter twenty of the Gen. Statutes of Neb, of 1865, this section reading as follows:

> "The secretary of state shall furnish to the public printer, within fifteen days after the adjournment of the general assembly, at each session, a copy of all acts, memorials and joint resolutions passed at such session; and the public printer shall, within forty days after such copy shall be furnished to him as aforesaid, print all the copies that may, by law, be required, passed at such sessions; and the secretary shall, within ten days after the same are printed, make out and deliver to the public printer an index to the same, who shall, within thirty days, print the same, and deliver to the secretary of state such copies of the laws, bound in such manner as may be by law required."

No provision is made in this section for the delivery of the printed matter to the binder "on the order of the secretary of state" for the simple reason, that under this act the public printer and binder were one and the same, and the contracts were awarded by the vote of the legislature. When the act of 1870 was passed providing for the division of this printing and binding into different contracts, it was necessary and imperative that someone have control of this work on behalf of the commissioners of public printing. The secretary of state was the most

logical person to control the printing and binding of the Session Act, and he was accordingly vested with this power. He was made intermediate agent between the printer and the binder, so that the states business might be expeditiously carried to completion without undue interruption or misunderstanding.

While it is true that under the present situation we have the same contractor printing and binding, the Session Acts the law remains the same, to-wit, the secretary of state is vested with the right to order the binding done, and the mere fact, that the printer and the binder are one and the same is not sufficient to divest the secretary of state ~~of~~ this power and vest that power in the printer, to hold that the printer could proceed to bind the Session Acts under his binding contract without authority of the secretary of state would be to divest the secretary of state of this power.

It is accordingly the opinion of this office that the binding of the Session Act can only lawfully be done upon an order of the secretary of state, which order if made before June 30, 1953, should direct Botz Printing Company to bind that Session Act, or if made after June 30, 1953, should direct Botz Printing Company to deliver the printed matter, to the binder designated by the Commissioner of Public Printing.

Respectfully submitted,

HARRY G. HALLMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

HGH:lm

IN RE: SECRETARY OF STATE: STATE PRINTING SESSION ACTS IN FORMS PASSED BY LEGISLATURE INCORRECT GRAMMATICAL ERRORS, MISS-SPELLED WORDS, ETC.

665 RSMo 1929

June 14, 1933.

FILED
11
28

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This letter is in answer to your request for an opinion with reference to your duty in printing and publishing the Session Acts of the Legislature, and in particular with reference to making corrections in said Acts.

We call your attention to Sec. 665 R. S. 1929, which among other things provides:

> "Said Secretary shall direct and superintend the printing thereof, collate with and correct by the original rolls the proof sheets of the printed copies; and, when the printing is completed, he shall note all errors which have been committed, and cause errata thereof to be annexed, together with an attestation, under his hand, that he has collated the laws and resolutions therein contained with the original rolls in his office, and corrected the same thereby."

This Statute means that the Secretary of State shall compare critically the printed laws with the original bills in his possession, so as to bring the printed copy and the original bill into harmony, word for word.

The rule as to the duty of the Secretary of State in having such laws printed is set out in 59 C. J. page 595, Sec. 141, in the following language:

> "It is proper for the Secretary of State to publish true copies of the enrolled

> bills as received on their passage, including grammatical errors, misspelled words, wrong punctuation, duplications, and other inaccuracies, and so to certify for his own protection."

In Fowler v. State, 196 S. W. 961, the Texas Court of Criminal Appeals said that the laws as printed and published should be true copies of the original bills. We quote from that decision l.c. 963:

> "It will be noticed in certifying the compilation of the acts of the Legislature to be as they appear before him and of record in his office, the Secretary of State, among other things, states:
>
> > 'The laws printed in this volume are true copies of the enrolled bills received in the office of the secretary of state after their approval by the Governor.
> >
> > 'Grammatical errors, misspelled, punctuation, duplications, etc., appearing herein, are in strict compliance with the law which requires that the printed acts of the Legislature be true copies of the enrolled bills, and are not the result of carelessness on the part of proof readers or printers.
> >
> > 'The public can have access at any time to the original bills filed in this office.'
>
> "This is not intended to be a criticism of the Legislature for the matters indicated in said note, but as a protection to the secretary of state and those who had charge of publishing bills passed by the Legislature. So it will be seen from the above statement that this act is precisely as the Legislature passed it

with whatever grammatical errors, inaccuracies, or incongruities there may be in it. So there was no mistake in placing the act as approved by the Governor into the acts of the Legislature as reported by the secretary of state."

It has been held that where the original bills use the term, 'one half of per centum,' that the actual meaning of such a phrase was 'one half of one per centum,' and that the printing of the original bill and inserting therein the word 'one' did not invalidate the bill because the two expressions mean the same thing. Goldsmith v. Railroad Company, 62 Ga. 468, l.c. 471.

It is also well settled that if there is any difference between the original act as published, that the original bill will control. Ruckert v. Grand Ave. Ry. Company, 63 S. W. 814, 163 Mo. 260.

Under the above statute and the foregoing quoted decisions, it is the opinion of this office that the legislative acts should be printed as passed by the Legislature without any corrections or changes made thereon. However, we think it would be perfectly proper to insert a small figure following the error and at the bottom of the page set out a note of explanation. This will not in any manner change the original context of the law, but will meet the requirement of the statutes requiring the Secretary of State to "cause errata thereof to be annexed." Whatever corrections in the law that are to be made can then be made by the courts in their interpretation of the intent and meaning of the statute.

Yours very truly,

FER:lm

FRANKLIN E. REAGAN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK

INCORPORATION TAX to be paid on basis of assets and not amount of capital stock, where assets greatly exceed capital stock.

June 21st, 1933

FILED
11
29

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

In re: Cairo Bridge & Terminal Co.

Dear Sir:

We have your request for an opinion from this Department as to the proper method of determining the incorporation fees, of a foreign corporation desiring to qualify as such under the laws of Missouri, and particularly whether or not the fees shall be based upon that portion of the Capital Stock as represented by the company in Missouri, or upon the actual value of its property as located in Missouri.

We understand that the above corporation is a Delaware corporation, with a Capital Stock of $109,425, and contains no no-par value shares. We also understand that the property owned by this corporation is valued at $2,600,000, and that half of this property is located in the State of Missouri. This corporation desires to qualify as a foreign corporation in the State of Missouri upon the payment of fees upon one-half of its Capital Stock, namely $54,712. In this connection we quote from the affidavit of principal agent or officer in the State of Missouri, Roland S. Baker, which affidavit was made on June 16th, 1933, and is as follows:

> "That the amount of authorized Capital Stock of said corporation is $109,425 par value stock and no shares of no par value; that the property located and business transacted in all states where license to do business is $2,600,000, and property located and business transacted in Missouri will not be more than $1,300,000, and that portion of the authorized Capital Stock of such corporation which is represented by its property located and business transacted in the State of Missouri will not be more than $54,712."

Section 4598 R. S. 1929 provides that a foreign corporation, incorporated for the purpose of gain under the laws of another State before being authorized to do business in the State of Missouri,

> "* * * shall be required to pay into the state treasury upon the proportion of its authorized capital stock represented by its property and business in Missouri, incorporating tax and

fees equal to those required of similar corporations formed within and under the laws of this State, * * *"

Under this statute foreign corporations, insofar as the amount of fees required of them prior to incorporating, stand upon the same footing as domestic corporations.

It is the opinion of this Office that these fees required to be paid to the Secretary of State, constitute a tax, and that no corporation has the authority to arbitrarily fix its capital stock at a figure far below the value of its actual assets in Missouri for the purpose of escaping and avoiding this tax. In State ex rel. v. Roach, 266 Mo. 435, decided in 1915, the Supreme Court en banc, by four to three decision decided that a corporation with capital stock fixed at $50,000, and assets at $91,000, must pay the incorporation fees upon the actual value of the assets, namely $91,000, and not upon the amount of capital stock fixed at $50,000. In line with this decision it is therefore the opinion of this Office that the incorporators here must pay to the Secretary of State incorporation fees upon the value of $1,300,000 assets in the State of Missouri.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

6-29

June 29th, 1933

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Mo.

In re: Cairo Bridge & Terminal Co.

Dear Sir:

At your request, we are supplementing our opinion of June 21st, 1933 with reference to the above matter by adding thereto, that in determining the value of the assets of a corporation for the purpose of fixing the tax, the existence of any liens on said property shall not be deducted from the value of the property itself in determining the tax to be paid upon the value of the property.

Yours very truly,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

CORPORATIONS: EXTENSION OF FRANCHISE.

Meanding of "about to expire" and "not about to expire". Extension of franchise of corporations can be made only on payment of fees.

Sec 4555 R.S. Mo. 1929
SB 131 Laws 31

June 27th, 1933

FILED
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31

Hon. Dwight H. Brown
Secretary of State,
Jefferson City, Mo.

Dear Sir:

We have your request of June 20th for an opinion from this Office upon the following state of facts:

> "We regret to bother you so much on requisitions but under Section 1, page 297, Act of 1931, relating to method by which existence of corporations may be extended, we are in need of an opinion from your Department on this statute. It is a question in our mind as to whether or not we should charge a full fee the same as charged in the original incorporation for these amendments, or whether the latter clause of that section limits the fee to the ordinary $5.00 for an amendment. The question seems to be as to where the line should be drawn when a corporation is 'about to expire', by limitation, or as to when the existence is 'not about to expire'. "

Under Section 4555 R. S. 1929, certain powers are given to corporations in this State, namely, among others, the power to exist as a corporation for a definite period of time. Where no time is fixed for the duration of the corporation, it is for the statutory period of twenty years. State ex rel v. Road Company, 207 Mo. 85.

Under the above statute, a corporation can continue in existence for a certain definite length of time. When this time is consumed the life of the corporation, if not renewed, "expires". The meaning of the term "about to expire" means that the corporation is approaching the end of its original period for which it was authorized to exist and do business. We are unable to draw a dividing line between a corporation which is "about to expire" and a corporation which is "not about to expire". The distinction between the two is a question of fact. For example,

if the corporation has considerable length of time in which to operate under its original charter, clearly then it is a corporation whose existence and corporate rights are "not about to expire". On the other hand, if a corporation has been organized for a period of twenty years, and nineteen years and six months of that time have passed since its incorporation, and no effort has been made to renew it, then the corporation is one whose charter is "about to expire". The term "about to expire" means that the corporation is approaching the end of its charter term, while the term "not about to expire" means that the corporation has considerable time under its original charter in which to exist and continue as a corporation.

As to what fee a corporation should pay, which desires to take advantage of the Laws of 1931, p. 297, with reference to extending its corporate existence, we must read this provision in connection with Section 4556 R. S. 1929, which among other things provides:

> "Provided further, that the duration of such corporation shall not be continued as aforesaid, until such corporation shall pay into the state treasury fifty dollars for the first fifty thousand or less of the capital stock of the corporation, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law."

Such has been the construction placed upon this statute by the Supreme Court, in State ex rel. v. Roach, 269 Mo. 437. The Court said, l.c. 443:

> "On a similar, though slightly different, state of facts, the Supreme Court of New Jersey, held as we do (National Lead Co. v. Dickinson, 70 N. J. L. 596) that in order to extend the corporate existence the tax must be paid and this is in accordance with the interpretation heretofore uniformly placed upon the section by the public and executive officers."

It is therefore the opinion of this Office that before any corporate existence can be extended under the Laws of 1931, p. 297, that the corporation wishing such extension must pay the fees provided for in Section 4556 R. S. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

CORPORATION : Charter of expired corporation cannot be extended; new corporation may be organized.

July 12th,1933

FILED

Hon. Dwight H. Brown,
Secretary of State,
Corporation Department,
Jefferson City, Missouri.

Attention: Mr. Barks.

Dear Sir:

We have your request of June 29th for an opinion as to the right of a corporation to extend its charter after the same has expired, and which request of yours is as follows:

"The Bank of Higginsville, a banking corporation doing business at Higginville, LaFayette County, Missouri, was incorporated as such banking copporation under the laws of Missouri, July 28, 1882, and while the charter issued to the corporation did not specify the period or duration for which the charter was issued, the articles of agreement filed in the State Department provided that the corporation should have a corporate existence of fifty years.

The present bank officials, the office of the Secretary of State, and the State Finance Commissioner all apparently overlooked the fact that this charter expired by lapse of time July 28, 1932. Thereafter June 27, 1933, all of the stockholders of said bank having waived formal notice of a meeting called for the purpose of extending the corporate existence of the corporation voted to extend the corporate life of said corporation for a period of fifty years from July 28, 1932, and a copy of said minutes were duly recorded in the Recorder's office at Lexington, Lafayette County, Missouri, and was this day presented to the State Finance Commissioner and Secretary of State for the purpose of effectuating an extension of said corporate existence.

The fees due and payable to the state of Missouri for an extension of a charter are exactly the same as the fees which would be paid if a new

corporation under the same name was organized.

The statutes make express provision for the t extension of the corporate existence of a charter at a time when the same is about to expire by lapse of time but apparently is silent on whether an extension may be haddof the charter by limitation even though the extension requested dates from the expiration date.

This corporation has maintained itself in good standing in the office of the Secretary of State by filing all peports required and complying with the statutes in every respedt and is still doing business as a banking corporation.

Will you please advise us whether an extension can be made at this time of this corporate charter, said extention to date from July 28, 1932, the date of the expiration, or whether it will be necessary for the parties interexted to reincorporate and then effectuate a transfer of the properties and assets to the new corporation? "

When a corporation charter expires by limitation, it ceases to exist. It is "dissolved". Bradley v. Reppell, 133 Mo. 545, 32 S. W. 645.

The Supreme Court said that upon the expiration of a corporation charter, a corporation is dead. We quote from Park Company v. Gibson, 268 Mo. 394, l.c. 402, as follows:

"It has been held in this State under our statute, (Sec. 19, p. 329, G.S. 1865) that after the expiration by statutory limitation of a corporation's life, its property goes to its directors as trustees for the stockholders, and does not, as at common law, revert to the grantor. (Bradley v. Reppell, 133 Mo. l.c. 552; Richards v. Coal Co., 221 Mo. l.c. 158.) From this alone it follows on principle that the defunct corporation could not be sued after its dissolution and death by the expiration of its charter; in such wise, at least as to foreclose a lien against lands it no longer owned; but which by operation of law had passed to its late directors as trustees for its shareholders. For the corporate entity is dead ipso facto (10 Cyc. 1271)

> when its statutory years are accomplished and its holdings of whatever sort, by force of the statute, pass to others."

Section 4561 R. S. 1929 provides:

> "Upon the dissolution of any corporation * * * the president and directors or managers * * * shall be trustees of such corporation, with such powers to settle the affairs, collect the outstanding debts and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution."

If the business of the corporation is not wound up by the president and directors, a new corporation may be formed to take over the assets of the old corporation, in which event the creditors and owners of the old corporation will occupy the same position in relation to the new corporation. This procedure was approved in Scott v. Davis, 198 Mo. App. 512.

We now come to the proposition, as to whether or not corporate powers may be extended <u>after</u> the expiration of the charter. We must answer this query in the negative. There is no statute authorizing the extention of the corporate powers of a corporation after its charter of existence has once expired. Without such statutory authorization it cannot be extended. That this is the clear meaning of the law of this State is shown by the statute passed in 1931 relating to this subject matter. That statute Laws 1931, p. 297 provides:

> "The corporate existence of any corporation, now organized or hereafter to be organized, <u>that is about to expire</u> by limitation, may be extended * * *. Any corporation whose corporate existence is <u>not about to expire</u>, but whose corporate existence is limited may take advantage of this provision and have its corporate existence changed to any stated period of perpetual, * * *."

It will be noticed that the above statute relating to the extention of a corporate existence applies only to corporations whose

charters have not expired, and does not apply to corporations whose charters have already expired.

It is therefore the opinion of this Office that you cannot extend the charter of a corporation after it has expired, but a new corporation may be organized to continue in the place of the old.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

Acting Attorney-General

FER/mh

NOTARY PUBLIC--Bond of Notary Public may be terminated by suit as to future but not past liability.

Sec 11742 RS Mo 1929

July 13, 1933. 7-14

FILED
11
33

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

We have your letter of June 30th, 1933 requesting an opinion on the following state of facts:

> "On or about March 4, 1931, we executed a notary bond on behalf of Mildred A. Berger of St. Louis, Missouri. Miss Berger has been unable to pay the premium in connection with this bond and she has consented to relinquish her rights to act under her commission. Will you be kind enough to advise us if there is any manner in which Miss Berger could become released and we could cancel our bond."

The bond required of a notary public is for the protection of the general pubbic, and upon which, any injured member of the general public may maintain a suit at any time within three years after the cause of action accrued. Section 11742 R. S. 1929.

As to future liability of the surety on a notary public bond, we call your attention to that part of Section 11742, R. S. 1929 which provides:

> "Sureties on the bonds of any notary may be discharged from all <u>future</u> liability on such official bond, by petition in writing addressed to the county court (in the city of St. Louis to the circuit court), by conforming to the requirements, with the same rights and remedies as provided by sections 2944 to 2952, inclusive, of chapter 13, R. S. 1929, relating to sureties."

The above sections, referred to, namely 2944 to 2952, inclusive, set out the form of the pleadings and the necessary steps to be taken by a surety to relieve itself of future liability on a surety's bond.

When the surety on the bond is thus relieved, of liability the matter may then be certified and the commission returned to the Secretary of State, as provided for in Section 11744 in the following language:

> "* * * and should the person so commissioned fail or neglect to so qualify within three months after the date of said commission, the clerk shall return the commission to the secretary of state with his indorsement thereon of such failure or neglect, and the governor shall cancel and annul said commission."

It is therefore the opinion of this office that there is no provision whereby the bond of a notary public can be cancelled so as to affect any causes of action which have accrued prior to the date of cancellation, but that by the procedure as above set out, a surety on a notary public bond may by petition to the county court, or to the circuit court of the city of St. Louis, relieve itself of all future liability on the notary's bond.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

Acting Attorney-General

FER/mh

PENAL INSTITUTIONS: Sentences when concurrent or cumulative.

FILED
11

7-21

July 14, 1933

Honorable George D. Bryant
Pardon and Parole Commissioner
Jefferson City, Missouri

Dear Mr. Bryant:

LeRoy Sharon, Number 34016.

This Department acknowledges receipt of your letter dated June 30, 1933, as follows:

"Re:- LeRoy Sharon----#34016

I am enclosing herewith copies of Sentence and Judgment in the Case of the above named. You will note this subject entered a plea of guilty to two charges of Robbery, on the same day and was sentenced to 10 years on each charge; the copies submitted are worded alike.

Wish you would kindly advise this department whether this is to be treated as a 10 year or 20 year sentence, nowhere does it appear that one sentence is to begin at the expiration of the former, nor does it appear that they were to run concurrently.

Thanking you for an opinion on this subject, I remain".

Section 4456 Revised Statutes of Missouri 1929, provides as follows:

> "When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction".

As will appear from quotations hereafter set out the above section has been construed to apply to and cover cases only where a defendant has been convicted of two or more offenses before sentence had been pronounced upon the defendant in either case. When such a state of facts and record exists then by force of the above statute the punishment assessed shall be cumulative and successive and not concurrent, and the court has no authority to order the sentences to run concurrently in such a case.

The copy of the certified copy of judgment and sentence of the court in your case shows the defendant pleaded guilty in case number C-10080 and his punishment fixed in that case at ten years in the penitentiary. The copy of the certified copy of judgment and sentence of court attached to your letter shows the defendant to have pleaded guilty in case number C-10081 and thereupon was sentenced to ten years in the penitentiary, both sentences being imposed on the same day. The numbers of the record books nor pages of the records of the Clerk of the Circuit Court of Jackson County, Missouri, do not appear from the certificate of the clerk to the certified copies of the records, the cases are however numbered consecutively, and the record in case number C-10080 is a full disposition of the case. The judgment and sentence in case number C-10081 does not state whether the sentences and judgments in the two cases shall be cumulative or successive.

The letter attached from the Clerk of the Circuit Court of Jackson County, dated July 13, 1933, states that the defendant was sentenced to ten years on two charges, to run consecutively, but we do not find an affirmative direction to that effect in the copies of the records.

The real question is whether the failure of the Circuit Court of Jackson County to designate and direct that the sentences be served successively leaves the record in such condition that as a matter of law the sentences run concurrently.

In the case of Ex parte Turner, 45 Mo. 331, which involved an application for writ of habeas corpus, it was alleged that the petitioner had been sentenced to serve a two year term and also a three year term in the penitentiary, both judgments were rendered upon the same day and after the conviction in both cases. Under that state of facts, the court held the statute above quoted applied; that the sentences were cumulative and the prisoner was remanded.

In Ex parte Kayser, 47 Mo. 253, it appears that petitioner was sentenced in three separate cases on the same day to serve two years in the penitentiary in each case. The court at page 254 of the opinion said:

> "The evidence of the records from the St. Louis Criminal Court, where the proceedings were had, is that the prisoner was sentenced in each case at the same time".

The court further stated:

> "In law, a day is generally regarded as an indivisible point of time - punctum temporis- so that, in the words of Sir William Grant,'any act done in the compass of it is no more referable to any one than any other portion of it; but the act and the day are cotemporaneous, and therefore the act can not be said to be passed until the day is passed'. (Lester v. Garland, 15 Ves. Ch. 255.) It is nevertheless held - and that is the rule - that where justice demands it, the exact time when an act was done may be shown by parol evidence".

So that should it be determined that the failure of the trial court to direct that the sentences be cumulative, under the law renders the sentences concurrent, then it would appear that

inquiry may be made by you in cases like the present to determine the fact as to whether or not the sentence and judgment of court was pronounced in each case successively or in each case at the same time.

The case of Ex parte Kayser above referred to, was discussed in the case of State ex rel Meininger v. Breuer, 304 Missouri, 381, 418, where this court said:

> "Now, if the prisoner was convicted in all three cases before he was sentenced in either, that was the end of the case, because the statute (now Section 3697) applied and made the terms successive."

The case of State ex rel Meininger v. Breuer, supra, is the last expression of this court on the question under consideration; that case however arose strictly on the question of the right of the circuit court to try Meininger on a charge of embezzlement when he had theretofore been tried and convicted on a like charge, had been sentenced to the penitentiary and appealed. Prohibition was asked against the circuit judge. In holding that the circuit court had the right to try Meininger on the second charge after his conviction on the first, the court discussed concurrent and cumulative sentences on the theory that it tended to show that the court had the right to try defendant for one offense before his sentence had expired on a prior conviction. A large part of the discussion in the opinion centered around the case of Ex parte Meyers, 44 Mo. 279. We quote from the opinion not only as to the Meyers case, but such parts of the opinion as deal with concurrent and cumulative sentences. The court at page 389 said:

> "The doctrine which relator now urges this court to adopt is founded by him upon a construction he gives certain decisions of this court. Chief among these is Ex parte Meyers, 44 Mo. 279. In that case the record (still on file) and the opinion show that Meyers, at the March, 1866, term of the St. Louis Criminal Court, pleaded guilty to a charge of grand larceny and was thereupon sentenced to two years' imprisonment in the penitentiary. At the May, 1866, term of the same court Meyers was convicted by a jury on a like charge and sentenced to three years' imprisonment in the

penitentiary. The second sentence in no way refers to the first, and the trial court made no effort to make the terms cumulative or successive. Meyers was committed to the penitentiary and served more than three years in that institution. In July, 1869, he sued out a writ of habeas corpus, whereby he sought his discharge."

And again on page 390:

"In its opinion the court pointed out the error in the assumption that both convictions occurred at the same term, and stated the facts as the record shows them, i.e. that the sentence on the plea of guilty was passed at the March term, 1866, and the conviction on the second charge occurred at the May term, 1866, and concludes: "The prisoner was twice found guilty and sentenced on each finding at different terms." For that reason the court held that Chap. 207, sec.9, Revised Statutes 1865 (now Sec. 3697, R.S.1919) did not apply to the case because "this section applies only where a person is convicted of two or more offenses at the same term, and both convictions must take place before the sentence is pronounced in either case." When this point had been reached, the court had disposed of the statute. The proceeding before it was in habeas corpus, and the question was whether the record showing entitled the warden further to hold petitioner in his custody under the two sentences. Petitioner had served a time in excess of the longest of these. The law then, as now, was settled beyond dispute that, in the absence of a statute to the contrary, sentences were not cumulative, even where they might be made so, unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. In the Meyers sentences no sort

of effort was made by the trial court to render the sentences cumulative. The court discussed other matters but finally ruled as follows: "The prisoner has already served out more than the length of time prescribed by the longest sentence, and I think that he is entitled to his discharge. Prisoner discharged. The other judges concur." Since the trial court had not attempted to exercise the power to make the sentences cumulative, the court took the right course in disposing of the case on that theory, as it did in the sentence quoted in which its actual ruling appears."

And on page 403:

"It is clear that in 1869 the law was well settled, with no well considered or reasoned case to the contrary, that American and English courts were authorized to impose cumulative sentences and that no statutory authority therefor was required. Practically every authority to that effect is an authority for the rule that the courts had power to try and sentence one who had already been tried and found guilty of another offense. The facts involved made this true. It would be impossible to impose cumulative sentences without separate convictions, save in exceptional cases in which two offenses may be prosecuted simultaneously, as in burglary and larceny."

And on page 404:

"It has been suggested that, since Section 3697, Revised Statutes 1919, provides for successive terms of imprisonment when two or more convictions are secured before sentence is passed for either offense, this amounts to a prohibition against such sentences in any situation other than that covered by the Statute. This is a misconception of the meaning of the statute.

> The section first appeared in our law in 1835 (Sec.9,p.213,R.S.1835.) It seems to have been taken from the Revised Statutes of New York of 1829, in which (2 N.Y.R.S.1829, sec.11,p.700) appears a section identical in legal effect and almost identical in words and even punctuation. In this country it was then generally held that in order to impose cumulative sentences it was necessary for the subsequent sentence or sentences to contain a direction to that effect. (19 Encyc. Pl.& Pr.,p.484) A failure so to direct in such sentences was "fatal to any imprisonment which exceeds that of a single sentence". Courts sometimes inadvertently omitted the direction and at other times did not make it sufficiently certain to be effective. This statute was devised to put an end to miscarriages of the kind in so far as situations described in the statute are concerned. The purpose of the statute was merely to provide that in the cases it covered the sentences should run successively by force of the statute itself and not be dependent for their cumulative character upon any action of the trial court specially referable to that matter. The language of the statute itself evidences this. The decisions hold this is its effect. This is emphasized by the previous state of the law and the frequent abortive attempts of courts to impose cumulative sentences."

What is now section 4456 above quoted was adopted in this state in 1835 from the New York Revised Statutes. Referring to the latter statutes and the notes of the revisioners thereof, the court at page 405 of the Meininger opinion said:

> "This language means simply what it says. It is clear from it that the power to impose cumulative sentences already existed in the courts of New York and that the purpose of the statute was to make them cumulative (in the described cases) by force of the statute. The statute did not purport to give the courts any power to impose cumulative sentences.

> It took from them the power, in certain cases, to impose any sentence other than a cumulative one. It did this by writing itself into every sentence, in the kind of cases it described, as a part of such sentence. And so it has been held. (Ex parte Durbin, 102 Mo. l. c. 102; People v. Forbes, 22 Cal. l. c. 138.)".

In State ex rel v. Rudolph, 17 S. W. (2nd) 932, this court re-affirmed the holding that a defendant could be tried on a second charge and at a time when the sentence for a prior charge had not been served or satisfied.

> The cases of Ex parte Bryan, 76 Mo. 253,
> Ex parte Jackson, 96 Mo. 116,
> Ex parte Durbin, 102 Mo. 100,
> Ex parte Allen, 196 Mo. 226,
> Ex parte Lee, 287 Mo. 231, either come within

the provisions of the statute above quoted or the subsequent sentence or sentences were imposed on account of a crime committed by the defendant while he was serving a sentence, in which latter case the statute specifically provides that the sentence on the latter conviction must begin at the termination of the prior sentence or sentences.

In 16 C. J. page 1370, Section 3224, we find the following:

> "By common law cumulative fines and terms of imprisonment, if definite and certain, are valid where accused is convicted of separate and distinct crimes in different indictments or in different counts of the same indictment. And where a convict is serving a term of imprisonment under a prior sentence at the time of a second conviction, sentence may be pronounced to begin at the expiration of the term he is serving, even though the prior sentence was imposed by another and a different court in the state. Further, the fact that accused is undergoing life imprisonment will not preclude the imposition and execution of the death sentence, under a subsequent

> conviction. In some jurisdictions, however, it is held that cumulative sentences cannot be imposed except where they are expressly authorized by statute".

A great number of cases are cited in the footnotes, supposed to be in support of the foregoing declaration.

It seems to us to be impliedly recognized in all of the Missouri cases dealing with this subject, except the Meininger case which holds directly, that unless there is some order, direction or judgment making the sentences cumulative or unless the facts and record come within the statute above quoted, then where two sentences are imposed by a court on the same defendant at different times and where the defendant is incarcerated in the penitentiary under two committments, the sentences would be served concurrently and this would seem to be necessarily true because if the defendant is in the penitentiary serving under two committments it could not logically be said that he was serving under one committment as distinctive from service under the other committment without some authoritive direction to that effect.

Where a defendant is charged and is convicted of or pleads guilty to two offenses, the fact that the court does not withhold sentence in both cases and dispose of both after trial or plea would indicate that the court did not intend the statute to apply and by not directing the sentences to run consecutively would mean that he intended them to run concurrently.

Accepting the foregoing statements of this court in the Meininger case to be the law of this state, we are of the opinion that the record in the matter before us shows that LeRoy Sharon pleaded guilty to two separate and independent charges, and that the record shows he was sentenced on the charge in case number C-10080 first and in case number C-10081 secondly, and we are further of the opinion that since the court failed to directly designate that the sentences should be successive or cumulative then by force and operation of law the sentences run concurrently.

We are further of the opinion that the case presented by you is not controlled by Section 4456 Revised Statutes of Missouri 1929, because the record presented does not show that pleas of guilty were entered in each of the cases, prior to the sentence in either case. If the record did show

such pleas of guilty to have been entered before sentence was passed in either case, then the sentences would run consecutively by virtue of Section 4456 and the court would have no authority to direct otherwise.

I am returning you your copies of your files herewith, together with letter from the Clerk of the Circuit Court of Jackson County dated July 13, 1933.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures

COUNTY CLERKS--Guilty of misdemeanor in office for failure to file notary bonds with Secretary of State.

11742-11681-1168 RS Mo 1929

8-10

August 3, 1933

FILED
11
38

Honorable Dwight Brown
Secretary of State
Jefferson City, Missouri

My Dear Mr. Brown:

Acknowledgement is herewith made of your inquiry for an opinion of this office, which request reads as follows:

> "We have several county clerks who have not filed notary bonds with this office in accordance with Section 11742 of R. S. Mo. 1919. We have written them twice but received no reply. Please advise what further action we may take."

Section 11742, R. S. Mo. 1929 contains the following:

> "Every notary, * * * * shall take the oath of office, * * * * shall give bond to the state in the sum of two thousand dollars, except in counties of more than one hundred thousand inhabitants, in which they shall give bond in the sum of five thousand dollars, with at least two good and sufficient sureties, * * * * which, * * * * bond shall be filed and recorded in the office of said county clerk and * * * * after having been so recorded, shall be filed in the office of the secretary of state, * * * *."

This Section plainly requires that these bonds be filed in your office. The only person entitled to the bond after it has been filed and recorded with the clerk of the county court, is such clerk, and while the Statute does not state in so many words that the county clerk should forward the same to your office, it is his duty to do so.

Section 11681, R. S. Mo. 1929, contains the following:

> "If any clerk shall knowingly and willfully do any act contrary to the duties of his office, or shall knowingly and willfully fail to perform any act or duty required of him by law, he shall be deemed guilty of a misdemeanor in office."

As the duty to file the notary bond thus rests upon the county clerk, it would seem a breach of duty, or at least a misfeasance for him to fail to forward the bond to your office for filing.

Section 11682 provides the procedure when the county clerk has been guilty of a misdemeanor in office. A portion of said section reads as follows:

> "When any court, or the judge or judges, or a majority of them in vacation, shall believe from their own knowledge or from the information of others, on oath or affirmation, that the clerk of the court in which they preside has been guilty of a misdemeanor in office, they shall give notice thereof to the attorney-general or prosecuting attorney, stating the charges against such clerk, and requiring him to prosecute the same; and they may suspend such clerk from office until a trial can be had, and appoint a temporary clerk, who shall possess the same qualifications, take the same oath and give like bond as other clerks, and who shall possess the same power, perform the same duties and receive the like fees as other clerks, and shall continue in office until the regular clerk shall resume his office or a successor shall be elected. * * * *"

It accordingly seems that it would be proper for the Secretary of State to present the matter to the county court of any county wherein the county clerk has failed to forward these bonds to your office for filing. It would, of course, be nec-

essary that this information be transmitted to the county court on oath.

It is the desire of this office to cooperate with you in obtaining a full compliance with Section 11742, and if you so desire we shall be glad to correspond with any county clerk who has failed to comply with this Section, in an endeavour to get the matter adjusted without formal complaint being filed.

Respectfully submitted

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SECRETARY OF STATE: No duty to convene Prohibition Convention

8/28

August 25, 1933.

FILED

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of August 24, 1933 in which you request an opinion as to the following state of facts:

> "Inasmuch as some delegates to the Prohibition Convention, convening here on Tuesday, Aug. 29, and some interested citizens, have urged that it is the duty of the Secretary of State to call this meeting to order, I am respectfully requesting your office for an official opinion in this matter. Is it the duty of the Secretary of State to call the above meeting to order?"

Article V of the Constitution of the United States provides for the method of amending the Constitution. This Article provides as follows:

> "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided,

> that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It must be remembered that the Prohibition Convention, to which you refer, derives its power and authority, not from the Constitution or any law of the State of Missouri, but directly from the Federal Constitution. In the case of Hawke v. Smith, 253 U.S. 221, 64 L. Ed. 871, Mr. Justice Day said:

> "It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented."

We respectfully submit that we are unable to find any provision of the Federal or State Constitution, or any law of the State of Missouri wherein it is made your duty to call the Prohibition Convention to order. The Week's Bill, which sets up the machinery for this election, is silent on the matter.

However, neither do we find any reason, statutory or otherwise, why you cannot act in this capacity if you desire to do so.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

IN RE: FERRY-HANLY ADVERTISING COMPANY'S ELIBIBILITY AS TO REGISTRATION OF TRADE-MARK OF THE WORDS " JUST A STEP AHEAD ON PETTICOAT LANE."

Letter back to Secy of State

Sec 14329 RS Mo 1929

August 31, 1933. 9/r

FILED

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

You have requested this department to furnish an opinion based upon a letter which you received from the Ferry-Hanly Advertising Company of Kansas City, Missouri, relative to a proposed trade-mark, which is described in their letter of August 23 and which is illustrated in an attached advertisement.

Ferry-Hanly Advertising Company's letter of August 19, describing the proposed trade-mark reads in part as follows:

> "Our client, the John Taylor Dry Goods Company, wishes to register the slogan, "Just A Step Ahead on Petticoat Lane," which has been appearing continuously in their advertising for some time. The use of this slogan is illustrated in the advertisement attached."

Further, in a later letter, on August 23, the following information and questions are set forth:

> "In section 14329, it is stated that a trade-mark ' to designate, make known or distinguish any article or goods, wares or merchandise by him or them manufactured or prepared' may be registered with your office and fully protected by such registrations; however, it is not clear as to whether an advertising phrase or slogan may be registered if not intended for use on the merchandise itself.
>
> "In the present case, the John Taylor Dry Goods Company desires to register and have protected the advertising phrase, "Just a Step Ahead on Petticoat Lane" for use in their,newspaper

and other advertising and not particularly for the purpose of placing it on any labels or wrappers of any of their merchandise.

"Will you kindly inform whether this slogan can be registered for the purpose indicated and whether or not it is necessary to use the words "trademark registered" or any similar designation with the registered slogan to indicate to and notify the public that the advertising phrase or slogan is protected under the Missouri trademark laws.

"Furthermore, if such a slogan is registerable, will it be necessary to have it always appear in any unique type of lettering or can it always be type set as it appears in the sample advertisement sent you with our previous letter?"

The phrase in question is,

"Just A Step Ahead on Petticoat Lane."

If the above phrase appears below the signature "John Taylor Dry Goods Company" in advertisements and on goods sold by the John Taylor Dry Goods Company, the phrase "Just A Step Ahead on Petticoat Lane" is legally eligible for registration as a valid trade-mark under the laws of Missouri.

It is a fundamental rule that a term or mark or phrase merely descriptive of the subject to which it is applied cannot be a technical trade-mark. (Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19). Thus, no word or combination of words can be exclusively appropriated if it is merely descriptive of the particular business, or of the quality, style, character, grade, or class or make of the goods, or if it is merely to indicate the composition of the product or the ingredients therein, or the process of manufacture or method of production. The same rule applies to words or marks descriptive of the effect produced by the use of the goods, or of the purpose or use to which the article is to be put, A term descriptive of the type of goods or the class of trade to which the product applies likewise cannot be the subject of a trade-mark. No trade-mark rights may be acquired in laudatory or commendatory expressions, or in words or marks merely indicating superior excellence, popularity, or universality in use, such as "best," "standard," "favorite," etc., but similar words such as "perfection" and "ideal" have been upheld. A description of the appearance of the goods or of the package in which the goods are sold is not a valid trade-mark. (63. C. J. Sec. 43 - Title, Trade-

Marks, Trade-Names, pp. 346-351.) On the other hand, an arbitrary or fanciful term, figure or device and words and phrases used in a purely arbitrary or fanciful way, as applied to the goods in question, constitutes a valid trade-mark. (Novelty Company v. Leonard, 119 F. 937. - 63 C. J. Sec. 45, Title---Trade-marks, pp. 351-352.) Likewise, names or marks which merely suggest, to some extent, the character, quality or ingredients of an article or some supposed advantage to be derived from using it, or some effect to be produced by its use, or the locality of its origin, have been ordinarily upheld as valid trade-marks. (Menendez v. Holt, 9 S.Ct. 143; 128 U. S. 514; 63 C. J. Sec. 46, Title - Trade-Marks, p. 353.)

The phrase "Just A Step Ahead on Petticoat Lane, when used in connection with a well-known Department Store in a city, suggests the character, quality or ingredients of goods and articles which ladies and women purchase for their own and for their family's use, and such as are usually sold in large department stores.

It is the opinion of this department that this phrase "Just A Step Ahead on Petticoat Lane" is eligible for legal registration as a trade-mark under the laws of Missouri and will be, when so registered, a valid trade-mark.

In order that it may be a trade-mark, however, it must be attached or fixed or stamped on the article indicated by it and must be, therefore, so used by the person or firm desiring to claim a legal right to the phrase or emblem as a trade-mark.

In the case of Oakes v. Candy Co., 148 Mo. page 398, the Supreme Court said:

> "A trade-mark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself.
>
> "An article can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to or stamped, printed, carved or engraved upon the article as it is offered for sale."
>
> St. Louis Piano Co. v. Merkel, 1 Mo. App. 305;
> Browne on Trade-Marks, sec. 311;
> Rowley v. Houghton, 2 Brewster, 303;
> Candee, Swan & Co. v. Deere & Co., 54 Ill. 439;
> Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537.

The goods with the mark thereon must be placed upon the market. Grocers Journal Co. v. Midland Pub. Co. 137 Mo. App. 356. Westminster Laundry Co. v. Envelope Co., 174 Mo. App. 338.

This department has been unable to find any statutes that require the one using a registered trade-mark to use the words "trade-mark registered" in connection with a registered trade-mark to indicate that the phrase or emblem is protected under the Missouri Trade-Mark Laws.

Section 14332, Revised Statutes of Missouri, provides that the Secretary of State shall deliver to the person or association or corporation registering a trade-mark a duly attested certificate of filing of the same for which he shall receive a fee of one dollar, and this certificate shall, in all suits and prosecutions under this article, for violation of the trade-mark law, be sufficient proof of the adoption of such label, trade-mark or form of advertisement.

This department is of the opinion that the above mentioned phrase "Just a Step Ahead on Petticoat Lane," if properly filed and registered as a trade-mark under the laws of Missouri, can be used not only on the article sold but in the advertisement of the John Taylor Dry Goods Company, as well.

It is the opinion of this department that the registered trade-mark in advertisement or on articles sold or on the packages containing the articles, or in other places, used by the John Taylor Dry Goods Company, should always be in the same type of lettering so as to correspond in form and character and appearance with the kind of type registered in the Secretary of State's office.

Very respectfully yours,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

MOTOR VEHICLES:

Only State owned cars are permitted to bear the official license tag of the State.

September 16, 1933

9-20

FILED

Mr. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"There are frequent requests directed to this office for the issuance of official tags to be used on privately owned automobiles which are used in official business by the personnel of agencies of Government. The enclosed letter is self-explanatory and is being forwarded for your information. We are requesting that it be left attached to the file and passed back to this office with your communication. We have held that we are without authority to issue official tags to other than cars owned by the State of Missouri. We are asking to have your opinion in this particular."

Section 7767, R. S. Mo. 1929, provides as follows:

"(a) The commissioner shall issue certificates for all cars owned by the state of Missouri and shall assign to each of such cars two plates bearing the words: 'State of Missouri, official car number . . . . ' (with the number inserted thereon), which plates shall be displayed on such cars when they are being used on the highways. No officer or employe or other person shall use such a motor vehicle for other than official use."

It is apparent from the foregoing Section that the only cars which are entitled to bear the official tag are cars owned by the State of Missouri. Privately owned cars used by officials in State business are not entitled under any Section which we have knowledge to bear the official tag. The right to bear the official tag, to the exclusion of all others, must be found in the Motor Vehicle Law, and no where do we find any authority for any cars to bear the official tag except cars owned by the State of Missouri.

It is therefore our opinion that you, as Secretary of State, have no authority to issue an official tag to be used on cars other than those owned by the State of Missouri. The mere

fact that a privately owned car is used in official business does not make it a State owned car nor entitle it to bear an official tag.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

APPROPRIATION--"Egg-Dairy Products Inspection" paid out of general revenue fund and all licenses and fees derived by virtue of such inspection to go into general revenue.

HB 19 Laws 33
SB 42 Laws 33

October 5, 1933.

10-17

FILED
1 1
51

Honorable J. C. Breshears,
Commissioner,
State Department of Agriculture,
Jefferson City, Missouri.

Dear Mr. Breshears:

Your letter of September 13, 1933 has been received in which was contained a request for an opinion as follows:

> "This department hereby requests your opinion on Section 5 of House bill 549, page 66, Laws of Missouri, "Egg-Dairy Products Inspection", as to whether it was the intent and action of the Legislature to group the three kinds of license fees into one fund, setting up a fund from such earned fees for the inspection service of the 1933-34 biennium.
>
> Senate bill No. 42 (page 166, Laws of Missouri) transferred the Egg Law to the Department of Agriculture. Senate bill No. 46 (page 171, Laws of 1933) transferred the Milk-cream Station Law to the Department. Senate bill 15 (page 253, Laws 1933) transferred the Ice Cream Law to this Department.
>
> The Egg-Ice Cream and Cream-Milk Station license money and inspection are dependent upon this appropriation being available dependent upon the money being earned before being spent, and if this money is not temporarily segregated into a special fund, it means that the inspection service can not be started and continued during the shortage of general revenue. Without inspection, the licenses can not be honorably and legally collected. It is a service and a revenue proposition, if we see it rightly.
>
> If there is to be no inspection, the State should not even so much as try to collect the license money. The new State Department of Agriculture is about ready to start its inspection service, which is so generally dependent upon the availability of the license fees under this appropriation that our work will be paralyzed, except as this money shall be available from earnings, since we consider that the Legislature set up a fund for this purpose.
>
> While it may be superfluous information, as to this inquiry, but we beg leave to list the earnings from these three license laws for 1931-32 for the full 24 months thereof, as follows: Egg License, $58,946.00; Milk-Cream Station License, $11,752.00; Ice Cream License, $15,182.00; TOTAL $85,880.00.

Please bear in mind that the appropriation made against the above licenses is only $37,800 for 1933-34.

Not only will the inspection service be hampered, but it will embarrass the clerical work necessarily related thereto."

The narrow question presented by your request is if the appropriation of 1933 for Egg-dairy Products Inspection (Laws 1933, page 66, Section 5, such section being hereinafter referred to as "the appropriation act") is to be paid out of the general revenue fund of this state or out of some special fund arising from licenses and fees collected in connection with such inspection service.

This question hinges on the proper construction of the appropriation act which is as follows:

"Sec. 5. Egg-Dairy Products Inspection.--There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, for the years 1933 and 1934, the sum of thirty-seven thousand, eight hundred dollars ($37,800.00), to pay salaries, wages and per diem, and other general expense of the State Department of Agriculture and Commissioner of Agriculture, for the inspection of eggs and dairy products, from licenses and fees collected from milk and cream station licenses provided in article 5 of chapter 87 of the Revised Statutes of 1929, egg licenses and fees provided in article 4 of chapter 93 of the Revised Statutes of 1929, and the ice cream licenses and fees provided in article 5 of chapter 93 of the Revised Statutes of 1929, as follows:

A. Personal Service:

For salaries of not to exceed eight inspectors at not to exceed one hundred twenty-five dollars ($125.00) per month each, and other needful employees of the Department of Agriculture - - - - - - - - - - - - - - $18,000.

B. Additions:

Operative and transportation equipment, including office furniture and equipment - - - - - - - - - - - 1,800.

D. Operation:

General expenses, including communication, printing and binding, transportation of things, travel, stationery and office supplies - - - - - - - - - - - - - - 18,000.

Total, State Department of Agriculture $37,800.00"

However, this question of construction will require a brief analysis of the revenue system of this state, and of the statutes providing for egg and dairy products inspection and fees therefrom and such analysis will consist of

two parts, I, disposition of fees prior to the appropriation act, and II, disposition of fees by virtue of the appropriation act.

I.

DISPOSITION OF FEES

(A) FEES COLLECTED MUST BE DEPOSITED IN STATE TREASURY

The Constitution of Missouri, Article IV, Section 43, provides in part as follows:

> All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. * * * *."

The Constitution of Missouri, Article X, Section 15, provides in part as follows:

> "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the state for the benefit of the funds to which they respectively belong, in such banks * * * *".

In accordance with Article X, Section 15, just quoted, the Legislature has enacted three statutes which are as follows:

> "All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury, or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which such moneys respectively belong * * * * R. S. Mo. 1929, Sec. 11465."

> "The treasurer shall keep separate accounts of the funds of the state, and may require any depository to do the same, showing the name of each fund to which the money belongs and the amount of the interest paid by any bank, and said interest shall be apportioned and credited to such funds monthly." R. S. Mo. 1929, Sec. 11471.

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. * * * * *" Laws 1933, page 415.

The above cited and quoted constitutional and statutory provisions make clear the following two propositions:

1. That the funds collected from license fees for egg-dairy products inspection must be paid into the state treasury.

2. That they must be deposited by the state treasurer to the credit of the particular fund into which the statute providing for their collection requires them to be put.

(B) FEES COLLECTED MUST BE DEPOSITED IN GENERAL REVENUE FUND

1. The state treasury into which all state funds must go is not the same as the general revenue fund of the state. The state treasury comprises all state money and as provided in Article X, Section 15 of the Constitution above quoted the state treasurer is required to place all moneys in the state treasury "for the benefit of the funds to which they respectively belong." That the general revenue fund is merely one of the particular funds to the credit of which state money shall be placed appears from the case of State ex rel Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093 (1901).

> "But again, section 15, article 10, leaves no doubt whatever as to the intention of the convention. It requires that 'all moneys now or at any time hereafter, in the State Treasury, belonging to the State, shall immediately on receipt thereof be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong in such bank or banks' as may be selected under that section.
>
> So that it will not do to say that the Constitution requires all revenues of the State to be first paid into one general or common fund and then disbursed in the order named in section 43, article 4, of the Constitution." (160 Mo. 190, pp. 210, 211.)

Thus it is clear that all money going into the state treasury does not go into one general revenue fund, after which it is put into several special funds, leaving the residue as the general revenue fund, but on the other hand the treasurer puts all state money directly into the separate funds for which it was collected, of which the general revenue fund is merely one.

2. The fact that the general revenue fund is merely one of many funds into which state money is segregated makes it clear that Laws of 1933, page 415 quoted above does not require the setting up of separate special funds for all money in the state treasury although such statute requires all money received by the state to be placed in the state treasury to the credit of the particular purpose or fund for which collected." The "general revenue fund", as one of such funds, can receive the money collected for it as well as a special separate fund, because the "general revenue fund" is only one of the various funds of the state, is not the equivalent of the state treasury, and stands on the same footing as any other separate fund created by law. If this statement were not true, and if the general revenue fund were the equivalent of the state treasury then Laws 1933, page 415, might well be construed to change the law

as it stood at the time of its enactment because if the general revenue fund were the same as the state treeasury this statute would probably require it to be broken up entirely into separate funds, but the general revenue fund being merely a part of the state fund and one of many state funds this statute does not change the law as the statute will be complied with if money collected for the general revenue fund is credited to it.

3. The statutes relating to the deposit and disposition of fees collected under the egg and dairy products inspection laws are as follows:

> MILK AND CREAM FEES. "All fees collected by the state dairy commissioner or his deputies under the provisions of this article shall be turned into the state treasury for the general revenue fund." R. S. Mo. 1929, Section 12431.
>
> ICE CREAM FEES. "Such fees shall be paid into the state treasury to the credit of the general revenue fund of the state." Laws 1933, page 254, Section 13071.
>
> EGG FEES: "All inspection fees under this article shall be paid into the state treasury." R. S. Mo. 1929, Section 13065.

From the first two of these three statutes it is apparent that fees for these two inspection services must be credited to the general revenue fund when they go into the state treasury. This is especially clear when Revised Statutes Missouri 1929, Section 13071, repealed and superseded by the same numbered section in Laws 1933 is examined. The older statute provides in part as follows:

> "Such fees shall be paid into the state treasury and there constitute a fund to be known as the 'Ice cream inspection fund' and shall as authorized by the general assembly, be used by the state food and drug commissioner, for the purpose of defraying the expenses necessary and incident to the enforcement of this article. Any surplus accruing to said 'ice cream inspection fund' shall at the end of the biennium revert to the general revenue fund of the state."

Thus before the 1933 act there was a special fund for such fees but such special fund was abolished by the 1933 act so as to milk, cream and ice-cream inspection fees it is clear that no special fund is created by statute, but that such fees go into the general revenue fund unless the appropriation act of itself creates such special fund. It will be observed that the egg inspection fees are not appropriated to the general revenue fund expressly, nor is any special fund created for them unless it is created by the appropriation act.

II.

DISPOSITION OF FEES BY VIRTUE OF THE APPROPRIATION ACT

It has just been demonstrated that no special funds are created by statute for any fees in question unless the appropriation act of itself creates such fund and it has further been demonstrated that as to milk, cream and ice-

cream fees the money collected must go into the general revenue fund. Likewise the appropriation act while it is ambiguous in its terms puts fees from all three sources on exactly the same basis and the appropriation from whatever fund made by the appropriation act is entirely from the same fund.

The Constitution of Missouri Article X, Section 19, provides in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * *"

If the appropriation act is construed as creating a special fund in the case of milk, cream and ice-cream fees an appropriation would be necessary to get such funds first from the general revenue fund to such special fund, and second to get such moneys from such special fund to the Department of Agriculture, and it is apparent from reading the appropriation act that it only purports to make one transfer or appropriation of funds. The only basis for regarding the appropriation act as creating a special fund is the language thereof beginning "from licenses and fees etc.". If such language should be construed as creating a special fund it hardly seems likely that it is intended also to appropriate out of such fund because there is a considerable difference between the creation of a special fund and appropriations from it, as was pointed out by the court in State ex rel Kessler v. Hackmann, 304 Mo. 453, 264 S. W. 366 (1924) in which the court at page 458 said:

> "On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the State Treasury except upon an appropriation by an act of the Legislature. (State ex rel. Fath v. Henderson, 160 Mo. 190, l. c. 214; State ex rel. v. Gordon, 236 Mo. 142, l. c. 158.) In the case last cited the court had under consideration a fund for the support and maintenance of the Game Department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the State 'from any source whatsoever,'. The money collected by the board is received by the State; it goes into the State Treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the State, it is applied, not only to state funds, but to 'any of the funds under its management.'"

Even if it were decided that the appropriation act performs the two functions of creating the special fund and making the appropriation from it it would seem that such appropriation act would be ineffective as to milk, cream and ice-cream fees because no appropriation act exists transferring these funds from the general revenue fund to such special fund and, therefore, the appropriation would be from a fund which had no money in it and it seems clear that an

appropriation act would be necessary to transfer money from the general revenue fund to such special fund. See Laws 1933, page 71, Section 14 page 67, Section 7-a providing for such transfers between the general revenue fund and special funds.

For the above reason if the appropriation act were by its terms completely ambiguous it would seem that the construction that the appropriation was from a special fund created by the appropriation act would not be made for the reason that it would destroy the effect of the appropriation act as to milk, cream and ice-cream fees. However, the appropriation act is not completely ambiguous on its face because it begins "There is hereby appropriated out of the state treasury, chargeable to the general revenue fund * * *". If the construction were made of the appropriation act that the appropriation was to be out of a special fund the language just quoted would be flatly contradicted whereas if the opposite construction were made that the appropriation was as it says out of the general revenue fund there would be no contradiction because the phrase "from licenses and fees collected etc." could be held to be descriptive or surplusage and would not be contradicted, and it would seem better to have one phrase comparatively meaningless than to have another phrase flatly denied by construction.

As to the egg fees while a stronger case could be made for the creation of a special fund if the appropriation act referred to egg fees alone, since the appropriation for egg inspection is put on exactly the same footing as the appropriation for milk, cream and ice-cream inspection the appropriation for all of these services must be from the same fund since it is covered by the same language and therefore it is submitted that the proper construction would be that no special funds were created and that the general revenue fund is the fund from which the appropriation is made.

The case of State v. Bradshaw, 313 Mo. 334, 281 S. W. 946 (1926) may throw some light on the language of the appropriation act beginning "from licenses and fees etc." In such case grain inspection fees were in question which were required by the governing statute to be paid into the treasury, although the act showed a clear purpose that such fees were to be used for nothing but the expenses of the Grain Inspection Department. The Court at page 343 said:

> "The Commissioner is required to regulate the rates so as to meet the necessary expenses of the service and 'no more.' That expression was construed by this court in the case of State ex rel. v. Gordon, 266 Mo. l. c. 415, where it was held that the department was not intended to earn any profit, but merely to pay its way. The State of Missouri was not entitled to obtain any revenue for other purposes from any of the fees paid in for the work done by the Warehouse Commissioner and his assistants.
>
> Thepurpose of having the fees collected and paid into the State Treasury is apparent. Section 43, Article IV, of the Constitution, requires that all revenues collected and 'moneys received by the

State from any source whatsoever" shall go into the Treasury and must be paid out on appropriations by the General Assembly. When the charges for inspecting grain are paid to the commissioner, the inspector, his deputy or assistants, they must be paid, of course, to the State of Missouri. The money must go into the State Treasury. This is done so that the proper authorities may keep a check upon all the operations of every department of State. To allow a department of State, which is self-supporting from charges paid for services rendered, to have charge of the money received without accounting to the State in any way, would probably lead to abuses. The requirement that all money shall go into the State Treasury, with statements accounting for how it was received, would prevent exorbitant charges, which might weigh down the grain trade with undue burdens. From the fact that the money was to be paid into the State Treasury and go into the general revenue fund, it does not follow that the State should have any money from that source to appropriate for other purposes; the amount received from that department should be exactly, or approximately, balanced against the expense of the department."

Also, if there was to be a dependence between fees collected and the expenses of the Department of Agriculture it would seem that some such provision as appeared in the appropriation act of 1931 at page 95 of Laws 1931 would have been added. In such statute it was provided in part as follows: "There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, * * * provided that no greater amount shall be withdrawn or expended under this appropriation than is received from dairy license fees." No case has been found in which a special fund has been created by implication and it seems especially likely that such a fund would not arise by implication from the terms of an appropriation act as opposed to a general statute.

For the reasons stated above, it is our opinion that there is no such thing as a special fund or funds to the credit of which fees collected from milk, cream, ice-cream and egg inspection are to be deposited, and that the appropriation act at page 66 of Laws 1933 provides that the appropriation for the Department of Agriculture for this inspection service is an appropriation from the general revenue fund of the state.

Yours very truly,

EDWARD H. MILLER,

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

SECRETARY OF STATE: Not duty of to call House of Representatives together in extra session.

11226 R.S. Mo 1929

October 11th, 1933.

10-12

FILED
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50

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This department acknowledges receipt of your letter of September 27th wherein you request an opinion as to your duties with reference to the extra session which convenes October 17th. Your letter is as follows:

> "An official today raised the question with me as to whether or not it is my constitutional duty to call to order the House of Representatives when it convenes in extra session on October 17.
>
> I have been under the impression that the organization of the Legislature at a regular session, continues throughout the biennium, unless by resolution one or both bodies adopt resolutions providing for re-organization for the extra session, and my impression has been that such decision to re-organize would come after the body had been called to order and had proceeded to business.
>
> Kindly advise me whether or not it is my constitutional duty to call to order the House of Representatives. An early reply will be greatly appreciated."

By statute, when the General Assembly convenes in regular session, it is your duty to call the House of Representatives together, the Section being 11226 R. S. Mo. 1929 which is as follows:

> "The general assembly shall meet on the first Wednesday after the first day of January in the year 1861, and on the corresponding day in January every second year thereafter; and at 12 o'clock of the day fixed by law for the convening of the legislature, it shall be the duty of the secretary of state, or, in case of his death, absence or inability to act, some other person to be designated by the governor, to call the house of representatives together and preside over its deliberations until a temporary organization shall have been effected."

But this, being an extra session, we are to be guided by precedent. In 1861 there was a special session called by the governor and the House of Representatives was not called together by the Secretary of State, the officers of the General Assembly acting as officers until an election or resolution was voted upon and the officers for the session were declared elected. An extra session was called by the governor of Missouri in 1887 on page 5 of the House Journal and in that session the officers of the General Session remained as officers until a resolution was offered and the same was voted upon. In 1895 Governor Stone called an extra session, as shown by House Journal on page 5. In that session the House was called to order by Speaker Russell. A resolution was offered relating to the officers of the organization and the same was voted upon. On Tuesday, June 14th, 1921, pursuant to a call by Governor Hyde, as shown in House Journal, Vol. 2, page 1535 of the General Assembly, the House was called to order by Speaker O'Fallon. A resolution was then offered and voted upon relative to the officers for the extra session. On Thursday, November 3, 1921, Governor Hyde called a second extra session and the same was called together and presided over by Speaker O'Fallon until a resolution was offered and voted upon relating to the officers for that extra session.

In the absence of any law bearing directly upon the question we are guided, and have been guided solely in the past, by precedent, therefore it is the opinion of this department that as this is not a regular session and that section 11226 quoted supra is not applicable relating to your duties, the officers of the fifty-seventh General Assembly will preside and call the session together and will remain as said officers until re-elected or replaced by other officers.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

OWN/fe

BONUS: Only named beneficiaries can claim on death of soldier - soldier under guardianship may claim through guardian.

October 23, 1933

FILED

55

Hon. H. W. Brown
Adjutant General
Adjutant General's Office
Jefferson City, Mo.

Dear Sir:

On August 26th we received from your office two requests for opinions. The first request was as follows:

> "An ex-soldier filed claim for bonus which was approved during his life time. Payment, however, could not be made due to lack of funds. Before the funds became available, the man in question died. He left no heirs of the class designated in the Bonus Law as entitled to receive the bonus of deceased soldier. He did leave other heirs, however.
>
> This office desires to know, in view of the fact that the claim was allowed before the man died, whether or not it can be paid to the heirs of his estate."

The second request was as follows:

> "Your opinion is requested as to whether the guardian of an ex-service man who is mentally deficient would be permitted to file and sign a bonus claim for said mentally deficient soldier, and, if the claim was allowed, should the warrant be made payable to the guardian."

Article 4, Section 44B, p. 93 of the Missouri State Constitution provides as follows:

> "The General Assembly shall have power, for the purpose of paying to each bona fide resident of the State of Missouri who served honorably in the military or naval force of the United States of America at any time between the 6th day of April, 1917 and the 11th day of November, 1918, a bonus * * * The Legislature shall enact such laws as shall carry into effect this amendment. The wife or husband, child, ~~mother, or~~ father, in the order named, and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder, if such deceased resident had lived;* * *"

Thus we see that the constitutional amendment above quoted provides for the payment to each bona fide resident of the State of Missouri who served in the World War or, on his death, to his certain named heirs 'and none other'. In the case of Fahy vs. Hackman, 291 Mo. 357 l.c. 379; 237 S.W. 752, the Supreme Court held that this amendment is not self-enforcing and said:

> "The Legislature shall enact such laws as may be necessary to carry into effect this amendment.
>
> The Constitution is dotted over with the word "shall" as it is used here. * * * * *
>
> Such Legislature might refuse to act, and the only remedy of the people who framed the amendment would be to (1) elect a different Legislature, or (2) to initiate and adopt the necessary laws. We call attention to this, not to have it inferred that legislatures do not usually follow the suggestion of the Constitution, and enact laws, but to make it plain that the very vital portion of the amendment (contained in the first 16 lines) required a legislative act to put the amendment in force."

We look to the Legislature's act of enforcement and in the Laws of 1921, 2d Extra Session, p. 8 we find that Section 3 provides as follows:

> "In case of the death of any person who would, if living, be entitled to the bonus under this act, the same shall be paid to the following persons, in the order named, and none other: First, surviving wife or husband, second, surviving child, and if there be more than one child surviving, then equally among such children, third, surviving mother; fourth, surviving father. Every person making application for a bonus, as hereinafter provided, shall set forth in his application the names and addresses of all persons who would be entitled to receive the same in the event of the death of the applicant, and if such applicant shall die before the payment of such bonus, then such application shall be deemed to inure to the benefit of the person or persons next entitled thereto, and payment shall be made to such person or persons upon proof of identity satisfactory to the commission hereinafter provided for. If all persons designated herein as entitled to the bonus shall die before the payment thereof, the right to the bonus shall cease and determine. Application for bonus made in behalf of minor children shall be made by the duly appointed guardian or curator of such children, or by any person who stands in loco parentis to such minor children."

Section 9 of said law, as amended by the laws of 1931, p. 140 provides as follows:

> "It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payment shall be filed with the adjutant-general on or before December 31, 1932, and at such place or places as the adjutant-general may designate and upon blanks furnished by the ad-

> jutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish free of change, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

Thus we see, in answer to your first request, that the Legislature provided the order of payment and to whom payable in case of death. It is our human endeavor to make every reasonable effort to construe the law in favor of a deceased soldier's personal representative or collateral heirs, if it be at all possible, especially since the bonus might lapse for want of a beneficiary. In the light of the constitution with its express limitation and the laws issued pursuant thereto, we cannot conscientiously say that the personal representative or collateral heirs are entitled to the bonus money unless the Legislature so intended. It is our opinion that the Legislature did not so intend, for they limited the payment on death of the soldier to named beneficiaries and none other,

using the express language of the Constitution itself. They further said, 'If all persons designated herein should die before the payment thereof, the right to the bonus shall cease and determine.' In the face of the language of our Constitution and the law written pursuant thereto, it is subject to no other construction, and the fact that the claim was allowed before the soldier died will not alter the hard, fast rules laid down by the law.

Answering your second request, it is the opinion of this office that the guardian of a soldier who is mentally deficient is permitted to file and sign the bonus claim of said soldier, signing the soldier's name and his name as guardian. There should be proof of guardianship furnished by the guardian, but a certified copy of the order of the Probate Court should be sufficient. The soldier's warrant should be made payable to the soldier, but of course it can be cashed by the guardian endorsing the same as guardian.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WOS:FE

TRADE-MARK: -- In Re. RIGHT TO REGISTER TRADE-MARK "9-O-5 or Nine-O-Five" applied to whiskies and other intoxicating liquor on ground former registration of said trade-mark was legally extinguished by either abandonment or by cessation of business on the part of owner thereof.

November 22, 1933.

11-22

FILED

61

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

Your letter of November 17, addressed to this department, reads as follows:

> "We wish to have an opinion on the enclosed application for trade-mark "9-O-5 or Nine-O-Five" to be applied to Whiskies, Wines, Brandies, Gin and cordials. We now have in our files and on our register a trade-mark of the same and for the same products filed by a Corporation which we understand is now defunct. In order to expedite matters we are also enclosing the former application which we desire to have return at your earliest convenience."

The application you enclose is an application for registration of certain words to-wit, Nine-O-Five 9-O-5 to be applied as a trade-mark to whiskies, wines, brandies, gin and cordials. You enclosed an application for a trade-mark "9 O 5" (Nine-O-Five) made on the first day of August, 1898, by the W. Schneider Wholesale Wine and Liquor Co., City of St. Louis, State of Missouri, a corporation organized under the laws of Missouri and doing business at that time at 905 and 917 Franklin Avenue, St. Louis, Missouri, as wholesale and retail wine and liquor dealers. This application

was accepted by your office and the number 9 0 5 as a trade-mark was described in said application as follows:

> "The said trade-mark consists of, represents and is designed as follows:
>
> By the number "9 0 5" in prominent gilt figures on red-colored ground, surmounted by a female figure in a sitting posture holding in her right hand a sword and in her left hand a pair of scales, said figure representing the goddess of Justice; and underneath of said number "9 0 5" the firm name inscribed in the following manner, to-wit:
>
> Trade-Mark
>
> W. Schneider
>
> Wholesale
>
> Wine and Liquor Co.,
>
> St. Louis, Mo.
>
> The said trade-mark being subject however to such variety of color and style of letters as may be deemed expedient."

Your letter states that it is your understanding that the corporation is now defunct. I understand that this trade-mark is registered in your office to the above named applicant therefor, a corporation, and that the records in your office show that the said corporation is no longer in existence and is no longer carrying on business.

"Abandonment" in trade-mark law is the giving up of a trade-mark. Abandonment includes both intention to abandon and an external act by which the intention is carried into effect. It must be an act which shows determination not longer to enjoy the right. Clark Thread Co., v. Armitage, 67 Fed. 896.

Abandonment is purely a question of intent. In Saxlehner v. Eisner, 179 U. S. 19, involving the right, in this country, to the trade-mark of Austrian Bitter Water known as "Hunyadi", the Federal Supreme Court said:

> "To establish the defense of abandonment it is necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon, since acts which, unexplained, would be sufficient to establish an abandonment, may be answered by showing that there never was an intention to give up and relinquish the right claimed."

Lapse of time is merely one circumstance among others to be taken into account in determining whether or not an intentional abandonment is to be inferred. The general rule is that trade-mark rights are not lost by mere non-user, but that there must be an intention to abandon the trade-mark or a distinct element of estoppel that will make it inequitable to allow the original owner to claim exclusive right to use the trade-mark after a period of non-user.

In the well-known case of the Carthusian monks in 221 U. S. 580, it was held that neither a non-user nor the adoption of a new trade-mark constitutes abandonment where the circumstances surrounding the course taken are consistent with the intention to retain the right to use the old "mark".

In this case of Carthusian monks, that body had been compelled to leave France and their property was seized by the French Government and ultimately purchased by a new company which, by authority of the French law, manufactured a cordial which was called "Chartreuse". The Monks had gone to Spain where they manufactured their cordial by the original formula but were obliged, at least in France, to apply a different trade-mark to it.

Père Baglin, Superior General of the Order of Carthusian Monks, for himself and the other members of the Order, brought a bill in equity in the New York Federal

Court to restrain the French company from selling its "Chartreuse" under the trade-mark of the Carthusian Monks in the United States. The facts were that for several hundred years, prior to 1903, save for a brief period following the French Revolution - the Order of Carthusian Monks occupied the Monastery of the Grande Chartreuse, near Voiron, in the Department of Isere, in France. This was their Mother House. There, by a secret process, they made the liqueur or cordial, which upwards for half a century had a world wide trade under the name of "Chartreuse". The product was marketed here and abroad, in bottles of distinctive shape to which were attached labels bearing the inscription, "Liqueur Fabriquee a la Gde. Chartreuse," with a facsimile of the signature of L. Garnier, a former Procureur of the Order, and its insignia, a globe, cross and seven stars; and these symbols with "Gde. Chartreuse" underneath were also ground into the glass.

This trade-mark was registered three times in this country - first in 1876.

The French company manufactured its product at the same place in France at which the Monks had manufactured their product, and the French Company advertised it in this country under the trade-mark belonging to the Carthusian Monks. The court held that the Carthusian Monks owned the trade-mark and the fact of their being compelled to cease business did not destroy their right to the trade-mark because they only ceased business in France, from which country they were driven, but continued their business in Spain and the court said, the Carthusian Monks were entitled to the claim and protection of their trade-mark and enjoined the French company.

However, four years of disuse has been held not to constitute abandonment. Burke v. Tucker, 178 Mass. 493.

In the case of Hannis Distilling Company v. Torrey, (D. C.) 32 App. Cas. 530, it appeared, the Hannis Distilling Company appealed from a decision of the Commissioner of Patents dismissing its notice of opposition to the registration by appellee, George W. Torrey Company, of the words "Torrey's Old Mt. Vernon Rye, 24 So. Market St., Boston, Established 1836," as a trade-mark for whiskey. The notice of opposition alleges that appellant has used the words "Mount Vernon" as a trade-mark for whiskey continuously since 1860. The court said that the sole question before it was priority of use and found that the evidence established the use by appellee and his predecessor in business as early as 1847 or 1848.

It was contended, however, that the appellee abandoned the use of its "mark" for twenty years, between 1855 and 1875. The facts, however, showed that during the period mentioned, of twenty years, the law restricted the sale of liquor and the court held that, as appellee had acquired the right to and use of the "mark" prior to 1855, it could not be lost by any forced restriction that might have been placed temporarily upon the sale of liquor in the State of Massachusetts.

Without having any knowledge on the question as to whether or not the W. Schneider Wholesale Wine and Liquor Company used the trade-mark continuously up to the time Federal Prohibition became operative under the Eighteenth Amendment, still it is a matter of common knowledge that, after the Eighteenth Amendment became operative, such trade-mark could not be legally used because the liquors could not be sold legally. If the W. Schneider Wholesale Wine and Liquor Company had not gone out of business and would, after December 5, assert its right to the trade-mark, I do not think that anyone else could legally claim same or register the same trade-mark in this State.

It appears, however, from a statement in your letter that you understand the W. Schneider Wholesale Wine and Liquor Company is now defunct and has discontinued the business in connection with which the trade-mark herein under consideration was used. Assuming that the W. Schneider Wholesale Wine and Liquor Company discontinued the business, in connection with which the trade-mark owned by it was used, it is the opinion of this department that the trade-mark no longer exists and must be considered as abandoned because the trade-mark cannot exist separate and apart from the business with which it has been connected. The corporation is dead and the business has been discontinued and this amounts to a legal abandonment of the trade-mark.

This department has no information to the effect that the business and the trade-mark was assigned, and no assignment of the trade-mark noted in the records of your office prior to the time the corporation owning the trade-mark ceased to exist.

In the case of Rice-Stix Dry Goods Company v. Schwarzenbach-Huber Co., 47 App. Cas. (D. C.) page 249, it was held,

> "Use of a word as a trade-mark cannot be predicated upon an assignment of the mark by the former member of a dissolved copartnership, who on dissolution of the firm did not continue its business. Under such circumstances, the mark becomes abandoned and subject to appropriation by anyone."

The point is that the property right in the trade-mark is dependent upon the continuous use of the "mark" in the business in connection with which the trade-mark is registered and used; and, when the business ceases, the trade-mark is abandoned and subject to appropriation by anyone.

Assuming that the business of the owner of this trade-mark, W. Schneider Wholesale Wine and Liquor Co., was discontinued years ago when the corporation ceased to exist, it is the opinion of this department that the trade-mark is abandoned and subject to appropriation by anyone.

We return herewith the application of Sidney Altman - accompanied by one dollar bill which is attached to the application - for registration of the above named trade-mark, also the application of W. Schneider Wholesale Wine and Liquor Company of August 1, 1898 for registration of the above named trade-mark, together with the letter dated August 2, 1898 to the Secretary of State, by Richard Koster enclosing application for trade-mark and registration thereof.

Please acknowledge receipt of these enclosures.

Respectfully yours,

APPROVED:

EDWARD.C. CROW
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

TRADE NAMES - Only one name can be registered in one application.

12-9 Sec 14329 RS Mo 1929

December 5, 1933

FILED

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We have your request of November 20, 1933, for an opinion as to whether or not Mida's Bureau of Chicago, Illinois, is entitled to register "Black Watch-Lord Nelson-Oscar Nelson and Southern Belle" in one application or whether separate applications should be filed for the registration of each name.

We call your attention to chapter 136, R. S. Mo. 1929, and in particular to Section 14329 R. S. Mo. 1929, which provides that anyone wishing to register a trade mark, trade name, or emblem,

> "may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file same, together with a facsimile of the same, term, design, or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workingmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar;"

We call your attention to the underscored portion of the above statute, wherein the four terms therein used are all singular.

Hon. Dwight H. Brown

It is, therefore, the opinion of this department that the Secretary of State should accept only applications for the registration of a single name, design, etc., and that no more than one trade name, or design, can be registered in one application. Each name should be registered separately and a fee paid for each registration.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

APPROPRIATIONS :)
PRINTING:)

Emergency relief administration entitled to paper and printing from Printing Commission and be paid out of appropriation under caption "incidental".

December 14, 1933.

FILED

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge your letter of December 12th, 1933, which reads as follows:

> "From time to time new state activities are established and under the laws governing the Printing Commission, we are required to furnish paper for such of those activities as are not lodged under the Eleemosynary Board or are not with the Educational Institutions. There are at this time some activities being carried on which are quasi State and Federal, and the Printing Commission is faced with the problem of determining to what extent it is legal and moral to furnish paper and printing for such activities.
>
> To what extent can the Commission go in taking care of paper requirements for those activities under Governor Wallace Crossley.
>
> Apparently the only warrant we would have, is the legislation of the department into existence and providing for its administration and operation through an appropriation bill, page No. 141, Session Acts, 1933. "

Laws of Missouri, 1933, page 469, provides:

Section 1.

"There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of Two Hundred Fifty Thousand Dollars ($250,000), or so much thereof as may be ordered by the Governor, to be used in the manner authorized and directed by the Governor, together with funds advanced through the Reconstruction Finance Corporation, or other agency of the Government of the United States of America, for the relief of citizens of the State of Missouri who are in need of aid by reason of being reduced to dire distress and want through unprecedented unemployment, and ruinously low prices of agricultural commodities: Provided, the expense of administration of the amount hereby appropriated shall be paid out of an appropriation made for that purpose, and shall not exceed the amount in such appropriation authorized.

Section 2.

There being no adequate law of this State authorizing and providing the relief authorized and provided by this act, an emergency is declared to exist within the meaning of the Constitution; therefore, this act shall take effect and be in force on and after date of its approval by the Governor."

This act was approved March 17th, 1933.

Laws of Missouri, 1933, page 141, Section 1a, provides:

"For emergency relief administration there is hereby appropriated out of the state treasury, chargeable to the general revenue fund for administration of emergency relief, the sum of Fifty thousand dollars or so much thereof as may be necessary for said purposes as follows:

For salaries of director, field representatives, office secretary, and stenographers $30,000.00

For general expenses, travel, office expenses including communication and incidental	$20,000.00
Total for emergency relief administration	$50,000.00"

This act was approved May 17th, 1933.

It is seen that the Legislature appropriated $250,000.00, or so much thereof as may be ordered by the Governor, to be used in the manner authorized and directed by the Governor. Therefore, the administration of emergency relief is under the direction of the Governor and his Department. And the Legislature provided $50,000.00 to pay for the expenses of administration of said fund.

In order for the Printing Commission to furnish paper and printing to the emergency relief administration it would have to be determined (1) if the emergency relief administration is within the provisions of Section 13799, R. S. Mo. 1929, and if it is, then (2) does the appropriation act (page 141) to said emergency relief administration include the payment for printing?

I.

Section 13799, R. S. Mo. 1929, provides in part as follows:

> "Executive departments shall in this and other sections of this chapter be construed to mean both the heads of said departments and the subordinate branches thereof, the boards, commissions, bureaus and officers appointed by the heads of said departments except the boards of educational and eleemosynary institutions of the state."

It is our opinion that the emergency relief administration is a subordinate branch of the Governor's Department, hence, "all work to be executed for the executive departments shall be ordered through the commissioners of public printing, and a requisition shall be obtained in advance signed by the head of the department ordering such work and said requisition shall be approved by the commissioners of public printing in the same manner as that provided in section 13802 of this law respecting the examination of accounts." (Section 13799)

State ex rel. McKinley Publishing Co., v. Hackmann, State Auditor, 314 Mo. 33.

II.

Article X, Section 19, of the Constitution of Missouri, provides in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law;"

Section 11421, R. S. Mo. 1929, provides as follows:

> "No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

In State v. Holladay, 65 Mo. 76, it was held that members of the state board of equalization were not entitled to warrants on the treasury, for service performed when there were no funds appropriated for such purpose. The court said, page 77:

> "No appropriation having been made by the last General Assembly for payment of the members of the State Board of Equalization for services in the year 1876, and that made by the preceding General Assembly for that purpose having been exhausted, the Auditor is not authorized to draw warrants on the Treasury in their favor."

In State ex rel. v. Henderson, 160 Mo. 190, l. c. 213, the court said:

> "Not a dollar of the funds raised under this act can be paid out of the Treasury without an express statute of the State disbursing it to such purposes as the Legislature may devote it to."

In State ex rel. Hackmann, 207 S. W. 64, l. c. 65, the court said:

> "Has the state board of equalization authority under the law to employ a stenographer at the expense of the state? If such board of equalization (hereinafter, for brevity, called simply the board) has any such authority, this authority must be bottomed on some statute. For it is fundamental that no officer in this state can pay out the money of the state, except pursuant to statutory authority authorizing and warranting such payment."

The appropriation act, page 141, Laws of Missouri, 1933, does not provide for printing and binding. The only provision for such would be embraced in the word "incidental". ("For general expenses, travel, office expenses, including communication and incidental")

The word "incidental" was defined in the case of The Robin Goodfellow. The Robin Gray. The Robin Hood., 20 F. (2d) 924, l. c. 925, as follows:

> "'Incidental,' obviously, means depending upon or appertaining to something else as primary. 'Burrill's Law Dictionary defines "incident" as "belonging or appertaining to; following; depending upon another thing as more worthy. * * * A thing may be necessarily or inseparably incident to another, or usually so." Webster defines it thus: "Something necessarily appertaining to or depending on another, which is termed the principal." Thomas v. Harmon, 46 Hun (N. Y.) 75, 77.' 4 Words and Phrases, First Series, p. 3494.
>
> Lord Dunevin, in Trustee of Harbor of Dundee v. Nicol, (1915) H. L. A. C. 550, said: 'indidental, in my view means incident to the main purpose of the main business.'
>
> Delivery of lumber is incidental to sale or traffic, the main object; and delivery may be made in any customary manner. If traffic is interstate, it must be shipped in the usual

> and customary way. Loading lumber on a truck, a car, or a ship, for delivery in the usual way, is no doubt incidental to the business of trafficking in lumber; and the loading may be by the regular employees of the lumber company or by a special employee. Employing libelant to load its lumber in carrying forward its business in the lumber traffic by the lumber company, is not engaging in the business of stevedoring, even though a small per cent. (less than 4 per cent., I think the testimony shows) of the cargo did not belong to the charterer, but to others to whom space had been given."

III.

We conclude that in order for the emergency relief administration to carry out the purposes for which formed that it is necessary for it to have printing done, hence, the word "incidental" used in the appropriation act would include printing.

It is our opinion that the Printing Commission must furnish paper and printing to the emergency relief administration, subject, however, to the following: (1) That said printing be used in administering the fund appropriated for unemployment relief (page 469, Laws of Missouri, 1933) and for state purposes solely (not Federal), and (2) that the expense of printing be paid from that part of the appropriation, page 141, Laws of Missouri, 1933, to-wit:

> "For general expenses, travel, office expenses including communication and incidental ..... $20,000.00"

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

SALARIES AND FEES:-Foreclosure of School Fund mortgage by sheriff, fees same as upon execution.

Dec 11789 RS Mo 1929

12-30

December 27, 1933.

FILED

65

Mr. John B. Brooks,
Presiding Judge County Court,
Trenton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "The County has some money loaned out of the School Fund that we expect to foreclose. We want to know what the Sheriff's commission would be on these sales.
>
> For example, if our loan amounted to $1000.00 and we bought it in for $1100.00, what would the Sheriff's commission be?
>
> Also, if a sale of property is ordered and publication made, and then sale ordered stopped by the Court, can the Sheriff collect commission on sale not made. If you will give us this information we will appreciate it."

In Jackson County v. Stone, 168 Mo. 577, it was held that a sale under a School Fund mortgage by the Sheriff is not a sale under a "mortgage with power of sale," and that the Sheriff's fees for such services are the same as he is entitled to on money received on execution. The Court at page 582 says:

> "In this case the defendant as sheriff, in the discharge of his official duty as such, levied on, advertised and sold the mortgaged land, on a duly certified copy of the order of the county court, which the statute declares 'shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, 'the execution to be issued shall be a special fieri facias, in accordance with the judgment, and shall be executed and returned as executions in ordinary civil suits.' * * *It necessarily follows from what has been said that no part of such amount was received by the defendant 'as commission for acting as trustee in a deed of trust or mortgage with power of sale' within the meaning of said section * * *."

Section 11789, R. S. Mo. 1929, fixes the fees allowed to

the Sheriff for his services, and among other things provides as follows:

> "* * *For commission for receiving and paying moneys on execution or other process, where lands or goods have been levied and advertised and sold, three per cent on five hundred dollars and two per cent on all sums above five hundred dollars, and half of these sums, when the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold and the money is paid to the sheriff or person entitled thereto, his agent or attorney."

In Miller v. Muegge, 27 Mo. App. 670, 675, it is said:

> "But the sheriff, as already stated, is entitled to a commission on the sum of money which he received and paid over."

If the County Court forecloses a county school fund mortgage and the land sold for the sum of $1100.00, the Sheriff would be entitled to a commission of 3% on the first $500.00, which would be $15.00, and a commission of 2% on the remaining $600.00, which would be $12.00, or a total commission of $27.00.

If, after the sale of property is ordered and publication made and the sale stopped and the money is paid over to the Sheriff, or to the county and not to the Sheriff, the Sheriff, under the foregoing section, is entitled to one-half of the commission above set out. In other words, after the sale had been ordered and publication made and the loan of $1000.00 was paid off and the sale stopped, then the Sheriff would be entitled to the commission of one and one-half per cent on the first $500.00, which would be $7.50, and one per cent on the second $500.00, which would be $5.00, or a total of $12.50.

It is therefore our opinion that the Sheriff is entitled to a commission of 3% on the first $500.00 and 2% on sums over $500.00 on money collected by reason of the foreclosure, and if, after sale is ordered and publication made, the sale is stopped and the loan is paid off, then he is entitled to a commission on the money received by the county under the mortgage, at the rate of one and one-half per cent on the first $500.00 and one per cent on all over $500.00.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

BUILDING AND LOAN ASSOCIATION:
Definintion of what are receipts under Section 5604
Revised Statutes Missouri 1929, amended 1931,page 155.

FILED
12

January 30, 1933

Bureau of Building and Loan Supervision
Jefferson City, Missouri

Gentlemen:

This office acknowledges receipt of your letter dated January 23, 1933, attaching letter of Cape Girardeau Building and Loan Association dated January 19, 1933, which latter letter is in part as follows:

> "This Association is now requiring notice from it's stockholders who wish to withdraw their certificates of stock in this Association and intend to pay withdrawals in accordance with Section 5604 of the Building and Loan Laws of Missouri. We would like to ask you to give us your interpretation of this section which states, "At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, etc." We would like to know whether one-half of the receipts should be interpreted as one-half of our income from dues, interest and penalties or whether the repayment of loans in full or part should be included."

Your letter of date January 23, 1933, is in part as follows:

> "Please note the enclosed letter received by this Department, requesting an opinion regarding Section 5604 of the Building and Loan Laws of Missouri".

The by-laws of the Cape Girardeau Building and Loan Association nor a share of its stock are not before us.

The laws contained in the Revised Statutes of Missouri 1929 with reference to Building and Loan Associations were repealed and are now found in Session Acts of 1931, pages 141 to 165 inclusive.

Section 5585 of the above laws provides that not less than twenty-five persons may associate themselves together with the

intention to constitute a corporation by acquiring real estate, making improvements thereon, removing encumbrances therefrom, by advancing to its numbers out of a fund accumulated by the payment of periodical installments or otherwise, a sum equal to the par value of their shares, and the corporation is for the further purpose of accumulating the savings of its members to be returned to such of its members who do not obtain advances for any of the purposes above mentioned when the savings and the profits arising therefrom shall amount to a certain sum per share, as specified in the Articles of Agreement.

Section 5586: That the limit of the capital to be accumulsted, the number of shares; the par value of each; the number of shares subscribed and that the first month's dues have been paid thereon shall be stated in such Articles of Agreement.

Section 5588: That any such association may increase its capital stock in the manner provided in the last named section.

Section 5593: That the object of such corporation shall be the accumulation of a capital in money, to be derived from payments by its members in periodical installments or otherwise, and from the profits and accumulation arising from the investment of such payments. The capital may be issued in prepaid or installment shares. The certificate of stock together with the by-laws and the provisions of Chapter 35, shall determine the liability of the association to the stockholders and the relations of the stockholders to the association. Capital, as accumulated, shall be loaned or advanced to members of the corporation who shall give security for and make payment of all dues, interest, premium and fines until each share so advanced upon shall reach its full value. Such association conditionally may acquire title to real estate and may accumulate from the earnings a "contingent fund" for the payment of contingent losses and an "undivided profit fund" both of which may be loaned and invested as other funds of the association. At any time the association has funds in excess of the amount needed for loans to its members and the payment of matured shares and withdrawals and borrowed money, it may invest in other obligations.

Section 5594: The moneys accumulated from payments on account of stock, interest, premium and fines, or from any other source, after proper allowances for expenses and other provisions as to the withdrawal and cancellation of shares and accumulation of contingent fund, may be offered to shareholders or shareholder who shall bid the highest premium for the preference of a loan or advance on his or their respective shares. The directors may make loans to others than stockholders on the security specified, and may dispose of such loans and investments as funds may be needed for making loans to members or for the other purposes of the association.

Section 5595: Premiums or loan fees for loans or advances shall consist of a percentage on the amount to be loaned, advanced or borrowed, and shall be a charge, in addition to interest as aforesaid, on the amount loaned, and such premium or loan fee together with interest and fines paid, shall be received by the association as a profit on the amount of capital invested in said loan.

Section 5597: That when a member procures a loan or advance from the association he shall transfer and pledge his shares of stock therein to be held until the value thereof has been fully paid and until all payments of dues, interest and fines have been made and all other liens thereon discharged.

Section 5600: Any such corporation may purchase, hold, convey, lease or mortgage real estate purchased at the foreclosure of any mortgage, deed of trust, judgment, lien or other encumbrance held by it.

Section 5601: A shareholder may repay a loan at any time upon the terms and conditions fixed in its by-laws. If there be no by-laws on the subject, then on a settlement the borrower shall be charged with the full amount of the loan, together with all installments of dues, interest, premium and fines and other sums of money then remaining due and unpaid, and shall receive and be given credit if he desires to surrender his shares, for the withdrawal value of the shares so pledged in accordance with the rule hereinafter provided for the withdrawal and cancellation of shares.

Section 5602: Every association shall accumulate from its earnings a contingent fund for the payment of contingent losses and at least three per cent of the net earnings shall be set aside in February and August of each year to such fund until it reaches at least five per cent of the total assets. All losses shall be paid out of such fund until the same is exhausted and whenever the amount in such fund falls below five per cent of the assets shall be replenished by semi-annual appropriations of at least three per cent of the net earnings until it reaches five per cent. All losses shall be assessed in the same proportion and manner on all members after the amount in the contingent fund has been applied to the payment of same.

Section 5603: Each shareholder shall pay a sum fixed as dues for each share held by him, as a contribution to the capital of the association until such payments aggregate the ultimate value of such share or shares. Whenever a share shall be matured and unpledged to the association, payments thereon shall cease and the holder may withdraw same as provided in this act. If not withdrawn, such stock shall become fully paid in a sum equal to the matured value of such share; not more than one-half of the funds in the treasury of the association can be applicable to the payment of matured shares without the consent of the directors; the directors may in their discretion retire the unpledged full paid shares or prepaid shares

at any time; and may retire installment shares at any time after the expiration of three years from the date of issue thereof by enforcing the withdrawal of the same, provided that the matured shareholders shall be entitled to receive and shall be paid the full value of their shares at the time, less all fines and their proportionate part of any loss. Borrowing shareholders shall in addition to the dues aforesaid pay interest or premiums on each share borrowed upon until such shares shall reach the ultimate value thereof, when the shares shall be cancelled.

Section 5604: This section prescribes the conditions on which shareholders may withdraw from the association among other provisions, and the vital one so far as the question in hand is concerned is as follows:

> "At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders, whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors."

The first legislative enactment touching the question of what portion of the funds of the association to be used for withdrawals is found in Session Acts 1887, page 111. That provision was as follows:

> "At no time however shall more than one half of the un-loaned funds in the treasury of the corporation be applicable to the demands of the withdrawing shareholders without the consent of the board of directors".

The conditions prescribed in the above quoted law was amended by the Laws of 1895, page 111, Section 15, so that the section read that one-half of the receipts of the corporation for any fiscal month could be used to pay withdrawals instead of one-half of the unloaned funds in the treasury of the corporation. The section was carried in the same form from 1895 until the present time.

From the brief outline of the statutory provisions with reference to building and loan associations, it is clear that such associations are designed for the accumulation of the money of the members by periodical payments into its treasury, such money to be invested from time to time in loans to the members on real estate or on their shares of stock, the borrowing member to pay interest and a premium therefor and also continuing his fixed periodical installments, all of which payments together with the non-borrowers' payments including fines, forfeitures and fees, go into a common fund until such time as the installment payments and the profits amount to the

face value of all the shares in the association matures the certificates of stock and cancels the borrower's debt.

The whole working of the law under building and loan associations indicates mutuality or a purpose to assist all the shareholders. All of the contributions to the treasury of the association after expenses and losses are paid may find their way into the capital stock of the corporation, so that each member has a contributed interest therein. The capital stock is a common fund contributed by all of the members. Therefore when a loan is paid to the corporation it is but the payment into the treasury of a common fund theretofore paid in by the members.

The case of Powell v. Doyle, 93 Missouri Appeal,296, was a case where the association undertook to retire stock in the association and to issue the notes of the association in lieu of the shareholders' proper proportion of the monthly cash receipts. The statute read then as it does now as to withdrawals. On the view of the court on what was meant by the term "cash receipts", the court at page 301 of the opinion said:

> "If the cash receipts of the month on hand had not been sufficient for that purpose, then the retirement of the stock could not have been legally accomplished. This is too plain for controversy. Such a course of procedure wholly ignores the explicit mandatory provisions of the statute. It was a flagrant violation of the association's charter".

Ahd further on the same page:

> "In such cases the funds must come out of the monthly cash receipts of the corporation, acquired through the ordinary channels of its business".

Money acquired through the ordinary channels of the association's business of course would include payment of loans, as well as collection of assessments, dues, premiums, fines, etc.

In our opinion the term "one-half of the receipts of the corporation for any fiscal month" includes loans theretofore made by the corporation and paid into its treasury during such fiscal month for in that way will the mutuality of the association be carried out and the withdrawing member who has kept his obligations with the association be paid his proper share of a fund he has helped build.

Yours very truly,

GILBERT LAMB
Assistant Attorney General.

APPROVED: _____
Attorney General.

GL:LC

RIGHT OF BUILDING AND LOAN ASSOCIATION TO PLEDGE ASSETS,
RIGHT TO BORROW MONEY OUTSIDE OF THE STATE OF MISSOURI,
RIGHT TO JOIN FEDERAL HOME LAND BANK.

5514-19-5607 Laws-31

V1

FILED

12

February 25, 1933

Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This office acknowledges receipt of your letter dated February 9, 1933, in which you inquire as follows:

"1. Has a Missouri association the authority to pledge its assets as security for a loan?

2. Has an association the authority to borrow money outside of the State of Missouri and send its assets beyond the border of the State, outside the jurisdiction of this Department and Missouri Courts?

3. Have the officers of Missouri associations the right to join the Federal Home Land Bank and thereby bind members to a joint and several liability that was not contemplated when they became members and without their knowledge and consent?"

The assets of a building and loan association under the laws of Missouri consist of payments on account of stock, interest, premiums, fines and fees, together with the obligations of the shareholders of the association, so that I take it your inquiry number one is whether the obligations of the shareholders of the association may be pledged as security for a loan to the association. Under Sections 5594 and 5597, Laws 1931, pages 149 and 151, loans or advancements made to shareholders must be on a non-negotiable note executed by the shareholder, secured by a first mortgage or deed of trust on real estate and accompanied by a transfer pledge of the shares of stock of the member obtaining the loan or advance. The term non-negotiable as used in the foregoing section has been construed in the case of Layton v. Hough, 169 Missouri Appeal, 213, 229, as follows:

"The statute itself regulating these companies, when providing in what is now section 3392, R. S. 1909, that they are non-negotiable, does no more than put into the statute a construction that had long before been applied by the courts, in holding that notes,

given to these companies, are not commercial paper. (See Sappington v, Aetna Loan Co.,supra). By the statute it is provided, that "for every loan or advance made as aforesaid, a non-negotiable note or a bond secured by first mortgage or deed of trust on real estate shall be given, accompanied by a transfer and pledge of the shares of stock of the member or members so obtaining a loan or advance. Said shares so transferred and pledged shall be held by (the) corporation as additional or collateral security for the performance of the agreements, covenants and conditions of said note or bond and mortgage or deed of trust". As we construe this term "non-negotiable", as applied to those building and loan companies, it means non-assignable".

The notes of the shareholders would not have validity as pledged assets unless such notes were assigned as collateral security. Under the above holding we think the notes would not be assignable for any purpose and therefore answer your inquiry number one in the negative.

Section 5607 Laws 1931, page 156, authorizes a building and loan association if so provided in its by-laws, to borrow money for certain purposes, so that in the first place whether an association is authorized to borrow money under any circumstances depends on whether or not such authority is given by the by-laws. While we do not find any adjudications on the subject, no reason appears if an association has authority to borrow money why it could not borrow money beyond as well as in the State of Missouri. The answer to your inquiry number one answers the remainder of your inquiry number two.

As to your inquiry number three, it is well settled and needs no citation that the obligations of contracts can not be impaired by acts done or even Legislation enacted subsequent to the entering into of the contract. Therefore unless the contract provides that an association may join the Federal Home Land Bank, or unless the law gave such right at the time the contract was made, then your inquiry number three would be answered in the negative. You do not submit a form of contract nor do you state the date when the contract inquired about was entered into, therefore we are unable to further answer your inquiry number three.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

Attorney General.

GL:LC

IN RE: House Bill No. 639 relating to registration of voters in towns of 10,000 to 30,000 inhabitants.

June 5, 1933.

FILED
12

Buxton & Skinner Printing and Stationery Co.,
306-308 North Fourth Street,
St. Louis, Missouri.

Attention: Mr. R.M. Kendrick

Gentlemen:

At the request of Governor Park, this department writes you in reply to your letters of May 29 and June 1, 1933.

Sec. 2, Art. VIII of the Constitution of the State of Missouri as amended by the Constitutional Convention February 26, 1924 and approved by the voters, provides as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Sec. 3 of House Bill No. 639 provides as follows:

> "Every male and female citizen of the United States, and every person of foreign birth who shall have declared his intention to become a citizen of the United States according to law, not less than one year or more than five years before he offers to register, who is over the age of 21 years, who has resided in the State one year next preceding the election

> at which he offers to vote, and during the last 60 days of that time shall have resided in the city, and during the last ten days of that time in the ward or precinct at which he offers to vote, who has not been convicted of bribery, perjury or other infamous crimes affecting his franchise, nor directly interested in any bet or wager depending upon the result of the election, shall be entitled to vote at such election for all officers, state or municipal, made elective by the people or at any other election or primary held in pursuance of the laws of the State; but he shall not vote elsewhere than in the election precinct where his name is registered, and whereof he is registered as a resident unless otherwise provided in this article."

It is apparent that the constitutional provision and Sec. 3 of House Bill 639 as to qualifications of voters, conflict. The provisions of Sec. 3 of said bill in so far as they conflict with Sec. 2 of Art. VIII of the Constitution are unconstitutional and inoperative. Sec. 3 authorizes persons to vote who have declared their intention to become a citizen of the United States not less than one year or more than five years before offering to register. The language in Sec. 2, Art. VIII is mandatory and limits the right to vote to citizens of the United States, including occupants of soldiers' and sailors' homes over twenty-one years of age, residing in this state one year and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at any election by the people.

The unconstitutional form in which Sec. 3 of House Bill 639 is drawn does not, however, invalidate the whole of the bill because the matter of the qualification of voters was not the principal object or inducement the Legislature had in passing House Bill 639. The objective sought by this bill was the matter of registration of voters in towns of 10,000 to 30,000 inhabitants. Our Supreme Court in State ex rel v. St. Louis, 241 Mo. 247, said:

> "We are cited to a case (Skagi County v. Stiles, 10 Wash. 388) holding that where a part of the law is bad the presumption is generally that the whole is bad. Such a presumption I think of doubtful existence and of little value if existing at all. To the contrary we approach the constitutionality of a law with a strong, even a violent, presumption it is valid. Its invalidity must be made to appear beyond a reasonable doubt and every

> allowable art, part and act of judicial power should be exercised in so interpreting the law, if possible in reason, that none of it perish by construction. But if that be impossible and some of it, through inherent vice, must perish, do not the separable and independent parts of the law still stand protected by the presumption of validity attending the whole law at the outset? Why not? To a little alter and use of simile of Lord Hobart (Malever v. Redshaw, 1 Mod. 35), which I have had occasion to use before in another form, a judge is not to be like a tyrant, making all void when part is void, but like a nursing father, making void only that part where the fault is and preserving the rest if he can."

We call your attention to the fact that under the general provision in the general election law of the state relative to qualifications of voters, Sec. 10178 R.S. of Mo. 1929, the same defects appear as occur in Sec. 2 of House Bill 639. This department is of the opinion, however, that the provisions of Sec. 2, Art. VIII of the Constitution are operative and self-enforcing in so far as qualifications of voters are concerned, and that all those who are eligible under said section and article of the Constitution as qualified voters of the state are legally eligible to register and to vote under the provisions of House Bill 639 in cities and towns of 10,000 to 30,000 inhabitants.

A comparison of the registration books and registration lists of poll books provided for by Sec. 4 of House Bill 639 with the provisions of Sec. 10542 R.S. of Mo. 1929 providing for registration in cities of 10,000 to 100,000 inhabitants discloses that the form provided by each of the two sections is identical. It is true that there is no "column" in the form provided in Sec. 4 of House Bill 639 for recording the nature of the disqualifications and the names of the witnesses upon whose testimony the rejected voter's vote was rejected. Sec. 4 contains no provision therefor, but Sec. 7 does provide as follows:

> ****And it shall be the duty of the judges of the election to try and determine, in a summary manner, before the close of the polls, the qualifications of any person challenged as aforesaid and upon proof that the person so challenged is not a qualified voter, the judges of election shall reject his vote and they shall state, opposite the name of the person on the registered list of voters whose vote is rejected, the nature of his disqualifications and the names of the

> Witnesses upon whose testimony his vote was rejected; but the vote of no person who may be challenged may be rejected except upon the testimony of two credible witnesses. ***"

The rule of law is that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. Our Supreme Court has said with reference to a partly invalid statute and the constitutional provision in State ex inf. v. Duncan, 265 Mo. 27, that

> "Where the entire statute is not built around the unconstitutional part, but that part is separable from the rest, the invalid part may be cut away, and the hiatus filled with a self-enforcing constitutional provision pertaining to the same subject; and if the valid part of the statute and the self-enforcing constitutional provision together constitute a workable plan, things done in pursuance thereto will be upheld."

Again our court has held "rules for interpretation of statutes are manifestly intended to aid in ascertaining the legislative intent rather than to control such intent or to confine the operation of a statute within narrower limits than was intended by the Legislature." The legislative intention evidently was as disclosed by the above quotation from Sec. 7 to have a record made of the rejection of a voter and that the record should be made opposite the name of the person on the registration lists of voters and that it should state the nature of his disqualification and the names of the witnesses. Section 7 commands that this shall be done.

We are therefore of the opinion that space should be left in the books and lists to make the notation required as to rejected voters. We do not hold that any one will be authorized to add another column to the form provided by statute, but it is our opinion that space should be left to make the notation of rejected voters as required by Section 7 of House Bill 639. Statutes should receive a sensible construction such as will affect the legislative intent.

State ex rel Gass v. Gordon, 266 Mo. 394.

Referring to Section 13 of House Bill No. 639, we find provision made for notification of death of voter or conviction of felony or misdemeanor connected with the right of suffrage to be given by method named to registration board and provision for cancellation of registration of deceased or convicted voters. Section 13 is to be construed in the light of Section 11 of said bill, which provides that the clerk of the court where parties are tried and convicted of penitentiary offenses

in the county in which such city is located shall furnish monthly to the city clerk, who is clerk of the board of registration, the names of all persons from such cities convicted of any crime, the punishment of which is confinement in the penitentiary, and their place of residence, and those who have been convicted likewise of a misdemeanor connected with the right of suffrage.

Turning now again to Sec. 13, it is provided that if cause is not shown "by the deceased" or convicted individuals as to why his or her name should not be stricken from the registration, the board should cancel the registration of the voter and mark same "deceased" or "convicted", as the case may be. It is evident that the Legislature intended that after the voter's name on the registration books, if he died, the word "deceased" should be written, and if convicted of a felony or crime or misdemeanor connected with the right of suffrage, the word "convicted" should be placed opposite his name.

This department is therefore of the opinion that there should be space upon the registration books for carrying out the provisions of Secs. 11 and 13. This department construes House Bill 639 to mean that the book signed by the voters in registering shall be the original book and that a copy thereof alphabetically arranged for each election shall, on the day before the election, be delivered by the board of registration to the judges of election.

This department has no method of determining what is meant by the phrase "the registration books and registration lists of poll books as hereinafter provided to be delivered to the judges of election" except from the terms of House Bill 639 itself, and whether correct or not, this department is inclined to the opinion that the "registration lists of poll books" refer to the copies of registration books provided by Sec. 18 to be delivered with the original registration book to the judges of election.

It is the opinion of this department that Sec. 10197 found under the head of General Provisions in the general election laws, Chapter 61, Article II, R.S. of Mo. 1929 is not the only section of the statutes setting forth the form of the poll books. The language of Sec. 4, House Bill 639, lines 13, 14 and 15 is as follows:

> "The registration books and the registration lists of poll books as hereinafter provided to be delivered to the judges of election shall be in the following form:"

We think the words "poll books" refer to the books to be used by the judges of election and to be kept by said judges and clerks of election on election day.

Respectfully youre,

EDWARD C. CROW.

APPROVED:

ROY McKITTRICK,
Attorney General

ADMINISTRATION: Affidavit insufficient for distribution under laws of Missouri.

September 30, 1933

10-2

FILED
12
48

Honorable T. Buynowski
Vice-Consul
1500 N. Dearborn Parkway
Chicago, Illinois

Dear Sir:

The office of the attorney general of Missouri acknowledges receipt of your letter wherein you desire an opinion based on the following facts:

> "I am requested by my Home Authorities to obtain for the Polish Ministry of Justice an authoritative opinion, whether the enclosed here affidavit of Augusta M. Lieberman, dated December 10, 1930, is according to the statutes of the State of Missouri sufficient document for distribution of the assets of the estate left by a deceased person, or same is only a motion for issuance of a decree of inheritance by the Court.
>
> It is understood by me fully that it is not your duty as Attorney General for the State of Missouri to render opinions for foreign representatives on question of law or the state, but in the above matter, I have the honor to request you to render the opinion as an act of courtesy.
>
> The enclosed affidavit please send back to me, as I am obliged to return it to my Home Authorities.
>
> Please be assured that my Home Authorities will most gladly reciprocate in cases of similar nature."

The enclosed affidavit appears to be merely to show the surviving heirs of Hermann Liebermann. We cannot ascertain by your letter in what manner this affidavit is to be used. We assume that Hermann Liebermann possessed property or was possibly an heir to an estate in Poland and his widow and son are requesting the distribution of the estate. If such assumption is correct, the enclosed affidavit is not sufficient for distribution to be made on the same. We note that the affiant lives in the state of Kansas and the deceased died in Kansas City, Missouri

We suggest that Augusta M. Liebermann or her son, Sylvan Liebermann, apply to the court in their county for letters of administration on the estate of Hermann Liebermann according to the statutes of the law of Kansas, and if there is an estate in which the heirs of Hermann Liebermann are interested in Poland, the funds could then be paid to the administrator and distribution made according to the laws of Kansas.

The enclosed affidavit is not sufficient and could not be accepted in the courts of Missouri. If we are incorrect in assuming the function or office that the affidavit is to perform, you are at liberty to write this department again, giving more definite facts and we will gladly oblige you with a further opinion.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED_____
ROY McKITTRICK
Attorney-General

OWN/fe

GAME AND FISH:
PURCHASING AGENT:

Purchasing Agent not necessary party in condemnation suit under Section 8220, R. S. 1929.

October 3, 1933

FILED
12

Honorable Wilbur C. Buford
Commissioner
Game and Fish Department
Jefferson City, Missouri

Dear Mr. Buford:

This is to acknowledge your letter of October 2, 1933, which is as follows:

> "Section 8220, R. S. Mo. 1929, provides for the condemnation of lands for state park purposes by the Governor, the Attorney-General and the Fish and Game Commissioner in the name of the State. Section 2 of the State Purchasing Agent Act, Pages 410-414, both inclusive, section acts of 1933 provides that the purchasing agent 'for negotiation, all leases and purchase of lands, except for such departments as derive their power to acquire lands from the constitution of the State.'
>
> It is the desire of this department to have instituted condemnation proceedings for certain lands for State Park purposes in Holt County Missouri. Will you kindly advise me whether or not such proceedings shall be instituted in the name of the state purchasing agent as relator or in the names of the Governor, the Attorney-General and the Fish and Game Commissioner as relators."

Section 8220 R. S. 1929, provides in part as follows:

> "It is hereby made the duty of the fish and game commissioner to set apart and withhold from the receipts of his office, not less than twenty-five per cent. of all fees and other moneys by him collected in the enforcement of the fish and game law, which shall be

> set apart and dedicated to the purpose of purchasing, improving and maintaining for the state suitable real estate for public parks, for the recreation of the people of Missouri;"

And further,

> "The said state fish and game commissioner by and with the consent and approval of the governor and attorney-general is hereby authorized to contract for and purchase real estate, the title of which shall be conveyed to the state of Missouri, for the use as public parks, etc., * * * * * * * * * And when any real estate is contracted for or purchased as herein provided a full report thereof shall be made to the governor of the state, and a copy thereof filed with the secretary of the state."

And further,

> "The governor, attorney-general and fish and game commissioner, in the name of the state, may enforce the right of eminent domain to condemn lands for state park purposes, where necessary, as is now done by railroad corporations for rights-of-ways. Etc."

A reading of the above section shows that lands for state park purposes, for the use of the people of Missouri, may be acquired in two different ways: First; by voluntary purchase, and second; by condemnation. Your inquiry concerns condemnation of land. You inquire if it is necessary to include the purchasing agent as one of the relators in a suit of condemnation.

Laws of Missouri, 1933, page 411, Section 2, in part provides:

> "He (purchasing Agent) shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Your attention is directed to the words "and purchase all lands". Referring to Section 8220, supra, we find that when the right of eminent domain to condemn land for state purposes is used that it shall be exercised in the same manner as railroads for rights-of-ways.

Section 4680, R. S. 1929, provides in part:

> "* * *, and if the title thereof cannot be secured by agreement with the owners thereof, or if from any other cause the title cannot be secured, such company may proceed to condemn the same in the same manner and with the same effect as is now provided by law for the condemnation of other lands."

See Section 4655 R. S. 1929, for general and additional powers of railroads relative to lands.

Constitution of Missouri, Vol. 1, R. S. 1929, Article II, Sections 20 and 21, pertain to "eminent domain". We quote Section 21:

> "That private property shall not be taken or damages for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Thus, Section 8220, supra, provides the right of eminent domain to condemn, and Section 2, Laws of Missouri, 1933, supra, provides that the Purchasing Agent shall negotiate all purchases of land. The question arises as to whether or not there is any difference between the right of eminent domain to condemn and the right to purchase; or whether or not the word "purchase", as used in the 1933 Laws, is comprehensive enough to include eminent domain. This brings us to a discussion of the words "eminent domain" and "purchase."

Corpus Juris, Vol. 20, page 513, in defining "eminent domain" says this:

> "Eminent domain is the right of the nation or the state or of those to whom the power has been lawfully delegated to condemn private property for public use, and to appropriate the ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law."

And further,

> "The prevailing view is that the right of eminent domain is an attribute of sovereignty, inherent therein as a necessary and inseparable part thereof, although a theory in some cases is that it is a reserve right vested in the state, * * *"

And further at page 533:

> "The right of eminent domain may be exercised either directly by the legislature or through the medium of corporate bodies, or of individual enterprises, by virtue of a delegation of the power. * * *"

And further, page 538:

> "The power to take property for public use may be delegated to private corporations, but such power must be conferred by express words of the statute or by necessary implication therefrom, and statutes claimed to confer such power must be strictly construed. * * *"

In the case of State ex rel. State Highway Commission v. Gordon et al, 36 S. W. (2d) 105, l. c. 106, Ragland, Chief Justice, in writing the opinion for the Supreme Court of Missouri, in Banc, said:

> "The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the constitution. Constitutional provisions relating to the taking of property are but limitations upon a power which would otherwise be without limit. 10 R. C. L. 11."

And further,

> "The right to exercise the power, or to authorize its exercise, is wholly legislative. When an agency of the state asserts that the right to exercise the power has been delegated to it, it must be able to point out a statute which in express terms or by clear implication authorizes such exercise and to the extent claimed. * * * * * * * * * * * *"

Under Section 8220, supra, the statute plainly states that the governor, attorney-general and fish and game commissioner, in the name of the state, may enforce the right of eminent domain to condemn lands for state park purposes. We now determine whether or not the word "purchase" used in Section 2, 1933 Laws, embraces the mode of acquiring lands by condemnation.

In Kohl v. United States, 91 U. S. 367, 23 Law Edition 449, l. c. 452 (Law Ed.), the Supreme Court of the United States said:

> "It is true, the words 'to purchase' might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference."

And, we are of the conclusion the word "purchase" used in Section 2, 1933 Laws, means the acquiring of lands by contract as is contemplated by that part of Section 8220, supra, which provides:

> "The said state fish and game commissioner by and with the consent and approval of the governor and attorney-general is hereby authorized to contract for and purchase real estate,"

and that the condemnation suit being a judicial one, it is not necessary that the Purchasing Agent be made a relator.

It is our opinion, therefore, that the style of the case shall be "State ex rel. Guy B. Park, Governor; Roy McKittrick, Attorney-General; and Wilbur C. Buford, Fish and Game Commissioner vs. _____", it being unnecessary to include the name of the Purchasing Agent as a relator.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

In Re: Amendment to Sec. 11072, Page 283, Session Acts Mo. 1933 relating to Reforestation.

12-5

December 5, 1933

FILED
12

Hon. C. M. Buford
Senate Chamber
Jefferson City, Missouri

Dear Senator:

I herewith enclose to you a copy of suggested change in Title and in emergency clause to House Bill No. 8.

Title 16. United States Code Annotated--Section 500, provides as follows:

> "Twenty five Per centum of all moneys received during any fiscal year from each national forest shall be paid at the end of such year by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated. When any national forest is in more than one state or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. There shall not be paid to any state for any county an amount equal to more than forty per centum of the total income of such county from all other sources."

I find no amendment of the above set forth Federal Statute. This act of Congress was construed by the United States Supreme Court in the case of King County vs. Seattle School District No.-1. 263 U. S. 361. (Date Decision Dec. 3, 1923). You will observe the language of the act directs twenty-five per cent of all money received from each forest reserve during any fiscal year shall be paid at the end thereof by the Secretary of the Federal Treasury to the State in which the reserve is situated and then the act says:

> "To be expended as the State* * *Legislature may prescribe for the benefit of the Public Schools and Public Roads of the county or counties in which the forest reserve is situated."

The Statute of the State of Washington directed the State Treasurer to turn over to the County Treasurers the amounts of such money belonging to the respective counties: And provided that:

> "County Commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the Public Schools and Public Roads thereof, and not otherwise."

A part of the time the County Commissioners paid one half of the money to Schools and one half to the Road fund. But from 1909 to 1915 directed all the money be assigned to the Road and Bridge Fund. Suit was begun by the Seattle School District in the Court to compel the County Commissioners to divide the money equally between the schools and roads and divide the half given the schools on basis of attendance in all the districts of the county. The Court held of course the Federal District Court had jurisdiction because the right and title to the money was claimed under a Federal Statute. TheCourt said:

> "There is involved the question whether the act permits the money so received by the county to be expended by the County Commissioner as directed by the State Legislature or requires an equal distribution annually for the benefit of Public Schools and Public Roads of the county.* * *When turned over to the State the money belongs to it absolutely. There is no limitation upon the power of the Legislature to prescribe how the expenditure shall be made for the purposes stated, though by the Act of Congress 'There is a sacred obligation imposed on its public faith'* * *No Trust for the benefit of the appellee (The Seattle School District) is created by the grant. But assuming the moneys paid over to the State are changed with a trust that there shall be expended

> annually one half for schools and one half for roads, the Appellee has no right to enforce the Trust. Congress alone can inquire into the manner of its execution by the State.* * *The act does not direct any division of the money between schools and roads. Its language above quoted indicates an intention on the part of Congress that State in its discretion may prescribe by legislation how the money shall be expended. No distribution to the Appellee or any other school district is required. The Public Schools and the Public Roads are provided and maintained by the state or its subdivisions and the moneys granted by the United States, "are assets in the hands of the State to be used for the specified purposes as it deems best* * * Equal division annually between the two purposes is not required or contemplated by the act. The Appellee has no standing to object to the distributions made by the County Commissioners."

Your proposed amendment gives all the money to the Schools. Under the above cited case this is legal. I believe the body of your bill is legal. I am inclined to the opinion the Court would sustain the "title to your bill and also the emergency clause." Perhaps my suggestions would strengthen the "Title and the emergency clause."

Very respectfully,

EDWARD C. CROW
Assistant Attorney General.

ECC:MM

SCHOOLS:
SCHOOL DISTRICTS:-Contractual relation between district and teacher discussed.

12-11

FILED
12
23

December 6, 1933.

Mr. J. L. Buntin,
Lock Box No. 13,
Napton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Through your valued and most highly appreciated assistance L. T. Stouffer, a member of our school board, has been removed. This, however, does not entirely eliminate our trouble.

The teacher (Virginia Abney) the teacher he (L. T. Stouffer) tried to elect claims that the contract she has is as good as any she can secure, which is the contract signed by her relative (L. T. Stouffer who was the president of our board of education at the time he tried to elect V. Abney as a teacher in our school.

Seven weeks after school started and after L. T. Stouffer, a great uncle of V. Abney (the teacher) had been removed, and all vacancies in the board filled, we voted by a majority of five votes to retain V. Abney for the remainder of the term, and, of course, would pay her for the remainder of the school year--but refuse to pay her for the first seven weeks because of the way in which she (V. Abney) secured the position.

She refuses to accept and sign a new contract, and is teaching now as she has been since the beginning of school, Sept. 4, 1933. It is reported that she intends to teach the remainder of the school year and then sue the school board for the full amount of her salary.

1. Is V. Abney a legally elected teacher under these circumstances,(after refusing to sign her contract)?

2. Since we voted to retain her in school rather than make a change in the faculty (which is organized for the school work of this school year) is it expedient for us to let her continue under these circumstances, or should we arrange for the employ-

ment of another teacher in her stead?
3. Since we voted to retain her, is it according to law for us to pay her the salary due her for the remainder of the school year even though she refuses to accept the new contract?
4. Since she has been legally elected seven weeks after school started, is it possible for her to collect for the seven weeks of school before her legal election?

Please answer these inquiries by number, and if you can get a reply to us by return mail it will be a great help to us in eliminating this trouble in our school, as the teacher's (V. Abney) father is trying to create as much trouble as possible for us because of our breaking up their family affair in our school, and to, we are to have a school board meeting Friday, Nov. 24, 1933."

We shall first discuss the law applicable to your inquiry and then attempt to answer your specific questions in order.

Section 9209, R. S. No. 1929, provides as follows:

"The board shall have power, at a regular or special meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be inforce for the full time for which the contract is made. The board shall not employ one of its members as teacher, nor shall the teacher serve as clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk."

The above section was amended in 1933, but no material change was made so far as applying to your case. Section 9210, R. S. No. 1929, provides as follows:

"The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby. Neither party shall suspend or dismiss a school under said contract without the consent of the other party. The board shall have no power to dismiss a teacher; but

> should the teacher's certificate be revoked, said contract is thereby annulled. The faithful execution of the rules and regulations furnished by the board shall be considered as part of said contract: Provided, said rules and regulations are furnished to the teacher by the board when the contract is made. Should the teachef fail or refuse to comply with the terms of the contract or to execute the rules and regulations of the board, the board may refuse to pay said teacher--after due notice, in writing, is given by order of the board--until compliance therewith is rendered. Should the schoolhouse be destroyed, the contract becomes void."

In construing the above sections the Court of Appeals in the case of Boswell v. Consolidated School District No. 8, 18 S. W. (2d) 665, 667, says as follows:

> "A contract between a school-teacher and a school district, by which the teacher is employed to teach the school, must be in writing, and the statute (Section 11137, Rev. Stat. 1919) prescribes what shall be included in the contract. Section 11138 of the same statute provides that the contract required by section 11137 shall be construed under the general law of contracts. Under these provisions of the statute, it has been held that a binding contract between the school district and a teacher may be made without the formal contract, as required by section 11137, being executed as therein required."

The contract consisted of the appointment of the teacher by the board and her notification that she had been appointed, together with a letter from the teacher accepting the appointment. The judgment was in favor of plaintiff, the teacher. The district sought to review this decision in the Supreme Court, but the Supreme Court in 18 S. W. (2d) 61, refused to review the case because the relator had not complied with the rules of the court. The decision of the Court of Appeals, therefore, was not affected by the removal to the Supreme Court.

In Edwards v. School District No. 73 of Christian County, 297 S. W. 1001, 1003, the court, in construing the above section, says:

> "Plaintiff in the cause at bar filed her written application, duly signed by her. It specified as to the school, term, salary, etc. This application may be termed an offer, and the board of directors not only made an order accepting this offer, but went further, and each director, including the president, signed a writing which evidenced the contract which they had consummated by their acceptance of record. It also

> appears that the clerk of the district signed the minutes of the board accepting plaintiff's application to teach the school. This record shows that every requirement as to writing and signing, made by section 11137, was fully met. There is no argument against the validity of the contract except that it was not formally written upon a separate paper and there signed by all the parties required by the statute. Such is not necessary and could not be made sowithout making the law respecting teachers' contracts different from the general law of contracts. We hold that plaintiff's contract was valid and binding."

In Wood v. Consolidated School District, 7 S. W. (2d) 1018, the Court says:

> "Under the plain terms of this statute the school board has no power or authority to dismiss the teacher, and any action of the board looking to that end would be ultra vires."

It is apparent from the above cases, in construing the above statutes, that a valid contract may exist between the school board and the school teacher, even though the agreement is not transposed on a separate sheet and signed by both parties. The Courts hold that Section 9209 is directory and mandatory, and that a contract between the two may be consummated even though the contract may not be in the form required by the statute.

At the time she was first employed we assume that she made her application in writing and that the board in regular meeting, by proceedings duly entered of record, accepted her application and thereafter entered into a separate written contract with her. At that time, however, her uncle was on the board and participated in her election, in violation of Section 13 of Article XIV of the Constitution. We believe that contract illegal for the reasons we will hereafter set out. After the removal of the related director the present board re-elected this teacher and we assume that the minutes or record of the board so discloses. At the time that they re-elected her we shall assume that her application was still on file and believe that in view of the foregoing decisions a legal contract was entered into between the district and the teacher without any separate contract in writing being executed, and it now appears that she refuses to execute a separate contract. She is, however, rendering service to the district and teaching school. The question arises then, and it becomes a question of fact, as to which contract the teacher is now operating under. If the teacher is relying <u>solely</u> upon the contract entered into when the related director was on the board, it presents one situation, but if she is relying upon the contract made by the new board it presents another situation, and we believe that she may rely, under the authority of the above decisions, upon the contract of employment made by the new board even though she refuses to sign

an independent agreement. It therefore becomes necessary to ascertain why the teacher refuses to sign the new contract. We, therefore, would suggest that before any definite action be taken by your board that you ascertain and have sufficient proof as to why this teacher refuses to sign the second contract. If she refuses to sign the second contract and denies that she made any contract with the district after the new board was formed, then her rights would have to be determined under the contract executed while her uncle was upon the board. If, however, she claims that in order to have a contract with the new board that it was not necessary to execute the separate agreement, then you have presented a situation by reason of the foregoing cases that in the hands of an astute lawyer might cause your district some difficulty. In as much as it is apparent that you will have some difficulty with this teacher, we will try to point out the various phases of the situation.

She cannot deny having any other contract except the one to which her uncle was a party, and recover upon the contract made between her and the new board. However, the mere fact that she refuses to sign a separate contract which is now being offered her, while it may tend to show that she is not claiming under the second contract entered into with the board, yet, at the same time she might explain her refusal to sign in such a way as the court would find that the second contract was a good contract.

We do not believe that the first contract is invalid for the reason that a relative related to her within the fourth degree participated in her election. In 13 C. J. 421, Sec. 352, it is said:

> "Frequently a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. The generally announced rule is that an agreement founded on or for the doing of such penalized act is void. In accordance with the view of Lord Holt in an old case: 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, tho' the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implied a prohibition, tho' there are no prohibitory words in the statute. * * * and it would seem that in all cases the true rule is that the question is one of legislative intent, and the courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment. * * *"

We are of the opinion therefore that the first contract is illegal for the reason that her uncle exercised his right to name her while a member of the board. Such being true, she would

not be entitled to compensation under that contract for any services performed thereunder. We do not believe, however, that this teacher will risk her compensation for teaching the term upon the validity of the first contract, but believe that she will contend that the new board entered into a valid contract with her after the removal of her uncle, and that she taught under it, and will excuse her refusal to enter into a separate agreement in some appropriate manner. We therefore answer your questions as follows:

(1) That it is not necessary, according to the foregoing decisions, in order to constitute a valid contract between the teacher and the board, that a separate instrument in writing be executed by the parties. Her application was on file with the board at the time she was elected by the new board and the new board, as shown by its records in writing, did elect her as teacher. This would constitute a good contract between the teacher and the board and her refusal to sign an agreement, independent of the first contract, would raise an issue of fact as to whether she was teaching for a remainder of the term under the new contract and is a matter which she might be able to explain to the satisfaction of the court.

(2) Considering that she might have a good contract with the board, notwithstanding her refusal to sign an independent document, we do not believe it expedient to dismiss her and employ someone else in her place. Under Section 9210 and the Wood case above, the board has no right to dismiss a teacher with whom they have a valid contract and we believe that in view of the involved situation it would be better for the board to treat the situation as though there was a good contract entered into between the new board and the teacher.

(3) Assuming that the new board has a contract with her, we believe it would be lawful for you to pay her her salary for the remainder of the school year as she earns it. If, however, you can conclusively prove that she denies having any contract with the new board and relies solely upon the written instrument executed between her and the board, while her uncle was a member, then it would not be proper for you to pay her her salary during the remainder of the term.

(4) Assuming that she was legally elected by the new board seven weeks after the term began, that fact would not justify you in paying her for the seven weeks teaching which she did prior to her legal election. Whether or not she can collect for the seven weeks she taught prior to her second election depends upon whether or not the contract entered into between her and the board, of which her uncle was a member, was a legal contract. We are of the opinion that it was not a legal contract and that she cannot collect for the first seven weeks of her teaching.

The relationship between this teacher and the board gives rise to a mixed question of fact and law. We do not believe that her refusal to sign the independent document is conclusive of the

fact that she is relying upon the first contract entered into between this district and herself. We have tried to point out above the various situations which might arise wherein the board would be liable. We believe, therefore, that it would be a better policy to consider that the second contract is a valid contract until she has taken a definite stand which would determine the board's rights. By adopting this position there is only seven weeks pay in dispute. If you adopt the attitude that her refusal to sign the independent document prevented the new contract from coming into existense and replace her with some other teacher and refuse to let her teach, then upon a proper showing she might be able to recover her pay for the balance of the term.

Very truly yours,

Frank W. Lyons

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

CORPORATION WHOLESALE PERMITTEE WHOSE STOCK IS OWNED BY RETAIL GROCERY MERCHANTS CANNOT SELL LEGALLY TO MERCHANT PERMITTEE FOR RESALE IN ORIGINAL PACKAGE OR FOR CONSUMPTION ON PREMISES AND THE CORPORATION WHOLESALE PERMITTEE IS VIOLATING THE LAW IN SO SELLING TO THE MERCHANT RETAIL GROCERS WHO OWN THE WHOLESALE CORPORATION.

FILED
13

April 17, 1933

Mrs. Hazel Campbell
Deputy Food & Drug Commissioner
3633 Lockridge Avenue
Kansas City, Missouri

Dear Madam:

You have submitted to me the following state of facts and ask whether there is any violation of the statute regulating sale of 3.2 percent beer in Missouri approved March 15, 1933:

> "An association of retail grocery merchants form a corporation to conduct a wholesale grocery business to enable the members of the associated grocers to buy more cheaply from manufacturers and producers by combining their united buying power in the wholesale grocery corporation. The wholesale grocery corporation stock is all owned by the retail grocers to whom the wholesale corporation sells the principal part of the goods it handles. The wholesale corporation also sells some goods to others than its stockholders."

The wholesale corporation has a wholesale or distribution permit to distribute 3.2 percent beer under the Missouri statute and the retail grocers have either permits to sell for consumption on the premises or in the original package not for resale. The wholesale corporation sells 3.2 percent beer to the merchant grocers, stockholders of the wholesale company.

Section 13139H, lines 13 to 18, of the statute, legalizing sale in Missouri of 3.2 percent beer, reads as follows:

> "and provided further, no manufacturer or distributor, to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company, or corporation, applying for, securing, or holding, a permit under either sub-paragraph "c" or sub-paragraph "d" of Section 13139c of this Act."

Under the above quoted section of the statute it is my opinion the wholesale corporation is violating the law. The retail grocers really constitute the wholesale grocery corporation.

The wholesale corporation was organized to aid the retail grocers in their grocer business. The retail grocers could not under the statute above quoted hold both a wholesale and a retail permit and the retail grocers cannot legally do indirectly through a corporation they own and operate what they cannot do directly.

Very respectfully,

EDWARD C. CROW

APPROVED:

_____
Attorney-General

ECC...lac

CITY ORDINANCES: Construction of the same in the manner of filling public offices.

1933

September 29, 1933

10/7

FILED 13

Mr. J. H. Campbell
Member of the City Council
Higginsville, Missouri

Dear Sir:

I hereby acknowledge your request for an opinion. Your request was in the following form:

> "I am writing you in regard to a matter concerning our city.
>
> The City of Higginsville has a municipal plant managed by a Board of Public Works appointed by the Mayor and has been so managed for the last seven years. The ordinance under which this board was appointed states specifically 'that no more than two members shall belong to any one political party'; but the mayor for some reason unkhown to any one appointed three Republicans and one Democrat. I take the position that the whole proceeding is irregular and a violation of the ordinance under which they were appointed and for that reason is invalid."

In answering your query I have consulted McQuillin on Municipal Corporations, the second edition, which is a leading authority in the United States, and I find that it provides as follows: Section 424.

> "The time and manner of the selection of municipal officers, either by election or appointment, their term in office, powers, duties and liabilities, their official oathes and bonds are regulated by the State Constitution, general laws, municipal charter and ordinances."

> "The law usually prescribes the manner in which the municipal officers are to be elected or appointed, and such mode must, in substance be observed."

Section 448 provides as follows:

> "The powers and duties of the mayor rest always entirely upon the proper construction of the charter and the ordinances or by-laws and municipal regulations passed in pursuance of such authority. He has no authority, except what is expressly and impliedly conferred upon him by the charter or the applicable law, or by the council or governing body acting within the scope of the law."

Section 472 provides as follows:

> "There can be no appointment of an officer or employee in the public service without legal authority to make the appointment. If the appointment is unauthorized, ordinarily no subsequent declaration by municipal officers can validate it. The right to appoint the officer or employee must clearly appear from the charter or the legislative action applicable. It cannot be implied from the fact that the mayor who seeks to appoint is the chief executive officer. This power is usually regarded as one of the prorogatives of sovereignty. However, in the absence of the evidence to the contrary, a court will presume that the appointment was legally made.

In treating upon the topic "Public Offices" I find that Corpus Juris, Section 37, p. 937 provides as follows:

> "The general provisions of the State Constitutions prohibit 'tests' for holding office are usually so construed as to prevent the requirement by the Legislature of religous or political qualifications. But a statute which provides for a board or commission of a certain number, no

> more than a certain proportion of whose members shall belong to the same political party, is not regarded as providing a political qualification, and a statute authorizing the appointment of officers from the two leading political parties is not unconstitutional on the ground that it forces an elector who might desire such an appointment to ally himself with the one or the other of the two dominant parties, thus destroying his free agency in matters political."

Corpus juris, Section 66, p. 953 provides as follows:

> "It is essential to the validity of an appointment that there shall have been a compliance with such valid conditions and limitations as may have been imposed on the appointing power."

Article 14, Section 9 of Missouri Constitution provides

> "The appointment of all officers not otherwise directed by this Constitution shall be made in such a manner as may be prescribed by law."

In the case of Wingate v. Woodson 41 Mo. 227 l. c. 230, our Supreme Court said:

> "The power of the State to declare in its fundemental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as in the power to fix the qualification of voters."

In 2 Blackstones Commentaries 36, I find"office" defined thus:

> "An office is the right to exercise ~~a private or public employment and to take the fees and emoluments thereto belonging."~~

Our Supreme Court laid down the rule in State ex rel v. Bus 135 Mo. 325 l. c. 331, as follows:

> "A public office is defined to be the

> right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual who is invested with the authority and is required to perform the duties is a public officer."

Then again in State ex rel v. Hackmann 254 S. W. 53-300 Mo. 59 l. c. 67, our Supreme Court said:

> "A public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law."

In the case of St. Louis v. Sparks 10 Mo. 117 l. c. 121, our Supreme Court said:

> "When the appointing power has made an appointment, and a person is appointed who has not the necessary qualifications required by law, the appointment is not, therefore, void. The person appointed is de facto an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified, but the peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the Governor to the constable. * * * * A statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the

> the requisite qualifications, his appointment is not, therefore, void, unless it is so expressly enacted."

In State ex rel v. Newman 3 S. W. 849 - 91 Mo. 445, our Supreme Court said:

> "The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office. As, by reason of his disqualifications, the elector was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election--evidence of title to that to which he has no right."

In State ex rel v. Draper 48 Mo. 213 l. c. 215, the Supreme Court said:

> "The commission invested Vail with the title, and was prima facie evidence of his right to the office. It gave him the possession, and he could only be deprived or it or ousted upon due process, in the manner prescribed by law. He exercised its duties and privileges by color of law, and that was sufficient until some other person legally established a better and a higher right. * * * * If error was committed in the issuance of the commission to Vail, and Denning was the party justly and fairly entitled to the office, the court furnished the proper and appropriate mode for seeking redress. He should have proceeded at once by quo warranto and settled his claims. This remedy the law points out."

The foregoing citation having imparted to us a fair knowledge as to what ~~one~~ "offices" and officers" within the contemplation of the law, we are of the opinion that the ordinance of Higginsville properly describes a constitutional office known as the Board of Public Works, which office is within the power of your Mayor to fill. This ordinance is a legislative act of your city and its construction should be by the rules governing the construction of legislative acts. The words of the ordinance

are not technical and their ordinary usual and natural meaning is necessarily their legal meaning. We cannot conceive how said ordinance could attain but one construction for it is written "that no more than two members shall belong to any one political party". It certainly cannot be said that the Mayor of Higginsville is legally empowered to fill the office with three Republicans and one Democrat by any forced construction of words. The ordinance expressly forbids.

It is our opinion that such an unauthorized appointment to office as you claim was made, is not absolutely void unless the ordinance so expressly enacts. Such an appointment is illegal, and anyone who holds said office or offices under such an unauthorized appointment is a usurper in office, holding the same contrary to the Missouri Constitution and the legislative act providing for said office. His commission by the Mayor is prima facia evidence of his right and title to said office. If error was committed in appointing members of said board, as stated in your letter, quo warranto proceedings can be started against said member and their legal right to the office can be judicially determined.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOS:H

SUBJECT: Legislature has a right to remit penalties accruing under Section 9914, Revised Statutes 1929, and similar sections.

February 1, 1933

FILED
14

Senator M. E. Casey
Missouri Senate
Jefferson City, Missouri

Dear Senator:

As we understand the question submitted by you to this office for answer is:

> "Can the additional tax penalty or interest as the same are interchangeably used in Section 9914, Revised Statutes Missouri, 1929, be legally forgiven and the same ordered cancelled and stricken from the tax books by the legislature."

In the case of Morgan's Railroad and Steamship Company v. Louisiana, 118 U. S. 455, 30 L. Ed. 237, the Supreme Court of the United States said:

> "A tax is defined to be a contribution imposed by Government on individuals for the service of the state".

Article 10 of the Constitution of the State of Missouri, authorizes the taxing power to be exercised by the General Assembly, counties and other municipal corporations, such taxes to be levied within the limits fixed by Article 10 of the Constitution and the amendments thereto.

Article 6, of Chapter 5, of the Revised Statutes of Missouri, 1929, provides for the levy, assessment and collection of taxes in the State of Missouri by the various authorities or bodies authorized to levy, assess and collect same. Subsequent sections provide when taxes shall be paid, and Section 9914 Revised Statutes Missouri, 1929, reads as follows:

> "If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector, after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, of one per cent. per month upon all taxes collected by him after the first day of January, as aforesaid; and in computing said additional tax or penalty, a fractional part of a month shall be counted as a whole month.
> Collectors shall, on the day of their annual settlement

with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year. Provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation. Whenever any collector of the revenue in the state fails or refuses to collect the penalty provided for in this section on state and county taxes, it shall be the duty of the state auditor and county clerk to charge such collectors with the amount of interest due thereon, as shown by the returns of the county clerk, and such collector shall be liable to the penalties as provided for in section 9938".

The Supreme Court of this state in Bank v. Foesten, 176 Mo. 49, 62, discussing Section 9235 Revised Statutes 1899, now being Section 9914 under consideration, held:

"The laws of this State (Sec.9235 R.S.1899) prescribe that if any one fails to pay his general taxes before the end of the year, "an additional tax, as penalty, of one per cent per month" shall be added. The section then says that "said additional tax or penalty" shall apply to a fraction of a month, and then adds: "Provided,however, that said interest shall not be chargeable against persons who are absent from their homes," etc."

"It will be observed that the one per cent a month, is first called "an additional tax as penalty" and then it is called "said additional tax or penalty", and finally it is called "said interest," thus showing the looseness of expression that may be employed in the same section of the same statute when referring to the same matter. But the term employed does not change the character of the imposition. It is not an "additional tax" at all, for regarded as a tax it would or possibly might be illegal, because the full amount of taxes that the Constitution permitted had already been levied. It is not "interest" in any proper sense, because it is a penalty imposed for a failure to discharge a duty that can be lawfully demanded."

The Supreme Court in the last mentioned case makes a clear distinction between the tax that has been levied under the constitution and by a body authorized to do so, and a penalty fixed for failure to pay such taxes when and at the time the laws of the state provide that they shall be paid.

That interest on a tax or penalty for failure to pay same is not any part of the tax, it is held in Henry v. McKay, 3 Pacific (2nd) 145, 151, the Supreme Court of the State of Washington holding:

> "The general principle of the law on the subject is entirely clear. The repeal of a penal statute puts an end to all prosecutions under it. 36 Cyc. on Stat. Const.Law 139 *** In view of this rule, I have not been able to perceive any ground on which to sustain this demand for the penal interest. It has always been held that interest does not inhere in a tax as a legal incident. City of Camden v.Allen, 2 Dutcher (26 N.J.Law) 399. This twelve per cent. has no existence, then, except by virtue of the act of 1863, and when that act was repealed, it fell with it. If that statute, instead of directing its collection by force of the tax warrant, had authorized a suit to be brought, such suit, by the repeal of the act, according to the cases referred to, would have fallen in any of its stages anterior to final judgment. The reason for this, given in the books is, that at the time of judgment a right to the penalty must exist, which cannot be the case unless the statute is alive which created it. It is not to be denied that this same objection applies with full force at the present time when this court is asked to compel the payment of this penalty, which, under existing circumstances, has no statutory basis whatever. My first impression was, that this interest might be regarded as a mere incident to the tax, and that in this mode its existence might be continued. But the defects of this theory are two-fold: first, the twelve per cent.is a penalty, and not a mere incidental part of the sum to be paid; and, in the next place, even if it should be regarded as an incident, it is altogether a statutory incident, and consequently would expire with the law from which it proceeded."

Along the same line and with particular application to Section 51 of Article 4, of the Constitution of the State of Missouri, with reference to the release or extinguishment of indebtedness, liability or obligation to the State of Missouri, the court of civil appeals of Texas in Pioneer Oil and Refining Company, et al, v. State, 273 S.W.615,618,said :

"The rule is well settled in this state "that a tax due by a citizen to a city is not technically a debt, nor is his obligation to the city to pay it, a contract, though the weight of authority is to the effect that the liability is a personal one and an action of debt can be maintained for its collection". City of Henrietta v. Mustis, 87 Tex. 14, 26 S. W. 619, and authorities there cited.

This rule, of course, applies alike to an occupation tax due the state as it does to a municipal ad valorem tax due a municipality. We cite the rule here, and the fact that appellants had not reported the taxes in question for the purpose of showing that they had not by their acts become in any way obligated to pay the taxes other than on the provisions of the law authorizing the tax imposed liability. We also cite it for the purpose of showing that our courts have not considered the mere statutory right to collect a tax in the nature of a vested right, the repeal of which is inhibited by the constitutional provision in question. The court in the case of Ollivier v. City of Houston, supra, quoted this rule with approval, but held it inapplicable to the facts in that particular case.

To hold, as contended for by the state, that this provision of the Constitution inhibits the Legislature from ever forgiving a tax, or extinguishing the right of the state to collect a tax authorized and accrued under a repealed law, would be nothing less than rendering nugatory and void the rule expressly adopted by our Supreme Court in at least three cases in which it is expressly held that the repeal of a tax measure, without a saving clause, terminates the right to collect taxes thereunder".

Since the provisions of Section 9814, supra, are in the nature of a punishment to the taxpayer for failing to observe the mandates of the statutes with reference to the time when taxes should be paid, and it being in the nature of a penalty only and being no part of the body of the levied and assessed tax, and the Legislature having the right to enact the penalizing section in the first instance, has the same right to repeal it provided that the bill seeking to do so is otherwise constitutional.

The general rule applicable to the question submitted is stated in 6 R. C. L. Page 317, Section 306:

> "Where a penalty has been imposed by law the legislature has the general power to repeal it entirely, or to limit the cases in which it is recoverable, although at the time there is an action pending which has been brought for its recovery".

And again on the same page:

> "Such a case presents simply a question of the power of the sovereign by whom the penalty was imposed to remit it, or to repeal the law imposing it, at discretion, and does not involve the impairment of any obligations of the contracts of individuals or the divestiture of individual rights of property".

Neither would the suggested legislation violate sub-sections 32 and 33 of Section 53 of Article 4 of the Constitution of Missouri, with reference to the prohibition against the enactment of special or local laws remitting penalties, if the proposed legislation applies alike over the entire state to the class affected. In City of Springfield v. Smith, 19 S. W. (2) 1, the Supreme Court of this state said:

> "It is well established in this state that a law is not a special law if applied to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis".

If the inquiry made has reference to House Bill Number 33 now pending before the Missouri Legislature, your attention is drawn to the case of Bank v. Deesten, 176 Mo. 49, 62, supra, in connection with the wording of House Bill Number 33.

Again we suggest that if the inquiry has reference to House Bill Number 33, that the bill should likewise cover penalties accruing by virtue of Section 10152 Revised Statutes Missouri, 1929, so as not to violate Section 53 of Article 4 of the Constitution of the State of Missouri.

We are of the opinion that the legislature has the authority to remit and order cancelled and stricken accrued penalties under Section 9014, when such legislation applies uniformly over the state to the class affected and if a judgment has not been

rendered for such penalties.

Very truly yours,

GILBERT L. MOSS
Assistant Attorney General.

APPROVED:

Attorney General.

GLM:EG

HIGHWAY COMMISSION: Regulation of highway commission with reference to Section 7787 merely declares policy of commission and does not have the effect of a judicial decision.

July 28, 1933 7-29

FILED
14
36

Mr. B. M. Casteel, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Attention: Mr. Lewis B. Howard.

Dear Sir:

This department is in receipt of your letter of July 26th in which you request an opinion on the following state of facts:

> ****2. In a letter of September 27, 1932, under the caption 'Maintenance': 1932-#35, Policy of Overlength Movements, written to all Division Engineers, the second paragraph states 'It is the policy of the Commission not to permit any over-length movements regardless of the commodity being transported except through special permit authorized in this section and then only from the nearest shipping point to the job.'
>
> 3. In Section 7787 a part of it states, 'These restrictions as to length shall not apply to vehicles temporarily transporting agricultural implements or road making machinery, or road materials, or towing for repair purposes, cars that have become disabled upon the highways.'
>
> 4. I wish the opinion to cover the exemptions in a section on agricultural implements, road machinery or materials and find out if there is any law which prohibits the movement of such implements or materials."

Section 7787 Laws of Mo. 1931, p. 265, provides for the regulation of motor vehicles as to width, height and length, and is set out so far as it is pertinent as follows:

> "* * *These restrictions as to length shall not apply to vehicles temporarily transporting agricultural implements or road making machinery, or road materials or towing for repair purposes cars that have become disabled upon the highway. Provided, however, that the state highway commission may, when in its opinion the public safety so justifies, issue special permits for the temporary operation of a vehicle or combination of vehicles which, including load, shall be greater than the lengths herein specified for transporting property the nature of which will not permit of such limitation of length, but such permit shall be issued only for a single trip or for a definite period of not to exceed 60 days and shall designate the highways and bridges which may be used under the authority of such permit.* * *"

It is obvious from the reading of the above statute that the policy of the highway commission as set out in your letter to us does not in any way conflict Section 7787 supra, but in fact finds its authority in the above section of the statute.

In a very recent case of Park Transportation Company v. Missouri State Highway Commission, the Supreme Court of Missouri, No. 32699 (not yet reported), Judge Hayes in discussing the question here before us said:

> "And in the varying situations which must necessarily arise therein, the law has properly provided and clothed with a reasonable discrimination and administrative body to determine, in the first instance and upon a factual investigation the applicability of the exception as occasions may arise."

In other words, the highway commission is a fact finding body that may hear and determine whether certain facts do or do not exist. However, whether these facts as found by the highway commission come with the exception provided in section 7787 supra, is a matter for judicial inquiry, and consequently is a matter over which the highway commission has no power.

Therefore, it is the opinion of this department that the policy of the highway commission not to permit any over-length movements regardless of the commodity being transported except through special permit authorized in this section and then only from the nearest shipping point to the job, indicates the policy of the highway commission and does not in any sense of the word overrule the provisions of section 7787 supra. If in fact a factual situation should arise that clearly came within the exception provided by Section 7787, then it is the opinion of this department that the regulations as to length would not apply regardless of the policy of the highway commission and that no special permit from the highway commission would be needed in order to make such transportation.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:MM

CITIES OF THIRD CLASS:

Upon failure of city to find or select a city depository, city Treasurer should be found who could give bond for the protection of city funds.

Sec 6794-97 RS Mo 1929

September 23, 1933.

FILED 14

10-2

Mr. Joe Carr,
Commissioner of Finance,
Maplewood, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "As Commissioner of Finance of the City of Maplewood, I would appreciate some advice from you as to how to handle the situation that has arisen in connection with the selection of a city depository and the handling of the city's funds.
>
> The depository contract previously entered into expires on October 1st, 1933. Apparently in violation of Section 6793 of the Revised Statutes of Missouri, 1929.
>
> Section 6794 provides for a bond with not less than three solvent sureties owning unencumbered real estate in the state of as great a value as the amount of the bond. The penalty of the bond to be double the revenues of the city in any one year. It looks like this section cannot be complied with.
>
> About six weeks ago the council appointed a Treasurer, so as to comply with Sections 6796 and 6798 regarding the signing of checks, etc. However, we cannot find any one willing to issue a bond covering the Treasurer. The bonding companies will not issue a depository bond because of the banking situation. Something must be done to protect the city's funds. The Board of Education is keeping it's funds in a safety deposit box. I understand that St. Louis County is doing the same.
>
> What can Maplewood do to comply with the law, safeguard it's funds and qualify it's Treasurer. An opinion will be greatly appreciated."

You state that the city depository contract expires on October 1, 1933, and that it is not possible to comply with Section 6794 in regard to the bond of the depository; that you cannot find anyone who will furnish a bond to the city Treasurer; that bonding companies will not issue a depository bond because of the banking situation. You ask us to solve the problem as to what the city shall do.

Section 6744, R. S . Mo. 1929, provides, among other things, as follows:

> "* * *Every officer of the corporation, when required by law or ordinance, shall, within fifteen days after his election or appointment, and before entering upon the discharge of the duties of his office, give bond to the city in such sum and with such sureties as shall be designated by ordinance, conditioned for the faithful performance of his duty, and that he will pay over all moneys belonging to the city, as provided by law, that may come into his hands. If any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation, or to give bond as herein required, his office shall be deemed vacant. For any breach of condition of any such bond, suit may be instituted thereon by the city, or by any person in the name of the city for the use of such person."

Under the provisions of the foregoing section, your Treasurer is not a qualified officer of the city until such time as he shall furnish the city a bond "in such sum and with such sureties as shall be designated by ordinance." We do not know in what amount your ordinance requires that the Treasurer give bond. That is a matter of public policy to be decided by the council in the passing of the ordinance. If, by reason of the financial condition in your community, it is not possible to obtain a depository for these funds with bond as required by law, then the source of protection that you have is the City Treasurer and the bond guaranteeing the funds in his hands. We can only suggest that a person should be made City Treasurer of your city who is in a position to give a bond ample in size and with proper security as would protect the city funds.

Section 6797, R. S. Mo. 1929, deals with the failure to select a depository. The Section also provides:

> "* * *The city treasurer shall not be responsible for any loss of the city funds through the negligence, failure or wrongful act of such depository, but nothing in this article shall release said treasurer from responsibility for any loss resulting from any official misconduct on his part, or from responsibility for the funds of the city at any time when, for any reason, there shall be no city depository, or until a depository shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

In view of the foregoing section the city treasurer in the absence of a city depository is responsible for the city's funds. For that reason the city treasurer should be properly bonded in order to protect the city's funds until such time as a proper city depository may be selected. The city Treasurer

being responsible to the city for it's funds, it is for him to decide whether or not he shall deposit the city funds in some bank without bond from them, or whether or not he shall preserve the city's funds in some other manner.

We, of course, cannot under-take to advise where the city treasurer shall deposit his money or where it shall be placed for safe keeping. Common prudence, however, would indicate that if the city treasurer deposits money for which he would be liable upon his bond in a banking institution, that he should require from such bank a bond which would protect him personally.

It is, therefore, the opinion of this Department, in view of the unusual situation confronting you, that no treasurer should be permitted to hold office in your city unless he is able to give the bond required under Section 6744, R. S . Mo. 1929, for the protection of city funds. Such treasurer, until a depository is found and selected, should protect himself if he deposits city funds in some bank. We do not understand the law to require the city to select a depository which is located in Maplewood. Certainly in St. Louis there must be institutions which would be agreeable to become a depository for your city under the terms of the statute. As a practical matter, you may find the solution of your problem in going outside of the city of Maplewood for a depository.

We hope that the suggestions here may be of some help, but in the solution of your difficulty, it occurs to us that it is not so much a matter of law as it is a matter of business to be worked out by your officials.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

MORTGAGE RECORDING TAX LAW.

October 13, 1933

10-14

FILED
14
57

Hon. Charles F. Carter
State Budget Officer
Jefferson City, Missouri

Dear Mr. Carter:

We hereby acknowledge your request for an opinion dated September 27, 1933. Your request was in the following form:

> "Some of the Democratic leaders were talking with me about raising more revenue and the mortgage recording tax was discussed, and they asked me if I wouldn't ascertain whether it is constitutional or not, so will you please give me your opinion as to whether we can put a tax upon the recording of mortgages in this State?
>
> I think some years ago we had some sort of a law along that line that was declared unconstitutional, and I don't know on what grounds. I would be glad to be advised by you."

In November 1900 the State of Missouri passed a constitutional amendment by vote of the people which was in the following form:

> "SECTION 22. A mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi-public corporations, for which provision has already been made by law; in case of debts so secured, the value of the property affect-

ed by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, in the manner hereinafter to be provided by law, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city or other local subdivision in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: Provided, that in all such cases the interest of the owner of the security, as well as that of the owner of the property affected by such mortgage, deed of trust, contract or obligation shall be assessed on terms equally fair and just. If the note or other obligation secured, is entitled to a credit by payment on the principal thereof, the assessable value of the owner of the security, upon the fact being made known to the assessor prior to the assessment, shall be diminished by the amount of such payment, and the assessable value of the owner of the land or other property, correspondingly increased, the intent hereof being to place those interested in any way in such land or other property, on the plane of absolute equity as to taxation.

'SECTION 23. Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein and as to such tax or assessment, be null and void."

The fourteenth amendment to the United State constitution provides as follows:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This constitutional amendment was held by our Supreme Court En Banc, in a four to three opinion written by Judge Valliant, to be in violation of the fourteenth amendment to the United States Constitution, above set out, in that; said amendment exempted railroads and other quaisi-public corporations from the tax and hence there was an unfair discrimination between the holders of the mortgages executed by natural persons and those holding such securities executed by railroad and other quaisi-public corporations. In this case of Russell v. Croy, 164 Mo. 69 l.c. 97, the majorities of the court made the following observations;

> "Under our system as existing before the adoption of this amendment, mortgages on real estate are taxes as personal property and the mortgagee is required to give them in for taxation, while the land is also taxed on its assessed value without deducting the value of the mortgage. Thus, there is, in theory at least, a double taxation on the value of the property.
>
> By this amendment the mortgagee is to be deemed to have taxable interest in the property and the value of that interest is to be deducted from the total assessed value of the property, leaving the mortgagor to pay taxes on the assessed value of the equity of redemption. It was supposed that in this way mortgage securities could be more effectively reached for taxation, than experience shows they have heretofore been.* * * (underscoring ours)
>
> But the constitutional provision in question has been the law of California ever since its adoption in 1879. Why the war against it,

which was so fierce in the beginning, has apparently ceased, and its operation suffered to go on without question, we do not know. Mr. Judson in his recent book on Taxation in Missouri, which was published while the adoption of this amendment was pending in this state, at p. 287-8, says: 'As we are now asked to adopt a system which has been in force in California for over twenty years, it is important to study the experience of California with reference to this very matter. This subject has been carefully investigated by Prof. Carl C. Plehn, professor of history and political science in the University of California, in a recent article.

'As a result of an exhaustive investigation, he finds that the provision against the shifting of the tax back to the mortgagor has proved wholly ineffective. So successful have been the devices to shift the burden of the tax upon the mortgagor, that they have come into practically universal use, and printed blanks are used embodying agreements, which have been sustained by the Supreme Court of the State. Prof. Plehn says: 'Possibly the oldest and certainly the most widely used of the successful devices invented for this purpose, is that of a contract separate and distinct from the mortgage, in which the creditor agrees to reduce the interest, in case the debtor pays the taxes. The method is so common in the south that all stationers carry regular blank forms of these contracts.' And he adds:

' 'The feeling that the provision of the Constitution which requires the mortgagee to pay the taxes accomplishes no good and really increases the burden of debt, and that its evasion affords the debtor a genuine relief, while working no injustice to the creditor, probably accounts for this far-reaching opinion rendered in the recent

case of the London and San Francisco Bank v. Bandman, 120 Cal. 221 (decided March 31, 1898). In this case, it was held that a valid agreement, not simultaneous with or directly a part of the mortgage, providing for the payment of taxes by the mortgagor does not violate the constitutional provision. This sweeping decision makes the constitutional provision entirely devoid of meaning and brings the California system of taxing mortgages into practical conformity with that of Massachusetts. That is, the two parties to the mortgage can make any agreement they please as to the payment of the tax.

' 'Thus it is that this famous 'experiment in taxation' has come to an end.'

'As we are now asked to adopt a constitutional provision of another State, which has been construed by the Supreme Court of that State, will we not adopt this construction with the amendment?'

It may be, therefore, that evasion of the law has been found so much easier than contesting its validity, that the legal warfare has ceased and that patient borrower bears the burden as of old.' * * *

The letter and spirit of our Constitution, however, declare for uniformity and equality in taxation of the same kind of property under like circumstances, and this amendment is out of harmony with the general tone of our organic law."

Then again our Supreme Court said in the case of State ex rel v. State Tax Commission, 282 Mo. 213 l.c. 223;

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be

levied and collected by general laws."
(Sec.3, Art. X Constitution of Missouri.)

"All property subject to taxation shall be taxed in proportion to its value."
(Sec.4, Art.X Constitution of Missouri.)

The Constitution thus declares that taxes shall be uniform and in proportion to the value of the property taxed. (Note that it is the value of the property, not the value of the owner's interest therein, that is to be taxed.) These provisions are intended to secure uniformity and equality in taxation, so far as possible, and they apply to all taxpayers both natural and corporate, and to franchise as well as to property taxes."

In the session laws of 1921 pages 667 to 670 inclusive "A Mortgage Recording Tax" was imposed by the legislature but the same was repealed by the laws of 1923 page 366. I will not set out said law in full in this opinion, as it is lengthy, but will say that under this law, during the time that it was enforced, the question of its constitutionality was never decided by our courts.

Other states have passed Mortgage Recording Tax Laws, said states having almost identical constitutional provisions as our state on matters of taxation and revenue, and said laws have been held constitutional. In the case of Trustees, Executors and Securities Insurance Corporation v. Hooton, 167 Pac. 293, the Supreme Court of Oklahoma passed on the constitutionality of such a law where state and federal constitutional questions were raised and the Oklahoma Mortgage Recording Tax Law was held to be constitutional. In the Case of Wheeler v. Weightman, 149 Pac. 977, the Kansas Supreme Court held such an act to be unconstitutional. The opinions in both of these cases are lengthy and convincing although each reaches an opposite conclusion as to constitutionality. There was some difference in the wording of these acts of Oklahoma and Kansas, but their ultimate purpose was the same. The Oklahoma Court holding such a tax an excise or privilege tax while the Kansas court holding such a tax a property tax subject to constitutional restrictions on taxes as affecting property.

The power of the legislature to tax is inherent. The Missouri constitution is not regarded as a grant of power to tax but rather a restriction or limitation of power to tax. If our Supreme Court regards a Mortgage Recording Tax as an excise or privilege tax then it may be possible to draw up a law that would meet the constitution requirements. If they consider such a tax a property tax, and indirectly that is what it is, then it would be almost if not entirely impossible to draw up a law that would pass the test of constitutionality. Since our constitution provides that property must be taxed in proportion to its value, the owners interest in a mortgage note is not the value of the property secured, complying with Article X, Section 4 of our Constitution and such was the holding in the Tax Commission Case, supra. In the case of Russell v. Croy, supra, the court reasoned that such a tax is a property tax. We hesitate to make any forecast as to what our Supreme Court will do, if confronted with the question of constitutionality of a Mortgage Recording Tax.

It is our opinion that such a law may be passed eliminating the objectionable feature as ruled upon in Russell v. Croy, supra, and meeting the requirements of the equal protection clause in the Federal Constitution. In fact this seems to have been done in the law which was passed in 1921. It is impossible to say that any Mortgage Recording Tax Law passed by the legislature is bound to be constitutional because it meets the requirements of the Federal Constitution, for the constitutionality of a Mortgage Recording Tax Law in Missouri is at best a gamble under the provisions of the Missouri Constitution, as the same relates to taxation and revenue. We must see the prospectus of the proposed law before we can render an intelligent opinion on constitutionality. In the face of the Russell v. Croy case, our courts will be very slow in declaring any Mortgage Recording Tax Law constitutional. To do so it would almost be necessary for them to reverse themselves in their former ruling. The fact that our 1921 legislature passed such an act and our 1932 legislature repealed the same, would indicate that the 1933 legislature were advised and considered that such an act, as then appeared on the statute books, was unconstitutional.

Respectfully submitted,

Wm. Orr Sawyers
Assistant Attorney General.

APPROVED

Roy McKittrick
Attorney General

CONSTITUTIONAL LAW - INTERSTATE COMMERCE - Tax on beer to be sold or shipped in interstate commerce as violative of the commerce clause of the United States Constitution.

10-23

October 18, 1933.

FILED
4
53

Honorable Charles F. Carter,
Room 404 Capitol Building,
Jefferson City, Missouri.

Dear Sir:

Your letter of September 23, 1933 has been received in which is contained a request for an opinion in the following terms:

> "Would you please give me your opinion as to the constitutionality of putting a tax upon the beer made in this state and shipped to other states. I believe under the police regulations or the license power of the state that we could get a tax upon the stuff shipped out of this state."

The Constitution of the United States Article I, Section 8, Clause 3, provides that Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" and this commerce clause as early as Gibbons v. Ogden, 9 Wheat. 1 (1824) was held by the United States Supreme Court to give to Congress an exclusive power to regulate interstate commerce and to prohibit the several states from so regulating it so that Missouri could not either tax or regulate interstate commerce directly.

Furthermore, a tax or regulation cannot discriminate against interstate commerce even if the same subject of the tax could be reached by a statute which did not discriminate against interstate commerce. This is illustrated by the case of Welton v. Missouri, 91 U. S. 275 (1876), 23 L. ed. 347. In that case the court said:

> "But the court in its decision replied, that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself."

The court in that case held that such a tax was invalid. Although admittedly the state in that case could have levied a valid tax on the occupation of peddling goods which would be applicable to persons peddling goods which had been imported into the state, still that case held that it was not within the constitutional rights of a state to base the tax on the fact that the goods had been imported. For this reason Missouri could not enact a tax statute applicable solely to beer to be shipped outside of the state because in such a case the basis of the tax would be the fact that the goods would

be shipped in interstate commerce and therefore a discrimination against such commerce.

If a statute should be enacted expressly taxing all beer originating in this state, and not discriminating in any way against beer to be shipped outside of the state or to be sold in interstate commerce, such a statute could levy a tax in various possible methods. A discussion of such methods and their validity follows.

I. An occupation tax on the manufacture of beer in this state would be valid under the authority of American Mfg. Co. v. St. Louis, 250 U. S. 459 (1918) in which such a tax was upheld on manufacturing and in which the court said:

> "The question is whether an ordinance of the city of St. Louis, levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus intrenching upon the power of the national Congress under art. 1, Sec. 8 of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the 14th Amendment."

The fact that the tax is measured by goods some or all of which are immediately to be shipped in interstate commerce does not affect the result so long as the tax is on a valid subject such as the occupation of manufacturing. Oliver Iron Co. v. Lord, 262 U. S. 172 (1923) in which the court said:

> "Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation. Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Supt. Ct. Rep. 6; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 444, 59 L. ed. 1397, 1400, 35 Sup. Ct. Rep. 902; Hammer v. Dagenhart, 247 U. S. 251, 272, 62 L. ed. 1101, 1105, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; United Mine Workers v. Coronado Coal Co. 259 U. S. 344, 410, 66 L. ed. 975, 995, 42 Sup. Ct. Rep. 570. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

II. A tax on gross receipts from the sale of beer some of which sales were made in interstate commerce would not be valid for a tax on gross receipts from interstate commerce has been held in Galveston, Houston &

San Antonio Ry. Co. v. Texas, 210 U. S. 217 (1908) even where non-discriminatory to be a tax on such commerce and prohibited by the commerce clause.

III. A tax on the net income from the sale of such beer even though part of the sales were in interstate commerce would be valid under the authority of the case of United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, but presumably you would not be interested in such a tax in view of the existence in Missouri of an income tax.

IV. A franchise tax also presumably would not be entirely satisfactory to you as it would only be applicable to corporations and your inquiry did not deal with a tax on corporations alone.

V. An inspection fee which would apply to goods to be sold in interstate commerce would be valid under the authority of Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345 (1898) because the Constitution of the United States Article I, Section 10, Clause 2 provides as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;"

However, inspection fees cannot be used as sources of revenue on goods in interstate commerce as was pointed out by the court of the last cited case as follows:

> "If the state law of Texas which is complained of is really an inspection law, it is valid and binding, unless it interferes with the power of Congress to regulate commerce; and, if it does thus interfere, it may still be valid and binding until revised and altered by Congress. The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws."

For a similar reason the police power of Missouri would not justify a revenue-raising measure because although the states are allowed to infringe to a certain extent on interstate commerce by regulations to protect the health, welfare and morality of their citizens they cannot under the guise of the police power validly raise revenue. The Supreme Court of the United States in Mugler v. Kansas, 123 U. S. 623 (1887) in discussing this problem said:

> "It belongs to that department (referring to the Legislature) to exert what are known as the police powers of the state, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
>
> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

For the above reasons it is our opinion that an occupation tax on the manufacture of beer in this state not in any way discriminating against or referring to the fact that part of such beer will or may be sold or shipped in interstate commerce would be a valid tax, and that of the types of taxes above discussed such a tax would seem to be the most desirable.

Very truly yours,
EDWARD H. MILLER,

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

CONSTITUTION.
GENERAL ASSEMBLY.
STATE HIGHWAY. AMENDMENT.

Section 44a, Article IV, Constitution of Missouri only prevents the General Assembly from raising fees and taxes provided for in such Section 44a.

10-27

October 25, 1933

FILED
14
55

Honorable Michael E. Casey
Capitol Building
Jefferson City, Missouri

Dear Senator Casey:

Replying to your inquiry directed to this office, namely,

> "Does Section 44a of Article IV of the Constitution of the State of Missouri contain any provision which would prevent the 57th General Assembly proposing an amendment to the Constitution of the State, seeking to raise the level of fees and taxes now fixed or provided for by such Section 44a?"

Section 2 of Article II of the Constitution of the State of Missouri provides:

> "That the people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness: Provided, Such change be not repugnant to the Constitution of the United States."

With reference to the right of the people to amend the Constitution of this State, in State ex rel. v. Bernoudy, 40 Mo. 192, 194, the Supreme Court of this State said:

> "A power to amend the Constitution in all respects deemed essential for the public good, or to alter or abolish it, if it were deemed necessary for their safety and happiness, necessarily includes the power to amend it in any particular as well as in its total scope."

The only part of Section 44a, Article IV, of the Constitution which, expressly or impliedly, undertakes to fix a stationary level of fees and taxes with reference to motor vehicles and motor vehicle fuels, is the following:

> "For a period of ten years after the adoption hereof, the General Assembly shall have no power to levy and collect state registration fees, license taxes or other taxes on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) or state taxes on the sale or use of motor vehicle fuels in excess of the rates fixed by law at the time this amendment is adopted, except that in the event the proceeds from such registration fees, license taxes or other taxes on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and state taxes on the sale or use of motor vehicle fuels shall not be sufficient to produce funds requisite to pay the costs and expenses herein authorized and for the payments to sinking fund, for interest and for the proper maintenance of state highways as herein provided, then the General Assembly may increase the rates of such registration fees, or license taxes on motor vehicles or taxes on the sale or use of motor vehicle fuels to an amount sufficient to provide for such payment and the proper maintenance of state highways in order to avoid the levy of a direct tax on property in the State to meet such deficiencies."

It is apparent that the limitation is directed to legislation by the General Assembly and not to the inherent power of the citizens of the state to amend their constitution,

or the right of the General Assembly to propose an amendment to the Constitution.

For your information we are transmitting you herewith copy of an opinion of this Department heretofore written to Senator D. L. Bales, on the general subject of the right to amend Section 44a, Article IV of the Constitution.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosure

PENAL INSTITUTIONS: Right of the secretary to use interest fund of prisoners to liquidate thefts within the prison.

1173

October 30, 1933

FILED
14
57

Mr. Dan M. Carr, Secretary
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

Your request for an opinion was in the following form:

"Some years ago, the Secretary of the Board of Penal Commissioners undertook the care of funds belonging to inmates of the State Penitentiary, depositing same in a banking institution which paid a low rate of interest.

Under new banking regulations, this interest has ceased and several interesting and perplexing questions in connection therewith arise.

In order that you may have the fullest possible information relative thereto, may I say that during the years the Secretary has had charge of the fund, hundreds--thousands--of convicts have come and gone; at intervals he has added to their accounts and upon discharge paid them amounts due.

During this same period--up until now--it has been the practice to use this interest fund to protect the Secretary against losses arising through no fault of his own, such as forgeries, counterfeiting or prison money, thefts, etc.

At another time, when funds of the institution ran low, undesignated salaries were paid from the interest fund, without replacement.

Losses----------	$1,548.32
Salaries----------	1,330.39

These figures represent losses and salaries paid in a previous administration.

When I became Secretary of the Department April 1, it was known that petty thefts had been the rule in the mail room for several years and I undertook to catch the theif.

Eventually I did no, and have affidavits in which a convict admits his guilt and charges a former "square" employe with complicity.

I have also established that $61.50 in money orders were stolen under my immediate predecessor, as well as other thefts totaling approximately $500. Part of this has been recovered from the convict but there is no futher hope of recovery from him.

It was the opinion of my immediate predecessor, and the practice of former boards to pay these losses from the interest fund. Records of the institution support this statement.

Therefore, I would like to have your opinion on these points:-

1. May this interest be rightfully so used?

2. Who now is entitled to this interest?
   Obviously, it cannot be distributed over convict accounts as they have numbered thousands and shifted too rapidly.
   The fund is not a state fund and it would seem the state is not entitled to the money.
   It is not a Commission fund and it would seem the board is nor entitled to the use of the money, its position being merely that of agent for the state.
   The Secretary, it would seem from the general practice in connection with trust offices, is entitled to the use and protection of the interest on the fund, as he is charged with responsibility therefore and does all the work in connection with administration of the fund aside from his regular duties.

3. If the Secretary is properly entitled to the use of this interest, may he draw his check therefor to adjust the losses occuring in the preceding and his own administrations."

There is no provision in the law whereby the Department of Penal Institutions is required to establish and maintain a convict fund as described in your letter. Neither is it prohibited in the law.

You have explained this fund as a trust fund, where the prisoner adds to his account in said fund from time to time and upon the prisoner's discharge his savings in said fund are accounted for and given to him, less all accumulative interest. The prisoners who participate understand that they are to receive no interest, but that accumulated interest is to be used to replace losses suffered through no fault of the trustee (secretary) such as losses resulting from forgeries, counterfeiting of prison money, etc., and that accumulated interest is to be used for the further prupose of paying salaries for prison employees not provided for by statutes.

This trust is just as sacred as any other trust. The mere fact that thefts from the Department will total $500.00 does not entitle you to apply the interest from this prisoners' fund to cover the loss, unless it be the understanding with the contributing prisoners that said fund is held for that purpose. The fact that the practice of former boards was to pay these losses from the interest fund, would not justify of itself the payment. Former boards may have committed a breach of trust. The right to pay as you desire can best be justified if the trust existed for that purpose. You cannot legally execute said trust without being authorized by the trust agreement or arrangement, and the fact that it was the practice of former boards to pay these losses from the interest fund would indicate that they were acting in good faith in the execution of the trust which you presume to exist. Statements of participating convicts would tend to clarify the objects of the trust, further evidencing your right to cover the loss from the interest fund. If the original trust agreement be in writing it would throw some light on the purposes of the trust. It is for you to determine the existence of the trust.

Answering your first question.

It is the opinion of this office that the interest fund may be rightfully used, to cover the described losses, if such was the object of the trust creating the interest fund

Answering your second question

Only intended benificiaries are entitled to this ac-

cumulated interest. Assuming the interest fund is a trust fund to be used for the purpose of paying losses, the said fund may be used for such a purpose and the penal department when suffering losses would be entitled to cover said loss with the proceeds of the interest fund. Therefore, it follows that individuals who have advanced departmental losses would be entitled to received from the fund their advancements, if the trust existed for the purpose of covering losses. An advancement under such circumstances is a loss to the party advancing.

Answering your third question.

The secretary to the board should not be an insurer against other peoples thefts unless it was understood that you were to be such when taking the job, and you assumed the responsibility with that understanding. The office without such an understanding does not carry such liability. Assuming that you and Mr. Smith are personally responsible for losses occuring by reason of thefts of money order and other thefts, if you as secretary be properly entitled to this interest fund in the execution of the trust which you claim exists, then it would be legal for you to draw a check therefore and adjust the losses occuring, as you say they did occur, in the preceding and in your administration.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

WOS:H

MOTOR VEHICLES: Officials and employees of corporation owning motor car required to register as operator.

Ac 7766 RS Mo 1929.

12-30 ✓

December 27, 1933

FILED 14

Honorable B. M. Casteel
Superintendent Missouri State Highway Patrol
Jefferson City, Missouri

Dear Mr. Casteel:

This Department acknowledges receipt of your letter dated December 26, 1933, as follows:

> "Please give this department your opinion on the use of registered operator's license as mentioned in the attached correspondence."

Attached to your letter is request for opinion by Mr. Thos. L. Leigh as to who comes within the definition of a registered operator within the meaning of Section 7759 Revised Statutes Missouri 1929, particularly as applied to cars owned and operated by corporations.

Section 7759 Revised Statutes Missouri 1929, being the second section of what is known as the Motor Vehicle Law, defines the word "owner" as follows:

> "The term 'owner' shall include any person, firm, corporation or association owning or renting a motor vehicle or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively."

Section 7761 provides:

"Every owner of a motor vehicle or trailer which shall be operated or driven upon the highways of this state* * * *

is required to register the same with the Commissioner of Motor Vehicles.

Section 7759 further defines "operator" as:

"Any person who operates or drives a motor vehicle."

By Section 7759 "registered operator" is,

"An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

Section 7766 with reference to the registration of registered operators, provides in part:

"Every perdon desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement containing his name, age and address, and the trade name and motive power of the motor vehicle he is competent to operate, on a blank to be furnished by the commissioner for that purpose, which shall be indorsed by two citizens of this state who are registered motor vehicle owners, who shall certify to the correctness of the facts stated in such application and the good character of such applicant."

Section 7765 provides for the registration of chauffeurs and prohibits the issuance of a certificate of registration to any chauffeur under the age of eighteen years, the same age limit is contained in Section 7766 providing for the registration of registered operators.

Section 4526 Revised Statutes Missouri 1929 defines the term "corporation" as follows:

> " The term 'corporation,' as used in this chapter, shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships."

Section 4555 provides:

> "Every corporation, as such, has power* * * * * *
>
> Fifth. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation."

Corporation is defined in 14 C. J. page 51,Section 3, to be:

> "* * * an artificial being or person created by law having a legal entity entirely separate and distinct from the individuals who compose it, with the capacity of continuous existence or succession notwithstanding changes in its membership, and having also the capacity, as such legal entity and artificial person in the law, of taking, holding, and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of its creation, just as a natural person may".

Section 7783, Subdivision I, prohibits any person under the age of sixteen years from operating a motor vehicle on the highways of this state.

The application of an owner for registration of a motor vehicle shall contain, among other things, a brief description of the motor vehicle, the name, residence and business address of the owner thereof.

A statement filed by a chauffeur desiring registration shall give his name, age and address and his application shall be endorsed by two citizens of this state who are registered motor vehicle owners.

Section 7766 Revised Statutes 1929, makes provision for the registration of registered operators requiring that the person desiring to be so registered should file in the office of the Commissioner of Motor Vehicles of the state a statement containing his name,age and address and the trade name and motive power of the motor vehicle he is competent to operate and which statement should be endorsed by two citizens of this state who are registered motor vehicle owners and who shall certify to the correctness of the facts stated in such application and the good character of the applicant. Whereupon, upon the payment of the fee of $3.00 the applicant shall be granted a certificate of registration and assigned a number as a registered operator. Section 7785,Subdivision A, requires registered operators to at all times carry subject to inspection the registration certificate furnished by the Commissioner.

Subdivision F of Section 7783, Revised Statutes 1929, requires every person operating or driving a motor vehicle on the highways of this state, knowing that an injury has been caused to a person or damage to property, due to the culpability of said operator or driver or due to accident, shall not leave the place of said injury, damage or accident without stopping, giving his name, residence, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or other persons specified.

We have no way of knowing what was in the minds of the legislators with reference to what persons the defined words "registered operator" was intended to apply, except as we may ascertain that intention from what the legislature said by way of definition and by a construction of all the act. We are unable to find any construction or interpretation of the term "registered operator" by any court or in any text book.

The Legislature seems to have had in mind laying out a scheme of legislation intending to throw about the traveling public all possible protection under all circumstances and to not only keep a check on those authorized to drive automobiles but to see that those who did drive motor vehicles had some sort of qualification for such service and this would apply, as to those required to be registered operators, whether driving a car in the

course of his employment or merely as an incident to such employment. From the foregoing quotation from Corpus Juris it is apparent that the officers and employees of a corporation are a thing quite apart from the corporate entity, even though such officials or employees be stockholders in the corporation.

It is our opinion that if an officer or employee of a corporation, who also might be a stockholder in the corporation, operates a motor vehicle belonging to the corporation in the course of the employment of such official or employee or operates a motor vehicle belonging to the corporation as an incident to the employment of such official or employee of such corporation, then such official or employee of such corporation is required to register under the provisions of Section 7766 Revised Statutes Missouri 1929.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

NEGLECTED CHILDREN- BOARD OF CHARITIES AND CORRECTIONS- COURT PROCEDURE, Sections 14161, 14162 and 14166 R. S. Mo. 1929, Laws 1931, p.167. RESIDENCE, Section 655 R.S. Mo.1929

{14166 Laws 31
14161 RS Mo 1929}

March 16, 1933.

FILED
15

Mrs. W. H. Henderson
Executive Secretary
Board of Charities and Corrections
Jefferson City, Missouri

Dear Mrs. Henderson:

Your recent letter directed to the Attorney-General has been handed the undersigned for attention. In your request for an opinion you state the following:

> "Kindly give us an opinion for immediate and future use as to securing privacy in cases of illegitmacy in commitment of children to this Department:
>
> First, where birth of child occurs in city away from home county of the mother.
>
> Second, where mother is a minor.
>
> Third, period of time required for mother (of age) to have resided in order to establish residence in the city where birth occurred."

Section 14162, R. S. Mo. 1929, provides that the Cape Girardeau Court of common pleas and all circuit courts in counties with less than a population of 50,000 shall have original jurisdiction in all cases coming within the terms of the article under which said section appears.

Section 14161, R. S. Mo. 1929, defines the term "neglected child" and provides to whom the law, as in said article contained, shall be applicable.

In the Laws of 1931, p. 167, the statutory provision relating to treatment and correction of delinquent minors was amended by repealing certain specified sections and enacting new sections.

Section 14158 of this act provides, among other things, that,

> "the court shall proceed to hear the case in a summary manner and may conduct the examination of the witnesses without the assistance of counsel, and may take testimony and inquire into the habits, surroundings, condition and tendencies of said child, to enable the court to render such order of judgment as shall best conserve the welfare of said child and carry out the objects of this article; and the court, if satisfied that the child is in need of the care or discipline and protection of the state, may so adjudicate, and may in addition find said child to be delinquent or neglected, or in need of more suitable guardianship, as the case may be. The hearings may be conducted in the judge's chambers or in such other room or apartment as may be provided for such cases, and as far as practicable such cases shall not be heard in conjunction with the other business of the court."

From this provision you will observe that the court is granted the authority to hold hearings upon this subject in the chambers of his court, and, therefore, privacy of hearings could be obtained in the commitment of illegitimate children to your department.

Section 14101, R. S. No. 1929, provides,

> "All commitments to said home shall be made by the juvenile court of the county of such child's bona fide residence. ******"

The residence of the parent would, of course, be the residence of the child. What is, and what is not residence, is dependent upon the intention of the parent and the facts connected with such person in the establishment of residence. "Bona fide" is defined in Corpus Juris as "good faith, without fraud or deception". "Residence" is defined in R. S. No. 1929, Section 655, clause 17, as follows:

> "The place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;"

Bouv' Law Dictionary, Vol. 1, p. 915, defines "domicile" or "legal residence" as follows,

> "Proof of domicile or legal residence does not depend

upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile there, though not conclusive. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile, and (3) an intention of acquiring a new one. *****

"A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact which is often difficult to determine. *****

The Kansas City Court of Appeals in the case of In re Osias' Estate, 29 SW (2d) l. c. 243, in defining "residence" and "domicile" has the following to say,

"Residence and domicile are used interchangeably, and, in so far as they apply to the situation here presented are synonymous.

"Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."

From the above you will observe that residence to a considerable extent is dependent upon intention of the person to establish a given county or city as such residence. No particular time is required to establish residence for the purpose of this law.

Under your inquiry it is our opinion that the petition should be filed and the summons issued from the office of the clerk of the court in the county of the residence of the mother. Section 14185, R. S. Mo. 1929, provides that,

"*** unless the parties shall voluntarily appear or be in court, a summons shall issue in the name of the state of Missouri, requiring the child and the person having custody or control of the child or with whom the child may be, to appear with the child at the place and at the time set in the summons,***** The parents of the child, if living, and their residence known, or its legal guardian, or if his or her residence is unknown, then some relative, if there be one, and his or her residence known, shall be notified of the proceedings, and in any case the court may appoint some suitable person or association to act in behalf of

the child. ****** If it shall appear to the satisfaction of the court that there is no person in charge or care of the child, the court may order the sheriff to take control of the child and bring him into court."

If the residence of the child cannot be established by that of the mother, because unknown, then, for the purposes of the act relating to neglected children, the residence would be in the county where such neglected child was found.

If the above and foregoing does not completely answer the questions which you had in mind, we shall be glad to supplement same by your request.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:EC

COUNTY REVENUE--County courts may issue warrants WHEN, and may transfer unused or surplus funds from one department to another WHEN. (5% "moratorium" bank depository)

March 23, 1933.

FILED
15

Hon. Homer G. Chaffin
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Chaffin:

In answer to your letter of March 11th, 1933, wherein you state that your "County Depository is a bank that is open under restrictions, that is, 5% withdrawals", and that you have on deposit $70,000.00, which "on the Treasurer's Books is divided up into particular funds, three of which are subject to withdrawal by Warrant, and the other two--Permanent School Fund and All Road Fund subject to transfer by Order of the Court."

Our opinion is that you have a right to draw on the three funds, warrants which will be paid in proper order up to the 5% of those funds. Now in regard to the other, I will quote part of a section or two in regard to same.

Under Section 12162, R. S. Mo. 1929, the county court has the right "to audit, adjust and settle" accounts, etc.

Section 12167, R. S. Mo. 1929, provides,

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Under Sections 12167 and 12168, R. S. Mo. 1929, if the county court decides that under these two sections this 5% on the other two funds can be transferred, it might be well to do so in order that they might be checked out of the bank to the fund where, or to whom they are badly needed. In other words, the discretion given in these sections (12167 and 12168), if the facts warranted, would permit them to transfer them to the other three funds, and issue warrants against them.

> "It is our duty to harmonize and preserve the whole body of the law, when we can. We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and (or) provided for, the residue of such fund is a "surplus" within the purview of the transfer sections."

Decker v. Diemer, 229 Mo. 296 l. c. 336, 337.

If the facts would not permit them to do so, they could check them out into some other depository, if they thought advisable, and wait until they are needed.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:KG

N. R. A:

President's temporary code does not require operators of Beauty Parlors to adopt any fixed schedule of prices.

9/18

September 14, 1933.

FILED
15

Mrs. Mabel C. Church,
204 South Ohio Street,
Sedalia, Missouri.

Dear Mrs. Church:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Will you please advise me if it is necessary or compulsory to join a city organization whose chief aim is to fix prices using the N. R. A. to boost prices when a city is as hard hit as ours.
>
> I have a shop with four regularly employed operators and two apprentices beside myself. I have raised on all lines of work a little, 25¢ to 50¢ on each item of work and felt that was sufficient to pay my raised salaries, but a certain few shops try to insist upon a higher price which at times like this would cut our work until it would be necessary to lay off part of our girls.
>
> It seems to me to raise prices so much at this time until things are adjusted better would be defeating the N. R. A. Please advise as to fixed prices."

We are informed that a national code has not been adopted for the operators of Beauty Parlors. The temporary N. R. A. pledge which you have signed did not carry with it any attempt to regulate prices to be charged by Beauty Parlors. This temporary code will eventually be superseded, no doubt, by the national code to be adopted by all of the operators throughout the country. This code may carry with it a provision providing for a minimum price scale. Up to the present time, however, there is no obligation upon anyone who has signed the President's temporary code to adopt any scale of prices, as such code does not carry with it any such provision.

Any effort made by any local organization in Sedalia attempting to regulate and fix the charges which you will be compelled to ask for the services rendered at your Shop, would not be under the authority of the President's code. Any such agreement or a conspiracy seeking to raise prices would not

only be unauthorized under the temporary code, but would be in violation of the anti-trust laws of the State of Missouri, and any attempt made by any organization or individuals to coerce you into charging a certain fixed price would be illegal.

The prices which you desire to charge for the services which you render are to be determined in your own judgment. Such prices, no doubt, will be somewhat influenced by competition, and the demands of the public. Those things are matters, however, which at this time must be determined solely by you as manager of your business, just as other problems of business arising in your business must be likewise determined. No one at this time can compel you to charge a particular price, nor are you violating any law in failing to adopt any price previously adopted by any organization.

It is therefore the opinion of this Department that even though you have signed the President's temporary code, you are still free to fix such charges for your services as in your judgment good business requires. You are not required to, nor can you be compelled to adopt any scale of prices supported by any groups of your competitors. The President's temporary code does not cover the question of prices, and although we cannot advise you as to the scale of prices, we do advise you that that is a matter which is solely within your own judgment. A failure to adopt certain prices in accordance with the schedule adopted by others may subject you to criticism, but certainly such failure is not a violation of the law. At the present time you cannot be compelled or coerced to adopt any fixed charges in your Shop.

Very truly yours,

Frank W. Hayes.

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

HAIRDRESSERS AND COSMETOLOGISTS: State board of health may not require holder of certificate of registration to pay a license fee for the privilege of operating a shop.
LICENSE FEES:

11-8

November 7, 1933.

FILED
15
57

Mr. H. G. Cherry, Director,
Division of Cosmetology and Hairdressing,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I am herewith enclosing a copy of the law, Act No. 650, covering cosmetology and hairdressing, exacted by the 55th General Assembly of Missouri.
>
> What I want to know is, whether or not, under this law my Department can forces any one, operating a beauty parlor or shop in the state to secure a license from my department to operate said shop.
>
> If our law permits us to collect a license fee from shop owners and they refuse to take out a license, which many of them are now doing, what procedure will we take in order to enforce the law. I would like an opinion in the very near future."

You inquire whether you can require the operator of a beauty parlor or shop in this State to secure a license from your department in order to operate a shop.

Section 9089, R. S. Mo. 1929, provides as follows:

> "It shall be unlawful for any person in this state to engage in the occupation of hairdresser or cosmetologist or manicurist, or to conduct a hairdressing or cosmetologist's or manicurist's establishment of school, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9094, R. S. Mo. 1929, provides as follows:

> "Every person desiring to practice any of the occupations provided for in this article shall file with the secretary of state board of health a written application under oath on a form prescribed and supplied by said board and shall submit said proof of the required

age, educational qualifications and of good moral character and shall deposit with the secretary of said board the sum of ten dollars. Upon the filing of such application and the payment of the examination fee of ten dollars, the state board of health may issue to said applicant a temporary certificate of registration for a definite period of time but not beyond the next regular examination of applicants for the practicing of the occupations in this article provided; * * *."

Section 9101, R. S. Mo. 1929, provides as follows:

"All who are engaged in the actual and continuous practice of any of the practices of the qualified occupations named in this article, prior to the passage of the same shall be entitled to a certificate to practice hereunder without an examination upon the payment of a fee of five dollars." * *"

Section 9106, R. S. Mo. 1929, provides as follows:

"The fees for examination and certificate as provided in this article shall be paid in advance to the secretary of the state board of health and by him paid each month into the state treasury to the credit of the general revenue fund. * * *"

Under Section 9089 above, it is made unlawful for any person to engage in the occupations of hairdressing, cosmetology or manicuring and to conduct an establishment or school, unless such person shall first obtain a certificate of registration. Under Section 9094, a person may obtain a temporary certificate of registration upon submitting the required proof and the payment of the sum of ten dollars. Under Section 9101, persons engaged in such business prior to the passage of this Act, are entitled to a certificate upon the payment of a fee of five dollars. As we view the Act, persons are entitled to engage in the business of hairdressing, cosmetology or manicuring upon receipt of a certificate from the state board of health and depositing the required fee of five dollars or ten dollars, according to the situation of the applicant. We find no provision in the Act that gives your board the power to exact a license fee in addition to the fee required for the certificate of registration for the privilege of such operator to operate a business. It is made unlawful for any one to operate an establishment or act individually without the certificate of registration and when the operator complies with the law and receives his certificate of registration by paying the required fee, then such operator is entitled to carry on his business. As a matter of fact, the state has granted to the various cities the right to exact a license fee for the purpose of operating a shop or place of business within the city limits, but we do not find any provision in the law which

would give to the state the right to require a license fee from a person who has received his certificate of registration before they would be entitled to open a shop.

It is therefore the opinion of this Department that after the individual has acquired his certificate of registration and paid the fee required in the statute, that he is not required to pay a license fee to your board for the privilege of operating a shop within the state.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH : S.

TAXATION:-The fact that a foreign insurance company pays tax upon premiums doesnot excuse it from paying a property tax upon personal property located within the State.

A. 5979 Laws of 31

12-11

December 5, 1933.

FILED

63

Mr. Charles L. Chalender,
Assistant Prosecuting Attorney,
Springfield, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Our Assessor has requested that we obtain an opinion from you as to whether or not personal property of foreign insurance companies, which is located in Greene County, is assessable here. We call your attention to Section 5979, Revised Statutes of Missouri, 1929, which section states that the tax imposed by that section shall be in lieu of all other taxes."

Section 5979, Laws of Missouri, 1931, page 242, provides as follows:

> "Every insurance company or association, not organized under the laws of this state, shall, as hereinafter provided, annually pay tax upon the premiums received whether in cash or in notes, in this state or on account of business done in this state, for insurance of life, property or interest in this state at a rate of two per cent. per annum in lieu of all other taxes, except as in this article otherwise provided, which amount of taxes shall be assessed and collected as hereinafter provided: Provided, that 'Fire and casualty' insurance companies or associations shall be credited with canceled or return premiums, actually paid during the year in this state, and with premiums on reinsurance with companies, authorized and licensed to transact business in Missouri, which reinsurance shall be reported by the company reinsuring such business; but no credit shall be allowed any such insurance company or association for reinsurance in companies not licensed to transact business in Missouri."

The above section in various forms has been upon our statute books for many years. As it now stands every foreign

insurance company is required to pay a premium tax at the rate of 2% per annum in lieu of all other taxes. Under the various laws dealing with cities of various classes, such cities have a right to exact license tax upon a great variety of occupations including insurance companies. In City of Lamar v. Adams, 90 M. A. 35, the question arose as to the meaning of the foregoing section. The court at page 42 says:

> "By reference to the emergency clause of the act it will be seen that, after all, the main purpose intended by it was to withdraw from the counties, cities and towns, the power which was conferred upon them under the statute of 1899, supra, to tax foreign insurance companies on their annual premiums, or in other words to eliminate from the then existing statutes the power thereby given to the various local authorities to impose taxes on the annual premiums received by them. And these local taxes so abolished were we think, the 'other taxes' referred to in the second section of the act."

In Massachusetts Bonding Company v. Chorn, 201 S. W. 1122, the court had under consideration the identical section which we are now discussing. The court says at page 1124:

> "The payment of the tax entitled the Company under the laws of the State to transact this business in its capacity as a corporation. The amount of the tax is fixed at 2% on premiums received whether in cash or in notes in this State on account of business done in this State. That this is a tax upon the business done in this state under the protection of its laws, there can be no doubt."

Again at page 1125, the court says:

> "In addition to what we have incidentally said on that subject in the preceding paragraphs, we will say that this tax is not imposed upon property in any sense. The only property right involved in this tax is the right of appellant to acquire property by the exercise of its corporate capacity in this State purchased and paid for by the payment of this tax."

It will be seen from the foregoing that the tax of 2% which the foreign insurance company pays under Section 5979 on its premiums is not a property tax in the sense that the tax on its personal property would be. The court above says that the above tax entitled the Company to do business in this State. In the City of Lamar case above the court held that the "other taxes" mentioned in the section meant other taxes on its premiums which cities and counties might levy.

It was certainly never intended that a foreign insurance company, by the payment of its premium tax which entitled it to do business in this State, should be exempt from paying taxes upon its personal property located within your county. Bear in mind this situation is not similar to a tax laid upon the net assets of a corporation, or upon its capital stock where its personal property is reflected and contained in the net assets of the company. This, as we understand it, is purely a tax upon the premiums, and, while under said section, it is no longer possible for cities and counties to exact a tax on premiums from such companies, yet we do not believe that the payment of the premium tax exempts such corporation from the other constitutional and statutory provisions of this State.

Section 6 of Article X of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 7 of Article X of the Constitution of Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Under Section 6 above the Constitution provides what property in this State shall be exempt from taxation. Section 7 above provides that any laws exempting property from taxes other than the property enumerated in Section 6 shall be void. We do not find any provision in the Constitution or in the statutes of this State that exempts from taxation tangible personal property owned by foreign insurance companies and located within your county. Not being expressly exempted it, therefore, must be taxable. In view of Sections 6 and 7 above, any attempt made to exempt from taxation personal property of this insurance company would be void.

It is therefore our opinion that Section 5979, Laws of Missouri 1931, page 242, does not exempt insurance companies from paying a property tax upon their personal property located in and assessed by your county.

Very truly yours,

Frank W. Sayre

Assistant Attorney General.

APPROVED:

Attorney General.

CRIMINAL LAW:

Beer law: Act does not make it a criminal offense for one holding distributor's license to be interested in retail business.

Sec 13139H Laws-33

June 9, 1933.

FILED
16

Mr. David R. Clevenger,
Prosecuting Attorney,
Platte City, Missouri.

Dear Sir:

We are acknowledging receipt of your inquiry of June 3, 1933, as follows:

"I am very desirous of having some information relative to the following:

An investigation is being made wherein a certain man in this County, holding a wholesale beer permit, is likely interested in a restaurant selling beer under a retail permit.

I would appreciate your sending me a form of indictment or information covering this matter.

I will appreciate an early reply due to the fact that I am being pushed on this matter at this time.

Thanking you in advance for this along with past favors."

The sections referring to the issuance of the permit are as follows:

"Section 13139h. Before any permit authorized by this article shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath and he will not allow any intoxicating liquor of any kind or character, including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit, and that such applicant will not otherwise violate any law of this state, or knowingly allow any other person to violate any law of this state while in or upon such premises. 'Provided no permit shall be issued under this act to any person other than a native born, or naturalized, citizen of the United States of America,' and provided further, no manufacturer or distributor, to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company, or corporation, applying for,

securing, or holding, a permit under sub-paragraph "c" or sub-paragraph "d" of Section 13139e of this Act."

Sub-paragraph "c" of Section 13139e is as follows:

"For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, ($10.00) ten dollars."

Sub-paragraph "d" of Section 13139e is as follows:

"For a permit authorizing the sale of non-intoxicating beer by grocers and other merchants and dealers, for sale in the original package direct to consumers, but not for resale, ($5.00), five dollars."

The three above citations are the Sections under the beer act which cover the issuance of permits, both as distributor and as retailer. There is nothing in Section 13139h which would indicate, either expressly or by implication, that a violation of that Section is either a misdemeanor or a felony. The section simply provides that no person holding a permit as a distributor or manufacturer shall have any interest, directly or indirectly, in the business of any company doing business as provided in sub-section "c" and sub-section "d".

There is no general section in the beer law which provides that any violation of the act shall be a misdemeanor. There are various sections which make certain violations misdemeanors, and the violation of Section 13139t is made a felony. The only general section contained in the act is section 13139y, which is as follows:

"Any person convicted of the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law, and if any person so convicted shall be the holder of any permit issued by the Food and Drug Commissioner under authority of this article, such permit shall from and after date of such conviction, be void, and the holder thereof, shall not thereafter, for a period of one year after date of such conviction, be entitled to any permit for any purpose authorized in this article."

That section merely provides that "any person convicted of the violation of any provision of the article, the violation of which is by this article defined as a misdemeanor and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law."

Section 13139h contains no provision making the violation of that section a misdemeanor, and the violation of that section would not come under the provisions of Section 13139y.

Section 4474 R. S. No. 1929, provides as follows:

> "The terms "crime", "offense," and "criminal offense," when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

Under the definitions in the above section, a person violating section 13139h has not committed a "crime," "offense," or "criminal offense," because no where in the act is the violation of section 13139h made punishable by fine or imprisonment. Nor are there any words indicating that the violation of said section would be a crime.

It is, therefore, the opinion of this Department that if a distributor in violation of section 13139h should have an interest in a retail establishment selling beer, that he is not guilty of a crime for the reason that the Legislature has not made such a violation a crime. However, the person violating said section could have his license forfeited because it is clearly the intention, as expressed in the Act, that the distributor shall not also be a retailer. If the person seeking a license as a distributor had an interest in a retail business at the time of his application, the license as a distributor would not be issued to him. If he acquires such interest after he has a distributor's license, his right to continue to hold a distributor's license will be forfeited.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

Acknowledgment--Extending existence of Corporations.
Act of 1931, Page 297.

SB 131 Laws-31

January 24,1933

FILED
19

Mr. S. A. Cunningham
Assistant Corporation Attorney
Secretary Of State
Jefferson City, Mo.

Dear Sir:

Your letter of January 20th,1933, to the Attorney General has been referred to the undersigned for attention. Said letter being as follows:

"We have a proposition in this Department concerning a method of extending existence of corporations. Under Act of 1931,Page 297, certain notices are required to be given, and where they are not given, and the amendment is signed in duplicate, acknowledged and sworn to by all the stockholders, such notice may be waived.

Beeler Lawler

There is a question now before this Department as to whether or not the following can be construed as an affidavit and an acknowledgment combined:

"State of Missouri)
City of St.Louis) ss

Frank M. Mayfield, J.J.Samesreuther, R.McK. Jones, S. Grobe, Linn Paine, Ed.H. Simmons, Oliver Anderson, A.L. Shapleigh, and E.D.Nims, being duly sworn on their respective oaths, state that they are all of the common stockholders of the Mermod, Jaccard & King Jewelry Company, and that they have read the above and foregoing instrument and the matters and things set forth therein are true and that they have executed the same as their free act and deed."

> There is no question in our opinion as to it being a valid affidavit. But as to whether or not it could be construed as an acknowledgment we are at doubt.
>
> We therefore desire your opinion on this question. Please submit same to us at your convenience."

Section 1, under acts of 1931, laws of Missouri, page 297 reads:******In case such amendment in duplicate is signed, acknowledged and sworn to by all the stockholders the notice of such meeting may be waived.******* This procedure, if followed, is mandatory to the extending the existence of corporations. You will observe that the statute uses the words signed, acknowledged and sworn. The proposition under consideration is whether or not the instrument in question was acknowledged.

The instrument recites that the various parties were duly sworn; that they were all the common stockholders; that they had read the above and foregoing instrument and the matters and things set forth therein were true; that they had executed the same as their free act and deed. The statute uses the word acknowledged and not executed. This brings us to the proposition as to what is meant by executed and what is meant by acknowledged.

Executed is defined in Corpus Juris, Volume 23, page 278 as follows:

> "The words "execute," "executed," and "execution," when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion. Thus when the terms are applied to a written instrument, they include the performance of all acts which may be necessary to render it complete as an instrument importing the intended obligation, of every act required to give the instrument validity or to carry it into effect or to give it the forms required

> to render it valid, in a technical sense, the words necessarily include the performance of three acts which are signing, sealing, and delivery, and in some instances the acknowledgment of the instrument, but the act of delivery is not always included, and not infrequently the terms are employed to express merely the acts of signing and sealing, or of signing only.******"

Acknowledgment is defined by Corpus Juris, Volume 1, page 745 as follows:

> "An acknowledgment in its broad, general sense is an admission; but in the technical, legal sense in which here used the term means a formal declaration or admission before an authorized court or public officer, by a person who has executed an instrument, that such instrument is his act and deed. It is a proceeding provided by statute whereby a person who has executed an instrument may, by going before a competent officer or court and declaring it to be his act and deed, entitle it to be recorded, or to be received in evidence without further proof of execution, or both.******"

Act of 1931, page 297, under consideration herein, uses the following words: "******The form of the amendment extending corporate existence shall be executed, acknowledged and sworn to in duplicate by the president of the meeting and attested by the secretary of said meeting and filed with the secretary of State as is required in case of any other amendment. In case such amendment in duplicate is signed, acknowledged and sworn to by all the stockholders the notice of such meeting may be waived/******** Section 4934 R.S.1929, which we believe act

of 1931, page 297, was patterned after, uses the words: "******shall be signed and acknowledged and sworn to.*****" Thus the word acknowledged is used in every instance while signed and executed are interchanged. In view, therefore, of the above we interpret-----"executed the same as their free act and deed", as set out in the instrument under consideration to mean signed and not acknowledged.

From the case of Alexander vs Merry, 9 Mo. 514, to the present date the law seems to be that a certificate of acknowledgment substantially complying with the statute as to the facts to be embodied therein is sufficient. In view of the above and of the cases holding such doctrine it is our opinion that said instrument does not substantially comply with the statute in these particulars, to wit; no formal declaration acknowledging same; no identification of the parties signing. In view of the fact that said instrument does not substantially comply with the statute it cannot be construed as an affidavit and an acknowledgment combined.

You are not requesting whether or not this is a valid affidavit but interested only in whether or not it is an acknowledgment. We hold that it is not an acknowledgment.

For your information we direct you to page 3862 R. S. Missouri 1929, that prescribes a form which we believe the statute under consideration contemplates should be followed.

Yours very truly,

James L. HornBostel
Assistant Attorney General.

Approved_____
Roy McKittrick
Attorney General.

JLH:MM

CONSTABLES -- Tenure of office. County court's right to vacate office. Section 11750 R. S. Mo. 1929.

February 14, 1933.

FILED
19

Hon. Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Cusick:

Your recent request for an opinion, addressed to the Attorney-General, has been handed to the undersigned for attention. Your letter states the following:

> "Mr. W. H. Tibbs, Constable of Union township, this county has failed to be commissioned since his election last Nov. altho he has been advised and requested to do so by county court, he has however, completed his bond.
>
> I have been requested to get your opinion by the clerk of the county court if said court would be within their authority in removing Mr. Tibbs from office.
>
> Mr. Tibbs was constable heretofore, and was reelected at the Genl. election last Nov."

We had occasion on February 7, 1933, to render an opinion upon this same subject matter to Hon. C. F. Turley, Prosecuting Attorney of Carter County, Van Buren, Mo., and enclose herewith a copy of that opinion which we believe answers your inquiry.

We will supplement this opinion, however, because of the fact that in your County the hold-over constable

and the constable elect is one and the same person.

The bond as given by the constable covers the term of his office, which is for a period of two years and until his successor is elected and qualified.

Section 11750 R. S. Mo. 1929, provides the conditions under which a new bond might be required and the power of the court to declare the office vacant upon refusal of the constable to comply with an order of court requiring the filing of additional security or a new bond.

Section 11753 R. S. Mo. 1929, provides the manner of filling such office in the event of a vacancy.

If, in the judgment of the county court, it should deem the bond of the hold-over constable insufficient in amount or security, it should by its order require that a new bond be given as provided for under these sections of the statute, and, upon failure of the constable to comply with s aid order within the time required, to declare the office vacant as therein provided and appoint an officer to fill such vacancy.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:EG
Enc.

MOTOR VEHICLES: When one car is drawn by another the former not required to have license tags attached.

for 7768 RS 1929

FILED
19

March 1, 1933

Honorable Edward Cusick
Prosecuting Attorney
Waynesville, Missouri

Dear Mr. Cusick:

This office acknowledges receipt of your letter dated February 24, 1933, in which you state and inquire as follows:

> "An Oklahoma Automobile dealer passed through this county recently with several new cars which were coupled to, and were being drawn by, other cars which were displaying regular license tags, however, these new cars which were being so drawn had no tags whatsoever, this party was arrested by the sheriff, and his trial is set for March 6th, 1933.
> I have been requested to get your opinion if you feel our traffic laws were violated in this instance and if this procedure is correct.
> Understand these cars which were being drawn had no passengers or freight therein and were being transported in the above manner only."

I assume that one car with engine running and operating was drawing a like car in which the engine was not running or operating, in other words that the latter car was drawn by the power of the first car, the first car having proper license tags attached but the car being drawn did not have license tags attached.

By "trailer" as defined in Section 7759, is meant any vehicle without motive power so that if the car being drawn had motive power, about which fact we do not know, then the car being drawn could not be classified as a "trailer".

Subdivision D of Section 770 provides motor vehicles in the course of delivery from a manufacturer to a dealer, or from one dealer to another dealer, may be operated on the highways in this state without number plates being attached if such car bears on the front and the rear thereof a placard as provided in said Subdivision D, but we are of the opinion that such subdivision relates to deliveries to dealers in this state and not to non residents.

It could not be said that the car being drawn was operated so as to require license tags to be attached.

In what we have said we have had in mind the reciprocal provisions of Section 7768 Revised Statutes Missouri, 1929.

We are of the opinion that your letter does not state facts which constitute a violation of the traffic laws of the State of Missouri.

Very truly yo urs

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____

Attorney General.

GL:LC

CRIMINAL COSTS: ...der Section 3832, R. S. Mo. 1929.
" " " State must pay the cost accruing on failure to convict on penitentiary charge.
CIRCUIT CLERK'S CHANGE OF VENUE FEES--Sections 11786 and 11815 R. S. Mo. 1929.
NEPOTISM -Right of Collector to employ brother-in law's wife as a deputy.

L 3832 RSMo 1929

April 25, 1935.

FILED
19
18

Hon. W. W. Crockett
Prosecuting Attorney
Ralls County
New London, Missouri

Dear Mr. Crockett:

Some time ago while you were in the office you made inquiry with reference to criminal costs in this, to-wit:

> Is the State liable for the costs in a homicide case where the defendant was exonerated in the preliminary hearing, the complaint therefor being filed by the prosecuting attorney?

In this connection your attention is called to Section 3832, R. S. Mo. 1929, wherein it is provided:

> "If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution was instituted, and the officer taking such examination shall enter judgment against such person for the same, and issue execution therefor immediately; and in no such case shall the state or county pay the costs."

Under that section of the statute it is to be observed that when the defendant is discharged the law specifically provides that, "in no such case shall the state or county pay the costs".

An opinion was recently rendered from this department pertaining to the liability of the State for criminal costs, written by Mr. Geo. B. Strother, an Assistant in this office, to Hon. James H. Keith, Prosecuting Attorney of Iron County, which opinion may be of interest to you and a copy of which is herewith enclosed.

In accordance with your request we are also enclosing you herewith a copy of a former opinion with reference to the fee of a circuit clerk in a change of venue case.

With reference to your inquiry as to the right of a sheriff to appoint his son-in-law as a deputy sheriff, we are enclosing an opinion written by Mr. Gilbert Lamb, an Assistant in this office, to Mr. Elbert L. Ford, Prosecuting Attorney, Kennett, Missouri, upon the same subject matter.

Your inquiry upon this matter included the further proposition as to the status of relationship between the sheriff and the proposed appointee where the wife of the son-in-law was deceased, leaving surviving a child or children.

Supplementing the opinion of Mr. Lamb to include the latter proposition stated, be advised that in 2 C. J. 379, we find the following declaration of law:

> "Death of the spouse terminates the relationship by affinity. If, however, the relationship has resulted in issue who are still living, the relationship by affinity continues."

This proposition, so far as we have been able to ascertain, has never been passed upon in this State. The declaration in Corpus Juris finds support in Indiana, Massachusetts, New York, Texas and Virginia, which cases are cited in the footnote. The declarations of law supporting the principle in Corpus Juris are not arrived at from a state of facts similar to those presented, but the question is raised in most of the cases with reference to the right to serve upon juries when a relationship existed within the prohibited degrees as fixed by the respective statutes. Following the reasoning, however, in those cases, it is our opinion that the son-in-law of the sheriff, under the facts stated, would not be eligible for appointment under our statute.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:
ROY McKITTRICK
Attorney-General.

CCA:EG
Encl. 3

P ower of the Missouri Commissioner of Labor to appoint a Federal Investigator.

Sec. 13173 RS Mo 1929

May 11, 1933

FILED

Mrs. Mary Edna Cruzen,
Commissioner,
Labor and Industrial Inspection Dept.,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This day we received your request which was in the following words and figures, to-wit:

> "Please inform this Department, at your earliest convenience, if it is within the power of the Commissioner of Labor and Industrial Inspection in the State of Missouri to delegate authority by appointing a Federal investigator from the Federal Department of Labor, to make personal investigations of the different industrial pay-rolls of the State."

Section 13173 R. S. Mo. 1929, provides:

> "Subordinate Officials, Assistants and Helpers--How Appointed.--The commissioner of labor and industrial inspection is hereby empowered, subject to the approval of the governor, to appoint the following subordinate officials, assistants and helpers, to-wit: Two deputy commissioners of labor and industrial inspection, who shall be in charge of the branch offices of the department; one chief clerk, who shall be a competent bookkeeper and shall have supervision, under the direction of the commissioner, of the principal office of said department at Jefferson City, and shall perform such other duties as the commissioner may require; also one statistician, and such inspectors, not exceeding eleven as may be necessary

to carry on the inspection work of the consolidated department; four stenographers, and one janitor for the principal office at Jefferson City."

It is the opinion of this office that the Commissioner of Labor and Industrial Inspection in Missouri, has only such power in said office as provided by the statutes in making all appointments to subordinate officials. Said power is set out in the above statute quoted, and neither expressly nor by reasonable implication can it be interpreted to mean that one holding the office of investigator in the Federal Department of Labor may also hold the office of inspector with the Labor and Industrial Inspection Department of Missouri. Such a forced construction of the statute would sanction what the legislature did not intend and also would allow a condition of one person holding two public offices which is against the public policy of this State.

Respectfully submitted.

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED_____
Attorney General.

WOS:MM

Power of the Missouri Commissioner of Labor to collect and adjust wages.

Sec 13173 RSMo 1939

May 12, 1933

FILED
19

Mrs. Mary Edna Cruzen,
Commissioner,
Labor and Industrial Inspection Detp.,
Jefferson City, Missouri

Dear Mrs. Cruzen:

This is to acknowledge your letter of May 11th, 1933, which reads in part as follows:

> "Has the Department of Labor and Industrial Inspection authority while arbitrating disbutes as to wages between employer and employee the power to take any legal action in collecting or adjusting the same?"

Section 13201 R. S. Mo. 1929, provides:

> "Disputants to Submit Grievances.— In all cases when any grievance or dispute shall arise between any employer and his employes, said dispute involving ten or more employes, it shall be the duty of the parties to said controversy to submit the same to said board for investigation. Within ten days after the completion of said examination or investigation authorized by this article, the board, or a majority thereof, shall render a decision stating such details as will clearly show the nature of such controversy, and points in dispute disposed of by them and make a written report of their findings and recommendations, and shall furnish the governor and each party to the controversy a true and complete copy of the same, and shall have a copy thereof published in some local newspaper."

Section 13202 R. S. Mo. 1929, provides:

> "Effect of Decisions--Exceptions, when Filed.--
> In all cases where the application for arbitration is mutual, or both parties agree to submit to the decision of the board, said decision shall be final and binding upon the parties concerned in said controversy and dispute. In all cases where either party to a dispute refuses to agree to arbitration, the decision of the board shall be final and binding upon the parties thereto, unless exceptions be filed with the clerk of said board, within five days after said decision is rendered and announced."

It is the opinion of this office that a legal action for the purpose of collecting and adjusting wages between employer and employee, is a legal right which only the parties in interest can prosecute in a civil action in the courts of justice. The Department of Labor and Industrial Inspection while having the power to arbitrate wage differences, as above set out, does not have also the power expresely or impliedly to commence a civil action for the purpose of collecting or adjusting said disputed wages. That right is a personal right, available to those in privity in the contract of employment.

The Board of Arbitration was not created to function as a collective agency but rather to sit as a referee in disputed matters, involving ten or more persons, and make certain findings and recommendations.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED_____
Attorney General.

WOS:MM

Wife of County Recorder helping husband with routine work is violation of Sec. 13, Art. 14 Missouri Constitution even though such relative is not paid.

June 3, 1933.

FILED
19

Hon. Joseph C. Crain,
Prosecuting Attorney,
Christian County,
Ozark, Missouri.

Dear Sir:

On April 14, 1933 you requested an opinion from this department, which is as follows:

> "I would like your opinion as to the effect of Article 14, Section 13, Constitution of Missouri, upon members of school boards who appoint their relatives as teachers in the school. Does this apply to members of the school board and, if so, does the member forfeit his office and also the employee?
>
> The wife of our County Recorder works in his office. As I understand the facts, the recorder has not appointed his wife as deputy nor does she sign any of the papers as his deputy, or receive any compensation for her work. Fees paid to his office go to the County officer personally, but she helps him with the routine work.
>
> What is your opinion as to the effect, if any of the above named section of the Constitution on his office?"

On April 24, 1933 an opinion from this office as to the above questions was prepared by one of the Assistant Attorneys General. This opinion was held up due to the fact that another Assistant writing an opinion pertaining to the question of whether or not Sec. 13 of Art. XIV of the Missouri State Constitution applied to school boards was contrary to the opinion held by the Assistant answering your letter. Since then the problem has been presented to practically all the assistants in the office and several other lawyers, and we cannot as yet give an official opinion on that question.

Relative to the second question in the above letter, it is the opinion of this department that if the wife of the Recorder

referred to in your letter performs regular routine work which some one would have to perform in the Recorder's office, then the Recorder is violating the constitutional provision mentioned above by permitting his wife to do such work. There can be no doubt in view of State ex inf. Norman v. Ellis, 235 Mo. 154 that a Recorder of Deeds falls within the constitutional inhibition mentioned above.

We find no provision in said section of the Constitution providing that before same becomes effective the person rendering the service there referred to, appointed as therein provided, must be paid. In other words, the fact that such person rendering such service is or is not paid is immaterial under that constitutional provision.

Yours very truly,

POWELL B. McHANEY,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

PBM:AH

IN RE: LICENSING OF BEER ON DINING CARS.

June 5, 1933.

FILED

Mr. Cyrus Crane
Solicitor for Missouri and Iowa
The Atchison, Topeka & Santa Fe Ry. Co.
1900 Fidelity Bank Building
Kansas City, Missouri

Dear Mr. Crane:

Your letter requesting an opinion of this office is in words and figures as follows:

"In a conference between General Crow and the writer at Jefferson City last month with regard to the sale of beer under the Missouri statute on dining cars operated by the Fred Harvey Company over the Santa Fe Lines, he suggested that we write you setting up the facts in our case and said he would take the matter up with you and obtain a ruling on the matter.

"Briefly, our position is that it works a hardship in the case of the Santa Fe to require a separate permit for each dining car due to the fact that most of our cars are transcontinental, operating between Chicago and Los Angeles, for example:

"Train 13, the "Chief", - the running time from Chicago to Los Angeles is 56 hours, mileage 2328, with a mileage of 188 in the State of Missouri, being 4 hours and 30 minutes in that State.

"Trains 23 and 24 have the same mileage from Chicago to Los Angeles, with running time of 65 hours, mileage 188 in Missouri, being 5 hours and 53 minutes in that State.

"Train 3 has the same mileage from Chicago to Los Angeles, with running time of 61 hours, being 4 hours and 45 minutes in Missouri.

"The only westbound train on which we could sell beer would be train 19 - the "Chief" - as it is a daylight train between Chicago and Kansas City.

"Train 23, westbound, arrives in Kansas City in the morning, therefore we cannot sell beer on that train.

"Train 24, leaves Kansas City at 8:15 P.M., and we could sell beer on this train.

"Train 20 leaves Kansas City at 10:00 P.M. and Train 4 at 10:15 P.M. and we may be able to sell a few bottles of beer during the hot weather on these two trains.

"We have dining car service between Chicago and Kansas City on train 9 and Kansas City and Chicago on Train 22. We have two dining cars to cover this run, which cars are in the State of Missouri every other day, for 4 hours and 30 minutes in each instance.

"We feel that our case is distinguishable from that of lines operating mostly in the state of Missouri. If a separate license is required for each car, in our case the amount of beer sold would not warrant the payment of the license fee and would make it unprofitable to sell beer on our dining cars in Missouri. It is our thought that possibly the Attorney General will make a ruling favorable to our interests. We do not know just what form it might take but have in mind the issuance of a blanket permit, some means of prorating the time each dining car is in Missouri, or transferring the permits from car to car."

"We shall greatly appreciate your careful consideration of the merits of our case and your early communication to us of the ruling upon this matter."

After considering the facts presented in your request for an opinion in the light of the recent Beer Law, it is

our opinion that it is necessary that any dining car coupled to the above described trains be licensed before beer be dispensed in said dining cars. A separate permit is required for each car except in a case where two diners are coupled on the same train; then, the license of one dining car so coupled would be sufficient for both.

We find no provision in the law for prorating the cost of licenses based on the number of hours one dispensing beer is actually open to the public for business nor do we find anything in the law that would justify one having a license to do business on one premise to use said license as a roving license for the privilege to retail beer on another premise, as in the case of a transfer from one railway dining car to another.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS/AJ

TAXATION AND REVENUE:

Lands bid in by County Court on foreclosure of school fund mortgage are not subject to taxation while held by the County.

9256 RS Mo 1929 7-4

June 30, 1933.

FILED
19
30

Mr. Edward Cusick,
Prosecuting Attorney,
Waynesville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 6, 1933, in which you inquire as follows:

"The County Court of this County has requested me to get your opinion as follows:

Certain School funds were loaned to farmers of this County and deed of trust made on their farm, now it is necessary to foreclose under said deed of trust, and the County Court bid same in.

Is this property (farms) assessable?"

Article 10, Section 6 of the Constitution of Missouri provides:

"The property, real and personal, of the State, Counties and other municipal corporations, and cemeteries, shall be exempt from taxation."

Section 9743 R. S. Mo. 1929, provides as follows:

"The following subjects are exempt from taxation: * * * Fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament * * *."

Section 9256 R. S. Mo. 1929, after providing for bidding in of land by County on sale under school fund mortgage, provides:

"And may purchase, take, hold and manage for said County to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. * * * "

In State ex rel McKinney v. Davidson, 386 S. W. 355, it was held that land owned by an individual upon which there was a school fund mortgage was taxable, but that the bond secured by the mortgage was not taxable.

It will be observed from the foregoing, under the Constitution and Statutes, lands and property belonging to Counties are exempt from taxation. Under Section 9256 R. S. Mo. 1929, if the County bids in the land it becomes property of the County and is to be managed for the benefit of the respective school fund. Under the Davidson case above, it was held that the bonds secured by the mortgage were not taxable. If it becomes necessary for the County to foreclose and bid in the farm so that the farm takes the place of the bond, it remains exempt from taxation so long as the land is owned by the County. However, when the beneficial ownership is again transferred to an individual, either by deed or lease, then the property again becomes taxable.

Therefore, the opinion of this Department is that land bid in by the County upon the foreclosure of a school fund mortgage is exempt from taxation and, therefore, is not subject to assessment.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

TAXATION: Personal property of World War Veteran not exempt from taxation. Cross reference under exemptions.

A-C 9743 RS Mo 1929

1-4

June 22nd, 1933

FILED
19
30

Hon. Edward Cusick,
Prosecuting Attorney,
Waynesville, Missouri.

My dear Mr. Cusick:

Acknowledgment is herewith made of your request of June 5th, for an opinion from this Office, which request reads as follows:

> " Our County Assessor Mr. Moneymaker, has requested me to obtain your opinion as to the legality of assessing personal property on the ex-service men who served in the world war, who are drawing compensation from the Federal Government.
>
> Will you kindly let us have your opinion at your earliest convenience and oblige."

The general exemption statute is Section 9743, Revised Statutes of Missouri 1929. Upon reading this Section it is very clear that an "ex-service man" would not be entitled to any exemption under this Section. Although some of the other States enacted blanket exemption laws in favor of World War Veterans, the General Assembly in this State has passed no such Act. The only relief to be found for ex-service men is under the Act which provides for the compensation. The pertinent parts of these Sections are as follows, 38 U. S. C. A. 454:

> "Section 454-Assignability and exempt status of compensation, insurance, and maintenance and support allowances. The compensation, insurance, and maintenance and support allowances payable under Parts 2, 3 and 4, respectively, * * * shall be exempt from all taxation. * * *"
>
> "Section 618. Benefits exempt from seizure under process and taxation. No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate, shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation."

The chapter referred to in the last mentioned Section is Chapter 11 of Title 38 of United States Code Annotated and is entitled "World War Veterans' Adjusted Compensation."

An examination of these two Sections reveals that the property exempt is in the first Section "compensation, insurance and maintenance and support allowance payable" and in the second Section "no sum payable under this chapter * * *". In other words so long as the sum, compensation, insurance, and maintenance and support allowance are payable, the same are not subject to taxation. Whether or not this exemption continues after this money has been used in purchasing property is determinative of the subject of your inquiry.

The Supreme Court of the State of North Carolina has construed these two Sections in the Federal Statute in the case of Martin v. Guilford County reported in 158 S. E. 847. In that case the plaintiff, an ex-service man paid his state and county taxes on his real estate and automobile which had been purchased by money received from the Government as compensation under protest and instituted this action to recover those taxes, alleging that under the two above quoted Federal Statutes, his property was not subject to state and county taxation. The Supreme Court stated as follows:

> " In the instant case, the sum of money which was payable to plaintiff as a veteran of the World War, under the Act of Congress, as compensation, insurance, and maintenance and support allowance, has been paid to him; he has acquired full and unrestricted title to the money, free from any control over the same by the government of the United States; he has invested it, as he had a right to do, in the purchase of a lot of land and an automobile, which are subject to taxation by Guilford county, under the laws of this state. We think it clear that by the enactment of sections 454 and 618 of Title, 38 USCA, Congress has not undertaken to exercise any control over the property, real or personal, now owned by the plaintiff, and that said property is not exempt from taxation by Guilford County, under the laws of this state, applicable to said property as well as to all other property in said county."

While the Supreme Court of our State has not passed on this issue, I find the following statement from the Kansas City Court of Appeals in the case of Duzan v. Cantley, Commissioner of Finance, reported in 55 S. W. (2d) p. 711, l.c. 712:

"It is argued that the money shall not be subject to the claims of creditors, and since there can be no assignment or garnishment or other proceeding against the beneficiary, therefore the relationship of debtor and creditor cannot exist, especially where the bank takes the fund with knowledge of the source thereof.

This contention is on the theory that the purpose and intent of the legislation in behalf of veterans is to protect the money from all claims, except the United States Government, not only until it comes into the hands of the beneficiary, but also until the latter has himself spent it. We think this is not the correct construction or interpretation to be placed thereon. In our view, funds thus arising are not thus protected after they have once come into the hands of the beneficiary. They have then become his absolute property, and having once come into his hands are no longer an object of solicitude or care on the part of the Government. The latter is careful to protect the fund until the beneficiary receives it, but no further. This seems to be clear from the use and subsequent reiteration of the word 'payable'. So long as a fund is 'payable' to a person it has not yet reached his hands, but when it has, it cannno longer be said to be payable to him. This is borne out by the plain intent of section 54, p. 81, of the above-mentioned USCA, where, in protecting money due pensioners, attachment, levy, or seizure of such funds is prohibited, it speaks of money 'due, or to become due' to any pensioner, 'whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner.' It is not exempt after it is paid to the pensioner."

While it is true that in the Duzan case, the Court was not considering an effort to <u>tax</u> the property of the veteran, still the logic of the decision is equally applicable in interpreting the portion of the Federal Statute pertaining to the exemption from taxation.

It is therefore the opinion of this Office that the personal property of ex-service men is subject to taxation once it has come into his possession and becomes his absolute property.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW/mh

LABOR AND INDUSTRIAL
INSPECTION DEPARTMENT:

Right to inspect office buildings; firms employing one or more persons in cities of less than 3,000; where only owners work; railroad and freight depots; gasoline filling stations; hotels; fraternity houses; collection of unpaid license fees.

July 10, 1933. 7-26

FILED
19
34

Mrs. Mary Edna Cruzen,
Labor and Industrial Commissioner,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of ten inquiries from you regarding your Department, and have consolidated them into one reply for the purpose of answering. Your inquiries are as follows:

(1) "Has the Department of Labor and Industrial Inspection any authority to inspect different offices in office buildings?"

(2) "Section 6782 R. S. of Missouri, 1919 states 'It shall be the duty of the industrial inspector, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings etc.' Please give me your interpretation of an office building.

In your judgment does this mean each separate office in an office building and should a fee by charged for each separate office in these office buildings - or does office building, as used in Sec. 6782 R. S. Mo. 1919 mean an inspection of the building alone, and should a fee be charged on the basis of the total number of employees employed in the several offices in that building?"

(3) "Has the Department of Labor and Industrial Inspection authority to collect inspection fees from a firm employing one or more persons in cities of less than 3,000?

For instance: - Monroe city with a population of 1820 sends us a list of 73 business houses all eligible to be inspected, and further -

The K. C. Chamber of Commerce reports to this department that small cities are asking factories to come and locate there in order to avoid inspection fees - high taxes etc."

(4) "Has the Department of Labor and Industrial Inspection

authority to collect an inspection fee from any firm where only the owner is working, and no employees are working with him?"

(5) "Has the Department of Labor and Industrial Inspection the authority to collect inspection dues from all Railroad and Freight Depots - even if in small towns."

(6) "Will you please give me a list of places to be inspected by the Labor and Industrial Inspection Department of the state of Missouri, as set forth in Section 13218?"

(7) "Has the Labor and Industrial Inspection Department the authority to inspect gasoline filling stations?"

(8) "Has the Department of Labor and Industrial Inspection any authority to inspect hotels?"

(9) "Has the Department of Labor and Industrial Inspection authority to inspect Fraternity Houses where young people are living?"

(10) "Has the Department of Labor and Industrial Inspection the authority to collect unpaid license fees during the term of Amanda D. Hargis, former commissioner?"

Section 13218 R. S. Mo. 1929, regulating the powers and duties of the Commissioner is as follows:

"The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors,

> may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments: Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

(1) and (2) Your first and second inquiries above refer to the inspection of office buildings. You desire interpretation of office buildings, and information as to whether the inspection of office buildings includes the right to inspect the various offices which go to make up the building.

In answer to your inquiry, it is the opinion of this Department that the term "office building," as used in Section 13218 R. S. Mo. 1929 above, means an inspection of the building alone, and that the fee therefor should be charged on the basis of the number of employees employed by the company, individual, or individuals owning the office building. You may not take into consideration in fixing the fee for this inspection the total number of employees employed by the various tenants who rent office space in an office building.

You inquire whether you have a right to inspect the different offices located in the building. It is the opinion of this Department that you do have the right to inspect the different offices in an office building where the businesses carried on in the offices are those named in Section 13218. When the offices in the office building are leased, the space rented belongs to the lessee for the period of the lease, and the owner of the building usually has no jurisdiction over it. The space rented belongs to the lessee and becomes separate and distinct from the building itself. Any number of different businesses may and naturally are carried on in the various offices of the large office buildings and when the businesses are those defined in Section 13218, they may be inspected the same as if they occupied an individual building of their own.

(3) In your 3rd inquiry you inquire as to the right to collect inspection fees of a firm employing one or more persons, in cities of less than 3,000.

The proviso at the end of Section 13218 above is as follows:

> "Provided, that the provisions of this Section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities which have 3,000 inhabitants or less."

Under the above proviso, mercantile establishments that

employ less than ten persons and are located in towns of 3,000 or less cannot be inspected. Mercantile establishments in towns of 3,000 or less may be inspected where they employ ten or more employees. All of the other places listed in Section 13218 may be inspected if they are located in towns of 3,000 or less, if they have one or more employees. The proviso of the above Act only exempts from inspection mercantile establishments employing less than ten and not the other businesses listed therein though they be located in towns of 3,000 or less.

Section 13210 R. S. Mo. 1929, provides that no female employe shall be employed more than nine hours during any one day, or more than fifty-four hours during any one week. The Section further provides, "that the provisions of this Section shall not apply to towns or cities having a population of 3,000 inhabitants or less." The above Section, therefore, regulating the hours of labor of female employees, does not apply to towns or cities having a population of 3,000 inhabitants or less, and your Department would have no right to charge an inspection fee in towns of 3,000 or less where your inspection was made for the purpose of enforcing the hours of labor for female employees,as provided in Section 13210. This Section, however, does not destroy your right to make inspections in towns of 3,000 inhabitants or less under Section 13218, as we have pointed out above.

(4) In your 4th inquiry you ask whether an inspection fee may be required from a firm where only the owner is working and who has no employees.

Section 13219 R. S. Mo. 1929, provides, among other things, as follows:

> "The commissioner provided for in this article shall be entitled to demand and receive from the owner, superintendent, manager or other person in charge of every establishment inspected, as provided for by law, the following fee for each inspection made in accordance with the provisions of articles 4, 5, 6, 8, 9, and 10, chapter 95 R. S. 1929, or elsewhere authorized or required of said inspector by law to be made: For the inspection of every building or shop in which three or less persons are employed or found at work, the sum of fifty cents." * * *

Chapter 95, of which the above section is a part, covers the legislation of this state relating to the relation between employers and employees. The Act was passed for the benefit of the employee and not for the benefit of the employer. In other words, the evil sought to be remedied was working conditions impressed upon the employees by the employers, and was not intended as a regulation of employers themselves when they

employed no others in their business. It must be assumed that employers themselves need no restriction or regulation for the purpose of providing suitable working conditions for themselves. It is only where they have under their control other employees that the state becomes interested and seeks to protect those employees against unfavorable conditions imposed upon them by their employers. The above section imposes a fee where there are three or less persons employed, but under the view taken by us the employer or owner of the business is not an employee within the meaning of this section. It is, therefore, our opinion that no inspection fee can be collected from a business which has no employees and which is operated by the owner himself.

(5) In your 5th inquiry you inquire regarding your right to inspect all Railroad and freight depots, even in small towns. In Section 13218 R. S. Mo. 1929, "freight depots" are specifically named. There is no exception in the statute which exempts those in small towns from inspection. The only exception as to small towns is that of mercantile establishments employing less than ten persons and located in cities of 3,000 or less are exempted. If the Railroad Depot is operated solely as a passenger depot, we do not believe that inspection can be made of it under Section 13218. As to Freight Depots, there is no limitation as to the size of the town in which they are located.

(6) In your 6th inquiry you desire a list of places to be inspected, as set forth in Section 13218 R. S. Mo. 1929, which Section has been quoted above and will not be quoted again at this place. The Section provides for an inspection of "all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops." After the enumeration of the various places to be inspected the Section includes, "all other manufacturing, mechanical and mercantile establishments and workshops." It is the opinion of this Department that the Legislature intended that the places enumerated be subject to inspection and by such enumeration did not intend that every place where one or more employees may work would be subject to inspection. The places enumerated, however, cover practically all of the well-known places where employees work under such conditions as to require the protection of these statutes. We believe that unless the place sought to be inspected is a factory, warehouse, etc., or is a manufacturing, mechanical or mercantile establishment or workshop, that such places may not be inspected. We suggest that when a particular place is desired to be inspected and there is doubt in your mind as to whether you have the right to so inspect it, you make inquiry regarding the particular place. The terms of Section 13218

are so broad that a list of places to be inspected under the general terms of the Act would include most of the places wherein business activity is carried on.

(7) In your 7th inquiry you ask regarding your right to inspect gasoline filling stations. "Gasoline filling stations" are mercantile establishments under Section 13218. They, therefore, may be inspected by your Department where they are located in cities of over 3,000, if they employ at least one employee, but they may not be inspected in cities under 3,000 population excepting where such filling station employs ten or more persons.

(8) In your 8th inquiry, you desire to know whether you have authority to inspect hotels. Hotels are not listed specifically in Section 13218 nor do hotels come within the general classification of "manufacturing, mechanical and mercantile establishments and workshops." Not being specifically named or coming under the general classification, it is our opinion that it was not the intention of the Legislature that hotels should be subject to inspection. However, if any part of the hotel falls within the classifications named in Section 13218, as for example, "restaurants," then that portion of the hotel may be inspected by your Department.

(9) In your 9th inquiry you ask regarding your right to inspect fraternity houses. Fraternity houses are not named in Section 13218 specifically, nor do they come under the general classification of "manufacturing, mechanical and mercantile establishments and workshops." It is true that fraternity houses, as a general rule, have employees, but if the test is only whether or not there are employees, then it could as well be contended that your Department would have the right to inspect private homes because many homes have one or more employees. We do not believe it was the intention of the Legislature that inspection should be made of all places where employees are found. If such were true, few places, either public or private, would be exempt from inspection by your Department. We believe that it was the intention of the Legislature to confine inspection to the places enumerated in Section 13218. Fraternity houses do not come within any of the enumerated places and we, therefore, are of the opinion that you have no right to inspect fraternity houses.

(10) In your 10th inquiry you ask regarding your authority to collect unpaid license fees accruing during the term of your predecessor. Section 13190 R. S. Mo. 1929, provides as follows:

> "No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first

obtaining a license for the same from the state commissioner of labor and industrial inspection." * * *

Section 13191 R. S. Mo. 1929 provides as follows:

"It shall be the duty of the commissioner, or his deputies, agents or assistants, to enforce sections 13190 to 13193 inclusive. When informed of any violation, it shall be their duty to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction. Any person convicted of a violation of the provisions of said sections shall be deemed guilty of a misdemeanor, and shall be fined not less than fifty nor more than one hundred dollars for each offense, or be imprisoned in the county jail for a period not exceeding six months, or both."

Under the above Section the Legislature has made it a criminal offense to fail to pay license fees required in Section 13190 R. S. Mo. 1929. No provision is made in the Statutes for the collection of such license fees where the person has operated and failed to obtain such license and pay such fee. For the violation of Section 13190 the Legislature has provided a penal remedy. Where a penal remedy is provided in such cases as this, the courts hold that the penal remedy is exclusive and that for failure to pay the license fee a prosecution may result, but that a common law action will not lie to recover the amount due.

In State ex rel v. Dix, 159 M. A. 573, 576, the Court says:

"Beginning with the case of City of Carondelet v. Picot, 38 Mo. 135, and ending with State ex rel. v. Trust Co., 309 Mo. 1. c. 490, the courts of this state in an unbroken line of decisions have held that a tax is not a debt or in the nature of a debt but is an impost levied by government and that it is not founded on contract but operates ininvitum. * * * But further we said 'however the payment and collection and mode of collection of taxes, are necessarily regulated by statute, and if the statute names a remedy which may be fairly said to be exclusive no other can be had.' And a specified remedy will be held to be exclusive where no other is provided and the ordinance is entirely silent with respect of any other. The rule in this state is that where the statute or ordinance wholly fails to provide a remedy an implication arises that the legislative body intended that a civil suit at law would lie for the collection of the tax but where an adequate remedy is

provided the implication must be the other way. * * * We think the penal remedy given in the ordinance was adequate and, therefore, exclusive."

The same rule is announced in Luckey v. Kansas City, 169 M. A. 666 l. c. 671, and is stated as the majority fule in an annotation found in 5 A. L. R. 1312.

It is, therefore, the opinion of this Department that where persons have been permitted to operate without having to pay the license fee, that those fees may not now be collected by your Department. This, however, would not prevent criminal action being instituted against such violations if the statute of limitation has not barred such prosecution.

Very truly yours,

Frank W. Hayes.

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

Taxation--Lien for tax extended to insurance for what year.
Section 9963b.

7-22

July 19, 1933

FILED
19
33

Hon. Joseph C. Crain
Prosecuting Attorney
Ozark, Missouri

Dear Mr. Crain:

Acknowledgement is herewith made of your request for an opinion on the following facts:

> "A has paid his taxes for 1931 which were payable in the fall of 1932. The taxes assessed in 1932 payable in 1933 and the taxes assessed in 1933 and payable in 1934 have as of this date been assessed against the land. A then has a fire which destroys a building. For what years does the state have a lien against the insurance?"

For convenience we quote portions of Section 9963b, applicable to your inquiry:

> "Section 9963b. LIEN FOR TAXES TO FOLLOW INSURANCE IN CASE OF DESTRUCTION OF BUILDINGS
> In the event of the destruction by fire, windstorm or tornado of any permanent buildings and/or improvements situate upon any land * * * *, which * * * * at the time of destruction were situate upon any land * * * * against which taxes were then levied and assessed, and was so situate at the time of such levy and assessment, the lien of such taxes shall attach to and follow any insurance that may be upon said property at the time of its destruction, * * * *. The lien given by this section shall be a first and paramount lien upon the money due in event of the contingency herein referred to. * * * *."

Taxes levied and assessed have at all times been a lien upon the real estate taxed. To further secure these taxes, the insurance upon the improvements on the land was made amenable to this lien. A study of the foregoing section leads us to believe that no new lien was created, but

the lien heretofore existing on real estate is simply extended to the insurance. The phrase "the lien of such taxes shall attach to and follow" does not contemplate a new and separate lien on the insurance, as distinct from the lien on the real estate, but refers to one lien upon the real estate and insurance.

While we have not overlooked the clause that states that the insurer shall pay the taxes, etc., then due, levied and assessed, it is our opinion that the lien extended to such insurance is the lien as exists upon the land, i.e:- for taxes levied and assessed, whether due or not.

Accordingly it is the opinion of this office, that whatever lien exist on the land for the payment of taxes, is by the terms of Senate Bill 94 extended to insurance in the event of a "destruction" occuring under the circumstances provided for in said section 9963b.

Respectfully submitted

HARRY G. WALTNER, Jr.
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

BANKS & BANKING: Relative to Proclamation of Governor March 13, 1933. Withdrawal of funds from banks.

August 1, 1933. 8-10

FILED
19

Mr. Ray J. Cunningham
Chief Attorney
Veterans Administration
4030 Chouteau Avenue
St. Louis, Missouri

In Re: G
CARLTON, Elmer M.
C-529 320

Dear Sir:

This Department is in receipt of your letter of July 19th, enclosing a letter from the Citizens Bank of Festus addressed to you, which latter letter is as follows:

"Your letter of May 24th addressed to Mrs. Ida Snyder, Guardian of Elmer M. Carlton was referred to us for attention. You advised Mrs. Snyder in the matter to withdraw her funds from the bank and invest in either of the options provided by the Government.

Replying will say Mrs. Snyder has $500.00 invested in certificate of deposit in this bank dated May 1st and due November 1st on which 4% is paid.

Now the question arises; under instructions of the Finance Department of Missouri and the Proclamation of the Governor, in line with Proclamation of the President of the United States, we are not permitted to pay out money for the purpose of investing in stocks, bonds and other securities. Would this deposit come within that restriction. I am asking you for information and if the same does not we will gladly release the money and invest it in Government bonds for her.
Thanking you for your attention in the matter, we are"

In your letter to this Department you ask,

> "Your opinion as to the application of the instructions issued to the Finance Department, under the PROCLAMATION of the Governor, is respectfully solicited."

The inquiry of the Citizens Bank of Festus evidently refers to the Proclamation of Governor Guy B. Park and Commissioner of Finance, C. H. Moberly, issued March 13, 1933, and more particularly to sub-division "(d)", item 2 of said proclamation, which is as follows:

> "Or permit withdrawal of money by any depositor for the purpose of investing same in stocks, securities or other similar investments, unless in the fulfillment of contracts or obligations entered into prior to March 6, 1933;"

It is the opinion of this Department that so far as the above proclamation is concerned the deposit in question would not be under the restriction as set forth in said proclamation and could be withdrawn for the purpose of investing the funds according to law and under the order of the Court having jurisdiction of the matter.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

CRIMINAL COSTS--Board and medical attention furnished by whom, in change of venue cases.

V

9-23

August 10th,1933

FILED
19
38

Hon. Ray Crow,
Prosecuting Attorney,
Chariton County,
Keytesville, Missouri.

Dear Sir:

We have your request of August 7th, 1933 for an opinion upon the following state of facts:

> "Otis Thornton, charged with a felony took a change of venue during the May Term of our Court and the case was sent to Linn County. Otis was taken to that county and the case was set for the June Term. At that term a continuance was requested and granted and a transfer made to the Brookfield Term. Thornton had been in jail in Chariton County eleven months before being taken to Linn County. Charge, highway robbery with a weapon which is not bailable. In a telephone communication today I have been advised that he is seriously ill with some venereal disease that is affecting his eyesight and that his general condition was bad and requesting that our county court allow them to call in medical attention, other than their county physician, and asking that Chariton County pay the expense. Apparently the reason for additional medical attention is that their county physician is not qualified or situated to properly treat the case.
>
> In view of the above, would Chariton County be liable for the medical attention furnished a prisoner being held in confinement in another county awaiting trial for an offense committed in this county and when such prisnner has requested and obtained a change of venue?
>
> Also, would our county be liable for the board bill of such prisoner?"

Whenever a change of venue is taken in a criminal case, and the case transferred from one county to another, all costs properly chargeable to a county are to be paid by the county wherein the case originated.

Section 3846, R. S. of Mo. 1929 provides:

> "In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted."

Section 3847, R. S. of Mo. 1929 provides:

> "The bill of costs in any case, as provided for in the foregoing section, * * * shall be presented to the county court in which the indictment was originally found, or proceedings instituted, and shall thereupon be paid as if the cause had been tried or otherwise disposed of in said county."

We are now confronted with the question of whether or not the original county, from which a change of venue has been taken, is liable for medical services and the board of such person while awaiting trial. The answer to this question depends upon whether or not medical services and food are "costs" chargeable to a county.

The sheriff receiving such prisoner on change of venue shall

> "take charge of and keep the prisoner in the same manner as if he had been originally committed to such jail." Section 3839, R. S. of Mo. 1929.

The duties of the sheriff with reference to furnishing food and medical attention are fully set out in Section 8533, R. S. of Mo. 1929, as follows:

> "SEC. 8533. FOOD, CLOTHING AND MEDICAL ATTENDANCE TO BE PROVIDED. Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Food for the prisoner and medical services when necessary, are expenses of imprisonment and are to be taxed as costs. Section 8534, in part, reads as follows:

> "The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid."

It was the clear intention of the lawmaker to have the "board" of a prisoner in a county jail taxed as costs of the case. This is apparent from the following two sections of the statute which we quote in part:

Section 11794:

> "Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county."

Section 11795:

> "It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court <u>for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills.</u>"

Section 3825, R. S. of Mo. 1929 recognizes that "board" is a part of the costs of the case, and is to be paid by either the State or county. Section 3825 provides:

> "Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, <u>except fees for board,</u> shall be paid by the state or county."

Whenever medical services become necessary for a prisoner in a county jail, the county court of the county wherein the prisoner is confined may

> "allow a moderate compensation for medical services, * * * furnished any sick prisoner, <u>which shall be paid out of the treasury of the county in which the cause originated.</u>" Section 3840, R. S. of Mo. 1929.

Under this last section, it is the duty of the county court, wherein the prisoner is kept to fix the compensation for medical services, and it is the duty of the county from which the case was transferred by change of venue, to pay for such medical services.

It is therefore the opinion of this office that it is the duty of the sheriff or jailer, or the county court, of the county wherein the prisoner is confined to furnish such prisoner the necessary food, and also furnish sick prisoners with the necessary medical services. Both of these items are to be charged as costs and paid by the county from which the case was transferred on change of venue.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

FER/mh

APPROVED:

ROY McKITTRICK
Attorney-General

LABOR DEPARTMENT:

Board of Mediation and Arbitration has not abolished, and the pertinent statutes appear in Article 3, Chapter 95, R. S. Mo. 1929.

August 26, 1933.

9/r

FILED
19

Miss Mary Edna Cruzen,
Commissioner of Labor,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Board of Mediation and Arbitration been abolished?

The following Statutes have been called to my attention:

Session Laws, 1901, page 195.
Creation of the board.
Amended Laws, 1903, page 218, and Laws 1909, page 615.

The statute appears in the 1929 revision, Secs. 13,195 and 13,204.

The Act of 1921 created a Department of Labor and transferred to the Department the duty of administering the provisions of Ch. 54, R. S. 1919, except the provisions of Art. III, thereof, also, Session Laws, 1937, page 292, Art. IV, contains the sections providing for a Board of Mediation and Arbitration.

The Act of the 51st General Assembly to be found at pages 417 to 425 inc., Laws 1921, was repealed by the Act to be found at page 260, Laws 1931.

There seems to be no record of a Board of Mediation and Arbitration having been appointed under the Caulfield administration."

You inquire whether or not the Board of Mediation and Arbitration has been abolished. In answering your inquiry we shall review the Acts and Statutes to which you call our attention.

The Board of Mediation and Arbitration was created by the Legislature in 1901. The particular Section creating the Board first appeared in the Revised Statutes of 1909 as Section 7802. The chapter dealing with the Board first

appeared in the Revised Statutes of 1909 as Article 3 of chapter 67. Article 3 of Chapter 54 of the Revised Statutes of 1919 is the same as article 3 of Chapter 67 of the Revised Statutes of 1909. In 1921 the Legislature in Laws of 1921, pages 417 to 425, created the Department of Labor and transferred to the Department of Labor the duties of administering and inforcing the provisions of Chapter 54, R. S. Mo. 1919, except the provisions of Article 3 thereof; Article 3 being the Section dealing with the Board of Mediation and Arbitration. The operation of the Laws of 1921, pages 417 to 425, were suspended by means of the referendum and at the election on November 7, 1922, the people rejected the Laws of 1921, pages 417 to 425. These Laws, therefore, never became operative and they were repealed and removed from the statutes by the Legislature in 1931 by the Laws of 1931, page 260.

In 1927 the Legislature, in Laws of 1927, page 292, created the Department of Labor and Industrial Inspection and conferred upon that Department all the duties and powers contained in Chapter 54 of the Revised Statutes of 1919, except Article 3 of said Chapter; said Article being the one relating to the Board of Mediation and Arbitration.

Article 3 of Chapter 54 R. S. Mo. 1919, therefore, was not affected by the Laws of 1921, pages 417 to 425, or by the Laws of 1927, page 292, and are, therefore, still in force and are found in the present revision of 1929 as Article 3 of Chapter 95.

It is, therefore, the opinion of this Department that the Board of Mediation and Arbitration is still in existence and has not been abolished by any of the foregoing laws.

Very truly yours,

Frank W. Hayes
Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

LABOR DEPARTMENT:

Commissioner has no present authority to draft and promulgate Boiler rules.

#B 206 / [illegible]

9/2

August 26, 1933.

FILED

Miss Mary Edna Cruzen,
Commissioner of Labor,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Commissioner of Labor authority to draft and promulgate boiler rules for the State of Missouri?

Has the Commissioner of Labor authority to enforce penalties for violation of whatever code may be adopted and approved?

Do the Statutes provide for penalties?

The following Statutes have been called to my attention:

A Board of Boiler Rules was created by the Legislature in 1919. Mo. R. S. 1919, Ch. 54, Art X.

The Act of 1927 created a Department of Labor and Industrial Inspection and gave to the Commissioner the power and duty of administering all the provisions of Ch. 54 R. S. 1919, except those of Art. III. The Board of boiler rules is named in the title of the Act.

Three of the five sections of Ch. 54 R. S. 1918 were carried over into the 1929 revision, Mo. R. S. 1929, Ch. 95, Art. II.

Art. 2 of Ch. 95, R. S. 1929, was repealed in 1933, Session Laws, 1933, page ~~287.~~ 282."

In answering your inquiry we shall review the Sections called to our attention. The Legislature in the Laws of 1919, page 83, created the Missouri Board of Boiler Rules, and gave to the Board the power to formulate rules and enforce their regulations by the imposition of certain penalties. This Act was incorporated in the 1919 revision and appears at Article 10 of Chapter 54, R. S. Mo. 1919. The Legislature in the Laws of 1927, pages 292 to 296, Section 14, repealed Section 6851 of Article 10, R. S. Mo. 1929.

This was the Section which created the Missouri Board of Boiler Rules. That left Sections 6852, 6853, 6854 and 6855 unaffected. Those sections, with the exception of Section 6854, appear as Sections 13296, 13297 and 13299 of Article 11, Chapter 95, R. S. Mo. 1929. Section 6854 R. S. Mo. 1919 was an appropriation Section and should have been Section 13298 R. S. Mo. 1929, but was inadvertently omitted from the revision. This Section, however, was repealed by the Laws of 1931, page 259.

The remaining three Sections of Article 11, Chapter 95, R. S. Mo. 1929, were repealed by the Legislature in Laws of 1933, page 282. The repeal of these last three Sections completed the repeal of what was originally Article 10 of Chapter 54, R. S. Mo. 1919, and took away from the Labor Department the right to formulate and promulgate Boiler Rules for the State of Missouri.

It is, therefore, the opinion of this Department that under the present condition of our Laws, the Commissioner of Labor does not have authority to draft and promulgate Boiler Rules for the State of Missouri. Having answered your first inquiry in the negative, your second and third inquiries must also be answered in the negative.

Very truly yours,

Frank W. Hayes
Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

NEPOTISM:

Wife is not related to husband's sister's husband by affinity so as to violate Section 13 of Article XIV of the Constitution of Missouri.

October 4, 1933.

FILE 19

177

Miss Mary Edna Cruzen,
Labor Commissioner,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I would like your opinion on the following:
>
> Is Mrs. Jones' husband's sister's husband, kin to Mrs. Jones by affinity?
>
> Thanking you for this information, I am."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision the officer appointing a relative within the fourth degree, either by consanguinity or affinity, shall forfeit his office. The question arises in your inquiry as to whether or not the appointing by Mrs. Jones of her husband's sister's husband comes within the prohibition of the constitution. In 2 C. J. 378, it is said:

> "Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, 11th Ed. Vol I, page 301, the author has the following to say about affinity:

> "The marriage having made them one person (husband and wife), the blood relations of each are held as related by affinity in the same degree to the one

spouse as by consanguinity to the other. But the relationship is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

Mrs. Jones' husband is related to the husband's sister's husband by affinity. The sister and her husband are also related by affinity. Under the foregoing rules, however, we are of the opinion that the fact that Mrs. Jones is related to the husband's sister by affinity does not make Mrs. Jones related to the sister's husband by affinity.

It is therefore the opinion of this Department that Mrs. Jones is not related to her husband's sister's husband either by affinity or consanguinity, and if one were to appoint the other to office, such act would not be in violation of Section 13 of Article XIV of the Constitution of Missouri.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

(Opinion relating to taxes levied and collected on property in special road districts.)

{Sec 11682 RSMo 1919
Sec 8042 RSMo 1929

October 5, 1933.

Mr. Joseph C. Crain,
Prosecuting Attorney Christian Co.,
Ozark, Missouri

Dear Sir:

This department acknowledges receipt of your letter under date of September 30, 1933, in which you state and inquire as follows:

"On February 7, 1933, the county court of our county granted a petition organizing a special road district out of part of Road District #8. At the time of the granting of this petition, there was money on hand in the treasury of the Road District #8 in the amount of $177.00. There was also a large amount of delinquent taxes due from members of the newly organized district and others remaining in district #8. Some of the delinquent taxes have been paid since the organization of the Special Road District. The Commissioners of the Special Road District and the Overseer of District #8 are having considerable dispute as to how the money is to be divided.

I would appreciate an opinion from your office on the following questions:

L. As to whether the newly organized Special District is entitled to any of the money on hand in the old district on February 7, 1933, and if so, what is to be the basis of division.

> LL. Is the newly organized Special District entitled to the delinquent taxes paid in by members of their district after the date of organization which had been levied while they were in the old road district or is this money divided on some other basis or does it go to District #8 which is now only a part of the original #8."

Section 8055 R. S. 1929, reads in part as follows:

> "If the majority of the votes cast for and against the adoption of this article be for its adoption, the court shall declare the result of the vote thereon by an order of record, and shall make an order of record declaring this article to be the law in such special road district, the same to take effect and be in force from and after a day to be named in such order within ten days."

State ex rel Special Road District v. Barry County, 302 Mo. l.c. 291, reads in part as follows:

> "Section 7891, R. S. 1929 provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within any road district shall when paid into the county treasury be placed to the credit of the district from which it arose.
>
> Section 8042 R. S. 1929, voicing the legislative purpose with respect to special road districts, provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of any . . . . . law' upon property within a special road district, is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundries is unavoidable. "

In case of State ex rel Special Road District v. Holman, 305 Mo. l. c. 203, the court said:

"Relator contends that Section 10838, Revised Statutes 1919, which is part of the act under which relator was organized, and which was enacted in 1913, requires the taxes levied under Section 10682 to be carried to the credit of districts like relator in so far as those taxes are derived from property within such districts. Section 10838 provides, among other things, that the county courts 'shall levy on the property taxable in' districts organized 'such taxes as may be levied by the authority of Section 10682 in district not incorporated, and such taxes when so collected shall be set aside to and placed to the credit of the district in which the property was taxable. . . . . All revenue so set aside and placed to the credit of such incorporated district shall be used by the commissioners thereof for' road work within the district. The argument of respondents, with relation to these statutes, is based upon the history of the legislation. It is contended that enactment of Section 36 of the Act of April 9, 1917, Laws 1917, p. 457, which is Section 10682, Revised Statutes 1919, so changed the section as to indicate a legislative intent to deprive special districts of taxes levied under that section on property within such districts. In the case of State ex rel. Monett Special Road District v. Barry County, 302 Mo. 279, 258 S. W. 710, which was decided after the judgment in this case, will be found a discussion and decision of practically identical questions raised in connection with Sections 10682 and 10818, Revised Statutes 1919. While the district involved in that case was organized under Article VII of the Road Law, there is nodifference between the operative words of Section 10838 and Section 10818 which would permit a different conclusion in this case. That decision fully disposes of the first question in this case. A district organized and operating under Article VIII of Chapter 98 is entitled to have all taxes collected under Section 10682 from property in such district 'set aside and placed to the credit of the district in which the property was taxable'."

In view of the Supreme Court rulings, this department holds that all taxes collected on property within the Special Road district, after it is duly organized, is entitled to have all taxes collected on property in said Special Road district set aside and placed to the credit of said Special Road district and paid over upon demand to the treasurer of said Special Road district.

We further rule that all moneys on hand to the credit of the road district, out of which the special district was formed, belong to said district.

Respectfully submitted,

W. W. Barnes
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

WWB:SF

FIRE ESCAPES:

No conflict between Sections 13226 and 13757, R. S. Mo. 1929; the first dealing with mercantile establishments, and the second with public buildings.

Sec 13757 - 13226 RS Mo 1929

October 6, 1933.

10/7

FILED 49

Miss Mary Edna Cruzen,
Labor Commissioner,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Will you please interpret the following sections of the Labor Laws regarding fire escapes. I am quite anxious for your opinion on this subject:
> Section 13226, R. S. Mo. 1929,
> Section 13757, R. S. Mo. 1929.
>
> These two sections seem to conflict."

Section 13226, R. S. Mo. 1929, provides as follows:

> "All manufacturing, mechanical, mercantile or other establishments in this state, of two or more stories in height, in which twenty or more persons are employed above the first floor thereof, shall be provided with at least one or more outside iron fire escapes. For every twenty persons employed on every floor above the second floor of such establishment, there shall be one rope or portable fire escape, and each story shall be amply supplied with means for extinguishing fire."

Section 13757, R. S. Mo. 1929, provides as follows:

> "It shall be the duty of the owner, proprietor, lessee, trustee, or keeper of every hotel, boarding and lodging house, opera house, tenement house, schoolhouse, theater, music hall, factory, office building, except fire-proof office buildings in which all structural parts are wholly of brick, stone, tile, concrete, reinforced concrete, iron, steel, or incombustible material, and which are not used for lodging purposes in the state of Missouri, and every building therein where people congregate or which is used for a business place or for public or private assemblages, which has a height of three or more stories, to provide said structure with iron or steel stair fire escapes attached to the exterior

> of said building and by staircases located in the interior of said building. The fire escapes shall extend from the upper story to the ground, pavement or sidewalk with iron or steel ladder from the upper story to the roof: Provided, however, that such fire escapes, if not continued to the ground, pavement or sidewalk, shall be equipped with a counter-balance device attachment, appliance or apparatus which shall extend from the floor level of the second story to the ground, pavement or sidewalk. School buildings, opera houses, theaters and church buildings, also hospitals, blind and lunatic asylums and seminaries, shall each have a stair fire escape built solid to theground. In no case shall a fire escape run past a window where it is practicable to avoid it. All fire escapes required by this article, except as hereinbefore provided, must be of the kind known as stationary fire escapes. All buildings heretofore erected shall be made to conform to the provisions of this article."

Section 13226 applies to manufacturing, mechanical and mercantile establishments. Under that section if such establishment is two or more stories in height and there are employed twenty or more persons above the first floor thereof, they shall be provided with at least one outside iron fire escape. For every twenty persons employed on every floor above the second, there shall be one rope or portable fire escape and these stories shall be supplied with ample means for extinguishing fire. Section 13757 applies to public buildings and provides for the construction of iron or steel stair fire escapes.

We do not believe that the two sections are so inconsistent or conflicting that either repeals the other. In Yall v. Gillham, 187 Mo. 393, 405, the court says:

> "Repeals by implication are not favored by law, and the general and almost universal rule is that a later general act will not be construed to repeal a prior general act unless the two are so inconsistent that they can not stand together or be consistently reconciled. If the two can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be read together and effect given to both."

Section 13226, R. S. Mo. 1929, deals with manufacturing, mechanical and mercantile establishments and permits and requires, under certain circumstances, rope or portable fire escapes. Section 13757 deals with public buildings and specifies the use of iron or steel stationary fire escapes, thereby eliminating, as regards public buildings, rope or

portable fire escapes.

It is therefore the opinion of this Department that there is no conflict between the two sections; that each deals with a separate subject-matter; that Section 13836 deals with manufacturing establishments and Section 13757 deals with public buildings and places where people congregate and assemble.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

LABOR DEPARTMENT:

Bake shops employing three or less persons chargeable with fifty cents inspection fee, under Section 13219, R. S. Mo. 1929; Section 13294, not increasing the fee to one dollar.

October 6, 1933.

10/7

FILED

19

Miss Mary Edna Cruzen,
Commissioner of Labor,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Has the Labor and Industrial Inspection Department the right under Sec. 13294 R. S. Mo. 1929, to collect a fee of $1.00 from bakeries employing only one to three men?"

Section 13294, R. S. Mo. 1929, provides as follows:

> "It shall be the duty of the commissioner of labor and industrial inspection or his deputy to inspect each bake shop at least twice every twleve months, and for each inspection he may receive a fee of not exceeding one dollar; he may make such additional inspections as conditions may seem to require, but he shall not be entitled to any fee for such additional inspection. It shall be his duty to see that the provisions of this article are carried into effect, and it is hereby made the duty of the prosecuting attorney of each county or city in this state to lend all possible aid in all prosecutions for violation of any of the provisions of this article."

Section 13219, R. S. Mo. 1929, provides as follows:

> "The commissioner provided for in this article shall be entitled to demand and receive from the owner, superintendent, manager or other person in charge of every establishment inspected, as provided for by law, the following fee for each inspection made in accordance with the provisions of articles 4, 5, 6, 8, 9 and 10, chapter 95, R. S. 1929, or elsewhere authorized or required of said inspector by law to be made: For the inspection of every building or shop in which three or less persons are employed or found at work, the sum of fifty cents: * * *."

Under Section 13219, R. S. Mo. 1929, for the inspection of a shop where three or less persons are employed, an in-

spection fee of fifty cents is permitted. Under Section 13294, for the inspection of each bake shop the inspector may receive a fee "not exceeding one dollar."

Section 13219, is the general Section providing for the inspection of all establishments and fixing the rate of fees to be collected therefor. Section 13294, is a special Section dealing with bake shops and must be deemed to restrict and limit Section 13219 in such respects as the two are in conflict. Section 13294 does not say that you are authorized to charge a fee of one dollar under any given set of circumstances, but restricts the charge under any and all circumstances to "not to exceed the sum bf one dollar." It does not mean that you are to receive the sum of one dollar for every inspection made. Section 13219, provides where three or more are employed the fee shall be fifty cents and such provision is not in conflict with Section 13294.

As we interpret the two sections, where three or less persons are employed the fee shall be fifty cents, and this is entirely consistent with Section 13294, which says that the fee shall not exceed one dollar.

It is therefore the opinion of this Department that Section 13294 does not authorize the collection of the one dollar fee where only three persons are employed, and that where three or less persons are employed the fee must be collection under Section 13219, which provides for a fee of fifty cents.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

LABOR DEPARTMENT:

In arriving at fee for inspection, only persons employed within building may be counted, and not those employed by same employer in the yards.

Sec 13219 R.S.Mo 1929

October 7, 1933.

10-13

FILED

Miss Mary Edna Cruzen,
Commissioner of Labor,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Has the Labor and Industrial Inspection Department a right to collect inspection fees covering the number of employes working inside and outside of a railroad building - i.e.
>
> The St. Louis-San Francisco Railway Company claim that inasmuchas they only had five employes working within the building that they did not have to pay an inspection fee covering the 54 other employes working in the yards whose duty did not require them to occupy any of the buildings or shops inspected - they claim
>
> That according to Law the inspection fee should be based on the men employed or found at work in the buildings or shop inspected. May I have your opinion on this subject?"

Section 13219, R. S. Mo. 1929, provides as follows:

> "The commissioner provided for in this article shall be entitled to demand and receive from the owner, superintendent, manager or other person in charge of every establishment inspected, as provided by law, the following fee for each inspection made in accordance with the provisions of articles 4, 5, 6, 8, 9 and 10, chapter 95, R. S. 1929, or elsewhere authorized or required of said inspector by law to be made: For the inspection of every building or shop in which three or less persons are employed or found at work, the sum of fifty cents; for the inspection of every building or shop in which more than three and not exceeding thirteen persons are employed, the sum of one dollar * * * *."

You state that there are five people working in the building owned by the St. Louis-San Francisco Railway Company. You also state there are fifty-four people working in the yards of this Railroad who are not in any way employed in the building

and whose duties do not require them to be in the building. Under Section 13219, R. S. Mo. 1929, we understand that the fees are regulated by the number of persons employed or found at work in the building inspected. We do not understand this to mean that you may include, for the purpose of arriving at the fee to be charged, persons employed by the same Company who are working upon the right-of-way or in the yards of the Railway Company. The fact that the Railroad Company may have employed in its yards and along its tracks a group of men, is not to be considered in arriving at the fee to be charged for the inspection of a building owned or used by the Company. If employes of the Railroad Company who do not work in the building and whose duties do not require them to be in the building can be included in arriving at the fee to be charged, then the question immediately arises as to what employes are included and what are not. The Railroad Companies do have men employed in their yards all along their tracks. If those working in the yards in the immediate vicinity of the building can be included, then it becomes a problem as to just what distance from the building the trackmen must work before they may be included in the enumeration. Shall those employed within 100 yards be included and those not employed within 100 yards be excluded? We do not believe that the Legislature intended that the fees be fixed upon such a basis.

It is therefore our opinion that under Section 13219, R. S. Mo. 1929, that the fees for the inspection of every building and shop are regulated according to the persons employed or found at work within the building or shop inspected. The purpose of the Inspection Law is for the regulation of buildings wherein people work. There can be no connection between the condition or inspection of a building and employes whose duties do not require them to enter such building, and who are not employed therein. We believe, therefore, that when there are only five people employed within the building your fee must be based upon that basis.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

EMERGENCY RELIEF:

Not illegal for county to make Social Welfare Board of city its agent in distributing county and Federal funds for emergency relief.

October 13, 1933.

10-17

FILED

19

52

Mr. Wallace Crossley, Director,
Missouri Relief and Reconstruction Commission,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"In developing a plan for the administration of Federal aid in Buchanan County, a question has arisen as to whether or not the County Court may legally appoint the Social Welfare Board as their agent for administering county funds in the county outside St. Joseph. The Social Welfare Board is by law their agent within the City of St. Joseph, and our office has requested that they be made their agent outside the City of St. Joseph in order to perfect a unified plan for administering both Federal and local funds.

For your information we are enclosing outline of plan (Exhibit "A") for administering Federal and other public relief funds in Buchanan County after August 1, 1933, which was presented to our office by our Buchanan County Emergency Relief Committee about the 1st of July of this year. When this outline was received we were advised that the County Court and all other parties involved had agreed to its content. When it came time for the County Court and the Social Welfare Board to make agreement as provided in Sec. II, paragraph 1, of the outline, the Court and Welfare Board were unable to agree. Two or three suggested plans have been presented to this office which were not acceptable from our point of view.

A few days ago, our Field Director, Mr. A. R. Gephart, was in St. Joseph and left with them the enclosed memorandum, marked Exhibit "B". He explained that the content of this memorandum would need to be included in any agreement between the County Court, and the Welfare Board, before it would be acceptable to this office. He explained that the agreement could

be amplified by such additional items as either party might wish to include, but that nothing could be accepted which would nullify the terms specified in the memorandum.

Please advise us whether or not an agreement making the Social Welfare Board the County's agent outside the City of St. Joseph is in any sense a violation of the law. A definite answer on this point will apparently solve our problem as the Court states that it is the only obstacle at the present time to the agreement."

You inquire whether or not it would be illegal for the County Court of Buchanan County to enter into an agreement whereby the Social Welfare Board of St. Joseph should be their agent for disbursing county funds for relief in Buchanan County.

Article 5 of Chapter 38, R. S. Mo. 1929, creates a Social Welfare Board in cities of the second and third classes. Under that Chapter the Social Welfare Board of St. Joseph is the agency for administering relief and in disbursing city funds for relief purposes within the limits of St. Joseph. Section 6900 of the Chapter, among other things, provides:

"* * *Said Board shall further have power to enter into co-operative arrangement with state or county agencies, or with charitable and philanthropic associations in order better to promote the objects of its work. Said board may act as agent for the county superintendent of public welfare within the limits of the city, under such arrangements as may be made jointly by them."

Article 10 of Chapter 125, R. S. Mo. 1929, creates the office of superintendent of public welfare and specifies his duties among which, under Section 14194, is that:

"The county superintendent of public welfare shall be agent of the county court in his county in investigating all requests for charity and applications of blind persons for pensions in his county."

The county welfare board of St. Joseph, under the foregoing Chapter, is authorized and directed to handle relief within the limits of St. Joseph where city funds are used for that purpose. The superintendent of county welfare is the welfare agent of the county. We find nothing, however, in either chapter which would preclude these agencies in co-operating together for the purpose of dispensing funds for the benefit of charity. It is apparent from Exhibit "A" which you have attached to your inquiry that unless the agency administering Federal funds is county wide in its scope, that the benefit of those funds will be greatly reduced and services greatly restricted.

Article 5 of Chapter 38, R. S. Mo. 1929, expressly provides that the social welfare board and the county superintendent may, under a mutual agreement, make the welfare board the agent for the county, within the limits of the city. We do not understand that this is a restriction on such agency or that the county welfare board might not in such an emergency as this be made the agent for the county to administer county relief and dispense county funds. While the county welfare board might not and would not have the authority to dispense city funds for relief purposes outsideof the city, we do not believe said Section is a restriction on the right of said board to administer relief in dispensing county funds in connection with the distribution of Federal funds provided for that purpose. While the Act creating the superintendent of county welfare provides that he should be the county welfare agent, it also assigns to him numerous other duties besides the administering of relief for charity. We do not think that the Legislature intended that the said superintendent of public welfare of the county should be the sole or exclusive agent through which the county court is compelled to act in matters of this kind. It is apparent that a co-operation between the county and the social welfare board is essential in order that the fullest benefit may be derived during this emergency from funds to be furnished by the Federal government. We do not believe there is any provision in the statutes that would prohibit the county court from arranging with the social welfare board to administer county funds in connection with the Federal funds to be supplied for this purpose.

It is therefore the opinion of this Department that the county, in order to avail itself of Federal funds to be used for emergency relief, might properly use the social welfare board of St. Joseph as its distributing agent in connection with this relief, and that such action on the part of the parties would not be illegal.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

LABOR DEPARTMENT:

Under Section 13190 R. S. Mo. 1929, person operating theatrical agency can be required to pay license fee.

13190 RS Mo 1929

FILED
19

October 13, 1933.

10-14

Miss Mary Edna Cruzen,
Commissioner of Labof,
Jefferson City, Missouri.

Dear Miss Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Has the Labor and Industrial Inspection Department the right to collect license fee of $50.00 for agencies in cities or over fifty thousand, and $25.00 for agencies in cities less than fifty thousaid from theatrical agencies who do booking and hiring of theatrical talent?
>
> As I am holding up a number of requests for this information, I would appreciate an opinion as soon as it is convenient for you to give same to me."

Section 13190 R.S. Mo. 1929, provides as follows:

> "No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. Such license fee in cities of fifty thousand population and over shall be fifty dollars per annum, and in all cities containing less than fifty thousand population, a uniform fee of twenty-five dollars per annum. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency. * * *"

You inquire whether or not you have a right to collect a license fee under the foregoing Section from theatrical agencies who do a booking and hiring of theatrical talent. Section 13190, R. S. Mo. 1929, provides that no person shall maintain an employment agency for hire or where a fee is charged to either applicants for employment or for help, without first obtaining a license, and provides what rate the license shall be. We believe that the above Section is broad enough to include within its terms theatrical agencies who maintain an office and

charge a fee for applicants for employment. The Section makes no distinction between the kind of labor or employment which the agency seeks to furnish. This Chapter is for the benefit of those seeking employment less they be taken advantage of by unscrupulous agencies or bureaus. The evil sought to be corrected might as easily exist in agencies dealing with the employment of actors, etc., as other persons. The statute, however, makes no distinction, and because of the broad wording of the statute we are of the opinion that you would be within your rights to collect a license fee under said Section from persons maintaining an employment office and charging fees to applicants, even though the employment sought to be affected was the booking and hiring of theatrical talent.

Very truly yours,

Frank N. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

CHARITY AND RELIEF:-The County Court of Buchanan County may enter into an agreement with the social welfare board of St. Joseph for the purpose of distributing county funds for relief work.

Supplemental

Sec 12938 - 12940 RS 1929

FILED
19
56

11-1

October 31, 1933.

Mr. Wallace Crossley, Director,
Missouri Relief and Reconstruction Commission,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "In developing a plan for the administration of Federal aid in Buchanan County, a question has arisen as to whether or not the County Court may legally appoint the social welfare board as their agent for administering county funds in the county outside of St. Joseph. The social welfare board is by law their agent within the city of St. Joseph, and our office has requested that they be made their agent outside the city of St. Joseph in order to perfect a unified plan for administering both Federal and local funds.
>
> For your information we are enclosing outline of plan (Exhibit "A") for administering Federal and other public relief funds in Buchanan County after August 1, 1933, which was presented to our office by our Buchanan County Emergency Relief Committee about the 1st of July of this year. When this outline was received we were advised that the County Court and all other parties involved had agreed to its content. When it came time for the County Court and the social welfare board to make agreement as provided in Sec. II, paragraph 1, of the outline, the Court and welfare board were unable to agree. Two or three suggested plans have been presented to this office which were not acceptable from our point of view.
>
> A few days ago, our Field Director, Mr. A. R. Gephard, was in St. Joseph and left with them the enclosed memorandum, marked Exhibit "B". He explained that the content of this memorandum would need to be included in any agreement between the County Court and the welfare board, before it would be acceptable to this office. He explained that the agreement could be amplified by such additional items as either party

might wish to include, but that nothing could be accepted which would nullify the terms specified in the memorandum.

Please advise us whether or not an agreement making the social welfare board the County's agent outside the city of St. Joseph is in any sense a violation of the law. A definite answer on this point will apparently solve our problem as the Court states that it is the only obstacle at the present time to the agreement."

You inquire whether or not it would be illegal for the County Court of Buchanan County to enter tino an agreement whereby the social welfare board of the city of St. Joseph should be the agent for disbursing county funds for relief in Buchanan County in connection with the Federal Aid program now in force.

Section 12938, R. S. Mo. 1929, provides as follows:

"In all counties of this state that now or may hereafter have located within said counties a city or cities of the first class, there is hereby created and established a board which shall be styled 'The social welfare board of the city of _____.' All powers and duties connected with and incident to the betterment of social and physical causes of dependency, the relief and care of the indigent, and the care of sick dependents, with the exception of the insane and those suffering from contagious, infectious and transmissible diseases, and excepting those persons who may be admitted to the county poor-houses of such counties, shall be exclusively invested in and exercised by said board. Said board shall have power to receive and expend donations for social welfare purposes and shall have exclusive control over the distribution and expenditure of any public funds set aside and appropriated by such cities and counties for relief of the temporarily dependent. This board shall have power to promote the general welfare of the poor within the limits of such cities by social and sanitary reforms, by industrial instruction, by the inculcation of habits and providence and self-dependence, and by the establishment and maintenance of any activities to these ends. Said board shall have power to sue and be sued, complain and defend in all courts, to assume the care of or take, by gift, grant, devise, bequest or otherwise, any money, real estate, personal property, right of property, or other valuable things, and may use, enjoy, control, sell or convey the same for charitable purposes, to have and to use a common seal and alter the same at pleasure. Said board may make by-laws for its own guidance, rules and regulations for the government of its agents, servants and employes, and for the distribution of the funds under its control."

Section 12953, R. S. Mo. 1929, provides as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Under Section 12938 above, the social welfare board of the city of St. Joseph has the power to receive and expend donations for social welfare purposes and shall have exclusive control over the distribution and expenditure of any public fund set aside and appropriated by the city and county for the relief of the temporarily dependent.

Under Section 12940, R. S. Mo. 1929, "Said board shall consist of the mayor of such cities and the president of the county court of such counties, who shall be ex officio members thereof, and six other members, three of whom shall be appointed by the county court of such counties, who shall hold office, one for one year, one for two years and one for three years, whose terms of office shall be designated by such county court, three by the mayor and common council of such cities, who shall hold office, one for one year, one for two years and one for three years, whose terms of office shall be designated by the mayor.* * *"

It appears from the foregoing Sections that the social welfare board of the city of St. Joseph is a body composed of representatives of both the city, and the county of Buchanan. It apparently was the intention of the Legislature that said board should be as much a representative of the county as it is of the city, and under Section 12938 the board is given exclusive control over the distribution and expenditure of public funds appropriated by cities of the first class and counties wherein such cities are located for relief of the temporarily dependent. We do not find anything in said Section which would indicate that this joint board, representing both the city and the county, is by law compelled to confine its activity to the limits of the city. Section 12953 imposes a duty upon the county to provide, at the expense of the county, for the relief, maintenance and support of poor persons. There are no provisions in Article IV of Chapter 90, of which this Section is a part, which place any limitation as to the manner in which the county may disburse its funds for the benefit of the needy. The county court may perform its duty as such, directly, or it may utilize an agency for that purpose. The social welfare board of St. Joseph includes in its membership the president of the county court and three representatives appointed by the court. This board, it appears to us, in the absence of any provisions in the statute prohibiting it, is the proper agency to represent the county in the distribution of county funds in connection with the Federal

funds. You state in your inquiry that it is very necessary, in order to receive Federal assistance, that the same agency administer local relief funds for the entire county. W e find no provisions in the statute which would prohibit the County of Buchanan from agreeing with the social welfare board of St. Joseph to administer county funds for and on behalf of the county.

It is therefore the opinion of this Department that the County Court of Buchanan County has authority to disburse funds of the county to be used for charity through the medium of the welfare board of the city of St. Joseph, and that both the welfare board and the County Court have authority to enter into an agreement to that effect.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

NEPOTISM:--Director voting to elect sister violates Section 13 of Article XIV; teacher so elected cannot collect salary under her contract which is void; director becoming member of board after sister has been elected may continue to hold office.

FILED
19

11-3

October 31, 1933.

Mr. H. Cunningham,
Tarkio, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I would like to have your opinion of the advisability of a member of a school board serving as such, with a relative, a sister as a member of the faculty of the school. What penalty would there be to the school board member, and likewise to the teacher, if any?
>
> Would there by a difference in the interpretation of the law as regards the board member, if the teacher was employed before the member was elected to the board?"

1. Director voting in favor of sister shall forfeit his office.

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision a director who exercises his right to name or appoint his sister as a teacher would forfeit his office as a director. You do not state whether or not the director about which you inquire participated in the election of his sister as a teacher. If the director did not vote for the teacher and she was elected by the votes of the other members of the board, then the director has not violated the above constitutional provision. However, if the director did exercise his right to vote in favor of his sister, then he has violated the provision of the Constitition.

In State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, the Supreme Court passed upon Section 13 of Article XIV of the

Constitution and held that a director who voted in favor of his cousin thereby forfeited his office as director. The court says at page 101:

> "Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

In view, therefore, of the above constitutional provision and the above decision of our Supreme Court, if a member of the school board participated and assisted in electing his sister as a member of the faculty the director has made himself liable for forfeiture of office.

2. Teacher elected by related director cannot collect salary.

Under the above constitutional provision, the ouster of the director is the correction of only one-half of the evil. To permit the related employe to retain the benefits of the appointment would be to defeat the purpose of the amendment. It is clear that the intention of the people under the above provision is that no teacher related within the fourth degree to a director shall be employed. A sister is related within the fourth degree. Under the Constitution, the director cannot legally and directly vote for a relative within the fourth degree and elect him to office. If, after such illegal appointment, the teacher could enforce the contract against the district, that would permit the director to achieve by indirection and subterfuge the very thing prohibited by the Constitution.

In 13 C. J. 421, Sec. 352, it is said:

> "Frequently a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. The generally announced rule is that an agreement founded on or for

> the doing of such penalized act is void. In accordance with the view of Lord Holt in an old case: 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, tho' the statute itself doth not mention that is shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute.' As a qualification of this rule it is stated that, if the penalty is imposed for the protection of the revenue, it may be presumed that the legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue, and that their contracts are not void. And it would seem that in all cases the true rule is that the question is one of legislative intent, and the courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and thepurpose sought to be accomplished in its enactment; * * *."

In Downing v. Ringer, 7 Mo. 585, the Supreme Court held that a contract entered into concerning an act forbidden by law is void, saying:

> "The penalty inflicted by the act concerning Plats of towns and villages, implies a prohibition against the sale of lots before the requisitions of the act are complied with, and the courts will not enforce a contract entered into against the spirit and policy of the statute."

In answer to the second part of your inquiry it is our opinion that if the teacher was elected as a result of a related director voting for her appointment that her appointment is void and that she cannot collect her salary from the district.

3. Where related teacher was employed before director became member of board, he may hold his position on board.

Under the foregoing constitutional and statutory provisions it is the naming or appointing of related teacher that is prohibited. The violation of the Constitution occurs when the related teacher is appointed or elected. If, as you state in your inquiry, a teacher is elected to office at a time when there are no related directors on the board her appointment would be absolutely legal. The fact that after she was elected a person related to her within the fourth degree became a member of the board would not make her appointment illegal, nor change her situation in any respect, nor would the fact that she was related to the director cause him to forfeit his office or prevent him from holding the office of school director. If he became a director after she was elected to office, then he could not have voted to name or appoint her, as prohibited under the Constitution.

4. Conclusion.

It is therefore the opinion of this Department that (1) the director who votes to name or appoint his sister as a teacher makes himself liable for forfeiture of office. (2) That the teacher so elected cannot collect her salary and that her contract of employment is void. (3) That if the sister was elected before the director became a member of the board, neither the director nor the teacher have violated the law; that the teacher may enforce her contract and the director may continue to serve as a member of the board.

Very truly yours,

Frank W. Haynes

Assistant Attorney General.

FWH:S

APPROVED:

_____

Attorney General.

PUBLIC SCHOOLS: School boards cannot use funds received under Sec. 13, Laws of Mo. 1931, p. 340 for incidental purposes.

FILED
19

October 31, 1933.

11-3

Hon. Edward Cusick,
Prosecuting Attorney,
Pulaski County,
Waynesville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 11, 1933 relating to Section 14, Laws of Mo. 1931, p. 342, same being as follows:

> "Will you kindly advise me if 25% or any per cent of the above is to be used for incidental purposes.
>
> It is clear that the above amount may be used for incidental purposes that is collected from the district by taxation. However, it is not clear as to what portion, if any portion may be used for this purpose which is received from the State; in other words, the question is what per cent received through State aid may be used for incidental purposes."

I.

District school boards cannot use any of the funds received under Sec. 13, Laws of Mo. 1931, p. 340, for incidental purposes.

Section 14, Laws of Mo. 1931, p. 342 defining "teaching unit" will not be quoted in full, as you appear to be familiar with its contents. However, the portion pertinent to your question is as follows:

> "****In no case shall more than twenty-five per cent of the minimum guarantee on account of teaching units be used for incidental purposes. ****"

Section 13, Laws of Mo. 1931, p. 340 defines or directs the manner in which the minimum guarantee may be computed, and is as follows:

> "****In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this act, it is hereby provided that when any district has legally levied for school purposes (teachers' wages and incidental expenses) a tax of not less than twenty cents on each one hundred dollars of the assessed valuation of pfoperty therein, such district shall be allotted out of the public school fund of the state an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of section 14 of this act, one thousand dollars for each high school teaching unit to which the district is entitled according to the provisions of section 14 of this act, and the amount approved for tuition and transportation according to the provisions of section 16 of this act, and then subtracting from the total, which total shall be known as the minimum guarantee of such district, the sum of the following items: The computed yield of a tax of twenty cents on each one hundred dollars ($100) of the assessed valuation of the property of the district, the sum received the preceding year from the county and township school funds, and the sum estimated to be received for the current year from the railroad, telegraph, utility and all other taxes based on assessments distributed by the state board of equalization, plus the county foreign insurance fund for the school year 1932-1933 only***"

There is, however, a general statute relating to this matter, same being Sec. 9233, R.S. Mo. 1929, which is as follows:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants , issued by order of the board to legally qualified teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9257, and no school warrant shall bear interest."

This section prohibits the income from state, county and township funds being applied to any other purpose than the payment of teachers' warrants. It is therefore the opinion of this department that no part of the fund received by the district from the state under Sec. 13, Laws of Mo. 1931, p. 340, and further defined by Sec. 14, p. 342 should be used for incidental purposes.

See Sec 14 p 342
O. W. N.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

SCHOOL DISTRICTS:-Laws of Missouri 1931, page 334, Sec. 18, does not
TUITION: permit student to select school which he shall attend; board of district may select school unless the county superintendent shall assign student under Section 18.

11-B

FILED
19
58

November 10, 1933.

Mr. W. W. Crockett,
Prosecuting Attorney,
New London, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you enclose a letter to you from the Ocean Wave School Board. Your inquiry is as follows:

"I am enclosing letter to me that explains itself. Ocean Wave District is in Ralls County. Tilden District includes part of Ralls County and adjacent territory in Marion County, the school building being located in Oakwood, just over the county line in Marion County. The Hannibal District is immediately north and the Ocean Wave District immediately south of the Tilden District. Oakwood is partly in both counties. Tilden needs the attendance of these pupils while Hannibal does not. Several pupils from Ocean Wave District are attending Tilden but one family, who has been sending their two pupils to Hannibal, because of a tax receipt of some kind without paying any tuition, now want to send there at the expense of Ocean Wave District when said district has made arrangements with Tilden, the nearest district, to take the pupils at the price the State pays.

Under the law the school board has the management of the school property and the running of the school matters. The question is: Can the board say what district they shall attend, the district with which the arrangements being made being more accessible and nearer than other districts?

If the pupil could attend a district two districts away, in an adjoining county, could the pupil attend a school five districts away, in an adjoining county? The law, as I see it, does not distinguish between them but in reason the school board of the district paying out the money of the district ought to be permitted to say something about the spending of such money provided they can get the same service and the district so attended is equally accessible and as convenient as other districts.*

You state that the Ocean Wave District is in Ralls County; that the Tilden District includes part of Ralls County and adjacent territory in Marion County, and its school building is located in Marion County. The school is immediately north of Tilden District. You inquire in which district the resident students of the Ocean Wave District may be sent for the purpose of acquiring the higher grades of instruction.

Section 18, Laws of Missouri 1931, pages 334-347, provides as follows:

> "Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the assignment, subject to an appeal to the state superintendent of schools by any county superintendent whose county is affected, and the decision of the state superintendent shall be final: Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

Under the above Section where a pupil is so located that an adjoining school is more accessible, the county superintendent shall assign such pupil to such adjoining district. It further provides that after it is deemed advisable to assign a pupil to a district in an adjoining county the county superintendent of the county wherein the pupil resides shall make the assignment, subject to an appeal to the state superintendent of schools by any county superintendent whose county is affected. Under the statute it is apparent the pupil is to attend the most accessible school, and the selection of the school is either to be made by the school board of the district or the superintendent as the case may be. We find no provision in the statute that gives to the student the right to select the school which he shall attend at the expense of the state and district.

In as much as your board has already arranged with the Tilden High School for the education of your resident pupils, we believe that the students may be sent there, to the exclusion of other districts, unless the county superintendent should assign the pupils to a different district. If the superintendent should assign the pupils to a different district, then, of course, your district would be bound to pay your proportion of the tuition.

It is therefore the opinion of this Department that the law does not give to the pupil the right to select the school which he shall attend at the expense of the district and state, and that if he does so select the school, the district is not compelled to pay his tuition; that the district may select the district to which the students shall be sent unless the county superintendent of schools, under Section 18 above, should assign the students to another district.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

$1.00, or in containing false and fraudulent informat

Sec 13190 R S Mo 1929

11-23

November 13, 1933.

FILED
19
58

Mis. Mary Edna Cruzen,
Commissioner of Labor,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Has the Interstate Employment System of Kansas City the legal right to send out letters as per the attached?
>
> They have been issued a license to do business as a Fee Employment Agency and if this is not in accordance with the State Laws, their license will be revoked.
>
> May I have your opinion as soon as possible?"

You do not call our attention to any particular matter contained in the attached letter as to why it would be illegal, so we assume that the matter referred to must be that of fixing the fee and whether the letter contains any false or fraudulent matters.

Section 13190, R. S. Mo. 1929, among other things, provides:

> "* * *Where a registration fee is charged for receiving or filing applications for employment or help, said fee shall, in no case, exceed the sum of one dollar, for which a receipt shall be given, in which shall be stated the name of the applicant, the amount of the fee, the date and the name or nature of the work to be done or the situation to be procured. In case the said applicant shall not obtain a situation or employment through such licensed agency within one month, after registration, as aforesaid, they said licensed agency shall forthwith repay and return to said applicant, upon demand being made therefor, the full amount of the fee paid or delivered by said applicant to said licensed agency. Any licensed agency shall not publish or cause to be published any false or fraudulent notice or advertisement, or give any false information or make any false

promise concerning or relating to work or employment to any one who shall apply for employment, and no licensed agency shall make any false entries in the register to be kept as herein provided. No person, firm or corporation shall conduct the business of any employment office or agency in, or in connection with, any place where intoxicating liquors are sold."

In Bradford v. Hargis, 45 Fed (2d) 223, the Federal court held invalid that part of the above statute which sought to regulate the fee charged. The court said at page 225:

"No distinction in principle can be drawn between the present case and the Ribnik Case. That case squarely holds that it is beyond the power of any state to regulate the fees charged for its services by an employment agency. The Missouri statute undertakes to do just that. It not only fixes the maximum fee which may be charged, thereby contravening the doctrine announced in the Ribnik case, but it offends still further against the due process clause by requiring an employment agency to return to applicants even such fees as the statute authorizes, if employment is not actually secured by applicants within one month after registration. If to prescribe a maximum fee which may be charged for registration is, as the Supreme Court holds, an unlawful interference with the right of private contract, and therefore a taking of property without due process, a fortiori to require the return of fees after the services for which they were paid have been rendered is a taking of property without due process."

"Our conclusion is that so much of section 6751 (now 13190) fixes a maximum registration fee to be charged by employment agencies is invalid. It follows that defendant's motion to dismiss must be overruled, and that a temporary injunction should issue restraining the defendant only from revoking complainant's license either on the ground that complainant charges a registration fee in excess of $1 or on the ground that it does not return registration fees where situations are not procured for applicants."

In view of the foregoing decision, we conclude that it is not illegal for agencies to charge a fee in excess of $1, and that the Interstate Employment System would not be doing anything illegal to charge fees in excess of $1.

The last part of Section 13190 prohibits the publishing of any false or fraudulent notice or give false information or make false promises concerning or relating to work to anyone who might apply for employment. We have carefully

read the letter sent out by them and do not believe that there is anything contained in the letter that would bring it within the prohibition of the above section. The letter seems only to point out the method used by this concern, and to explain the various different kinds of service rendered, according to the contract entered into by the applicant. We do not believe that the enclosed letter contains material which could be used as a basis for forfeiting the license of this concern; assuming, of course, statements of fact which they make are, as a matter of fact, true.

It is therefore the opinion of this Department that the enclosed letter is not illegal either because of provisions for a higher rate of fee than $1, or as containing false information or false promises, as relating to work or employment.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

GUARDIANS---WARDS: Estate of World War Veterans are invested--How.

Sec 418 R.S. Mo 1929

11-23

November 20, 1933

FILED
19
60

Mr. Ray J. Cunningham
Chief Attorney
Veterans Administration
4030 Chouteau Avenue
St. Louis, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion dated November 1st, which was in the following form:

> "It is desired to secure from your office an opinion concerning the question of investment by guardians of incompetent veterans and wards of the Government in so-called Home Owners' Loan Bonds.
>
> In this connection your attention is invited to a letter addressed to all Field Offices of the Veterans' Administration by Frank T. Hines, Administrator of Veterans' Affairs dated October 16, 1933, which is enclosed herewith.
>
> The propriety and legality of investment of trust funds must necessarily depend upon Section 418 Revised Statutes, State of Missouri, which sets out the specific types of investment allowed by law in estates under guardianship. Thus far there has been no enabling Act passed by the legislature permitting a re-investment in Home Owners' Loan Bonds, however in many instances there is no question but that an exchange would work for the protection of estates which now have real estate mortgages.
>
> Your consideration and advice concerning the above will be greatly appreciated."

Section 418 R. S. Mo. 1929 provides as follows:

> "Guardians and curators shall, unless the money be invested in improving the real estate of the wards as hereinafter

provided, loan the money of their wards at the highest legal rate of interest that can be obtained, on prime real estate security, or invest it in bonds of the United States, or of the state of Missouri, or of the federal farm loan bank except where the estate is less than three hundred dollars, in which case good personal security may be taken, and shall account for all such interest received, which shall be charged in their gnnual settlements; the interest in such cases shall be paid annually, and if not then paid shall become a part of the principal and bear interest at the same rate; and it shall be the duty of the court to require every guardian and curator to make a report at every annual settlement of the disposition made by the guardian or curator of the money belonging to the ward intrusted to him, and if it appear that such money is loaned out, then he shall state the name of the person to whom loaned, the description of the real estate security, and where situtated, and its value, which report shall be sworn to by said guardian or curator and filed in the court; and it shall be the duty of said court to carefully examine into such report as soon as made, and if in the opinion of said court the security is insufficient, it shall be the duty of the court to require additional security to be given sufficient to protect the interest of said wards, and if such additional security be not given within such time as the court shall order, not exceeding ten days, it shall be the duty of the guardian or curator to institute suit forthwith on such security to recover the amount due thereon, and he and his sureties shall be liable on their bond for any omission so to do; and if such money has not been loaned out, the guardian or curator shall state such fact and the reasons, which report shall be sworn to, and shall, unless the money be invested in improving the real estate of the wards as hereinafter provided, state that such guardian or curator has been unable to make loan after diligent effort to do so, and if

> any guardian or curator shall refuse or neglect to make such report at the time aforesaid, or shall make a false report thereof, he and his sureties shall be liable on their bond for all loss or damage to such ward occasioned by reason of such neglect or refusal so to report, or by the making of such false report, and such guardian and curator may, on account thereof, be removed from his trust in the discretion of said court: Provided, however, that whenever it shall appear that it would be for the benefit of the ward that his real estate, or any part thereof, should be improved, the probate court, upon the petition of the guardian or curator, may, after full examination, on the oath of credible and disinterested witnesses, authorize the investment of the money of the ward, or any part thereof, in the improvement of said real estate, under such regulation as the court shall consider suited to the case: Provided further, that such improvement shall in no case exceed the sum of money actually on hand and available for such purpose at the time of making of such order; and the sum so set apart shall in no case interfere with the fund needed for the education and maintenance of such ward or wards."

Our Supreme Court in the case of In Re Farmers' Exchange Bank of Gallatin, 37 S. W. 936, l. c. 942, while interpreting the above section spoke as follows:

> "Section 418, above quoted, speaks in no uncertain terms with reference to the manner in which the funds in the hands of a guardian and curator must be invested. If funds are otherwise invested, except as provided by statute, it is unlawful. Even the probate court cannot legally authorize the investment of such funds, except as prescribed. Therefore, the action of the bank, with full knowledge of the situation in this case, in taking the money of the wards and attempting to give the guardian and curator

worthless notes in lieu thereof, was not only a violation of the bank's agreement, but was contrary to the provisions of the statute referred to. Such conduct of a third person in dealing with property of a ward cannot be ratified by the guardian and curator on behalf of the ward. Plaintiff had no power or authority to waive any right the wards may have had against the bank or the finance commissioner. She was legally bound to exhaust every legal remedy available to redeem the wards' property."

It is the opinion of this office that the law of Missouri regulating the matter in which funds in the hands of the guardian must be invested does not permit the guardian to reinvest the wards' estate in Home Owners' Loan Bonds. The law now in force in Missouri provides in detail the securities that can be the subject of investment by a guardian, and Home Owners' Loan Bonds are not included in the designated list. The guardian having no direct authority to invest in this security, it follows that he has no authority to reinvest, for he cannot legally execute a power to do indrectly an act, when the Legislature did not give the guardian the power to so act directly. The same rule in Missouri applies to estates of all wards. There is no separate rule affecting wards who happen to be world war veterans having an estate under guardianship.

Respectfully submitted

WM. OTTO SAWYERS
Assistant Attorney General.

APPROVED:

WOS:H

ROY McKITTRICK
Attorney General.

STATE:
Cattle shipped or carried from stock yards,feed yards,or place of sale,auction or barter within state to another point within state not required to be inspected or tested under Laws 1933,page 174.

HB132 Laws 33

12-2

December 1, 1933

FILED
19

Honorable H. E. Curry
State Veterinarian
Jefferson City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter dated November 24, 1933, as follows:

> "I am attaching herewith copy of Missouri's 'Stocker and Feeder Law', which has to do with the inter and intra-state shipment of cattle in the State of Missouri. You will note under Section 1 that all cattle shipped into this state, or from one point to another within the state, shall be accompanied by a health certificate, and that female cattle and bulls for dairy and breeding purposes shall be accompanied with a tuberculin test chart, showing that the animals have passed a negative test within sixty days. We are also including correspondence covering a shipment of cattle from the Kansas City Stock Yards to Brookfield, Missouri; the cattle in this shipment belonging to Mr. Milton Yagle of Brookfield--they were purchased by him at Grandin, Missouri, and shipped to the Kansas City Stock Yards, where our Inspector, Doctor E.J. Packer,insisted that thirty-five of the animals in the shipment should be tested. He made the injection of tuberculin, tagged the animals for identification, and, as it requires seventy-two hours to complete the test, he permitted the shipment to go forward subject to release at destination at the end of the seventy-two hour period by Doctor M. S. Campbell, who is a deputy state veterinarian at Brookfield. When Doctor Campbell advised Mr. Yagle that thirty-five head of the cattle in the shipment came under the provisions of the law requiring a tuberculin test and that the animals had been injected and permitted to go forward for release, Mr. Yagle flatly

refused to do anything about it and, as a result, the final inspection on the shipment was not made.

You will note that Doctor Campbell makes the statement that these cattle were to be sold at public sale on October 24. I have been waiting to receive definite information from him as to whether these cattle were actually sold.

I would be very glad to have an opinion as to whether, under the provisions of the law, we are justified in instituting proceedings against Mr. Yagle for failure to comply with the provisions governing the transportation and sale of cattle within the State of Missouri. In my opinion, it seems that this is an open violation; however, being somewhat new in administering the affairs of the office of State Veterinarian, I hesitate to go into matters of this sort without knowing beforehand just what authority we have under the provisions of the law; therefore, I would be very happy to receive an opinion from your office on this matter."

A. SESSION ACTS Laws Missouri 1933, page 174.

The Act referred to in your letter is to be found in Laws 1933 page 174. The applicable portions follow:

"All cattle entering Missouri from any point outside the State or from any public or railway feed yards, or from any public stockyards or other established place of sale, auction or barter located within the State, shall be accompanied by a health certificate, stating that such cattle are free from symptoms of infectious or contagious diseases:

Provided, however, that female cattle and/or bulls for dairy or breeding purposes shall be accompanied by a tuberculin test chart showing that the animals have passed a negative test within six months, or by a certificate showing them to be part of an

> accredited herd or originating in a modified accredited area. Certificates shall be issued by a veterinary inspector of the U.S. Bureau of Animal Industry or by a veterinarian regularly in the employ of the State or by an accredited veterinarian. Tuberculin test charts shall be made in triplicate; two copies shall be mailed to the State Veterinarian and one copy shall accompany the shipment. Test charts shall conform with those of the U.S. Bureau of Animal Industry, governing the interstate movement of cattle. * * * * *"
>
> "Provided further, that female cattle of the beef breeds intended for feeding and grazing purposes may be admitted under quarantine until slaughtered, shipped to public market, or inspected and released by recognized authority as provided in Section 2 of this act. That bull calves under six months of age may be admitted on signed statement of the owner or his agent that said animals will be castrated within thirty days after arrival at destination."

B. CONSTRUCTION OF SESSION ACT.

1. Some portions of the act are clear enough as to their meaning, while other parts are, to us, meaningless in their practical application. The Act provides,

> "All cattle entering Missouri from any point outside the State* * * * shall be accompanied by a health certificate, stating that such cattle are free from symptoms of infections or contagious diseases* * * * *".

We assume that the legislature meant that the cattle described in the first proviso to Section 1 of the Act, above set out, were to be subjected to the test therein provided for when such cattle were being moved as provided in the first paragraph of Section 1, above set out, or that the Legislature intended as if the first proviso to Section 1 read,

> "* * * * female cattle and/or bulls for dairy or breeding purposes, entering Missouri from any point outside the State shall be accompanied by a tuberculin test chart showing that the animals have passed a negative test* * * * ."

So construed and that far the Act is workable.

2. It is the part of the Act dealing with cattle from public or railway feed yards, public stock yards or other established place of sale, auction or barter located within this State, that we encounter the difficulty. You infer in your letter that the Act says or means,

> 'All cattle shipped into this State or (shipped) from one point to another within the State'

but we cannot so read the Act. It reads to us as if it were written, in the first paragraph of Section 1, that

> "All cattle entering Missouri from any point outside the State or all cattle entering Missouri from any public or railway feed yard located within the State* * shall be accompanied by a health certificate,* * *"

and, as to the first proviso to Section 1, that,

> "Female cattle and/or bulls for dairy or breeding purposes entering Missouri from any point outside the State or entering Missouri from any public or railway feed yards located within the State* * shall be accompanied by a tuberculin test* * * *."

Of course cattle cannot enter the State when they are at a yard within it and that part of the Section is void because it does not mean anything.

3. We reach the conclusion that the only enforcible parts of the Act are those prohibiting cattle entering this State from points outside the State without an accompanying health certificate or tuberculin test chart.

C. PERMITTING CATTLE TO GO FORWARD WITHOUT TEST.

If the cattle in question were entitled to be examined or tested, the examination or test should have been completed prior to the moving of the cattle because cattle are required to be examined or tested on entering Missouri or, if the Act means as you construe it, before leaving any such yard as is mentioned in the Act and not afterward. The Legislature intended to prevent the spread of disease among cattle by prohibiting the shipping or moving of certain cattle until certain tests and inspections had been made, but the Legislature did not word Section 1, so as to give it its full probably intended effect, that is it does not include cattle shipped from one point to another within this State.

Even if the Act covered the shipment in question, your deputies had no authority to permit or order a shipment to go forward until you were prepared to furnish the required certificate, yet, the shipment having been directed to proceed with orders to complete the test at the point of destination a jury would not likely convict a shipper of transporting cattle without a proper certificate.

CONCLUSION

It is our opinion that there could not be a successful prosecution under the facts as detailed in your letter and under the Act above referred to.

We are returning your inclosures herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures

LABOR:-Concern charging no fee from applicant or employee, but furnishing training course for compensation to persons seeking employment, is not within Section 13190, requiring a license.

December 7, 1933.

FILED

Mrs. Mary Edna Cruzen,
Labor Commissioner,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Will you please advise if a company operating as per the enclosed letters, is subject to paying a license fee the same as a fee charging employment agency?
>
> I will appreciate your opinion on this question."

Section 13190, R. S. Mo. 1929, among other things, provides:

> "No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. * * *"

As we interpret the above section any person, firm or corporation who shall open, operate or maintain an employment office or agency for hire, is required to take out a license. If such person maintains an office or agency where a fee is charged, either to applicants for employment or applicant for help, they must also take out a license. We understand it makes no difference whether the fee is charged against the employer seeking the help, or the employee seeking the employment. The question then pertinent to your inquiry is whether or not it can be said that this concern is operating an agency for hire, or whether a fee is charged the person seeking employment or the employer seeking the labor.

It appears from the letter which you have attached to your inquiry that this concern has been appointed personnel manager for a number of firms and they have been authorized to employ, for these concerns, sales people. They state specifically that no charge is made to the employee who seeks the

employment. This apparently is true unless it can be contended that the $12.00 paid for the training and guidance course is a fee charged the employee within the meaning of the above statute. Apparently the contract with their clients does not provide any compensation to be paid by the employer for this service. It is apparent that they received their income for the service rendered in return for the course of salesmanship which they give to the applicants.

It is true that they find employment for people and they only give this teaching course to persons who find employment through their service. They perform a service; that is, the salesmanship course for the applicants, and that is what their charges are for. While this appears to be a close question, we doubt that this concern is operating an employment agency for hire or where fees are charged to persons seeking employment within the meaning of the statute. They, no doubt, perform a service over and above the employment feature. If the various concerns would employ their own sales people and then require them to take this course, that clearly would not be within the statute. The fact that they solicit people to take the course and find employment for them we do not believe brings them within the statute.

We believe before this concern would come within the statute that they must charge and accept a fee or compensation, either from the applicant seeking the employment or from the employer seeking the help. The applicant does not pay any fee to be placed with these concerns, nor does the employer pay any fee for the persons employed. For the $12.00 paid by the applicant each applicant receives a six weeks training course in salesmanship, which we do not believe would be considered a fee within the purview of the statute.

It is therefore our opinion that unless the applicant pays a fee for the purpose of getting employment, or the employer pays a fee in order to acquire the employee, that this concern would not come within the statute. We do not believe the fact that the applicant pays for and takes a training course of itself is sufficient to bring it within the statute, even though the transaction contemplates that the person taking the course might find employment by reason thereof.

Very truly yours,

Frank W. Haynes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

STATE HIGHWAY COMMISSION: - Tools not in use by Commission may be loaned by them on public projects.

12-11

December 11, 1933.

FILED
19
43.

Hon. allace Crossley
State Administrator
Civil orks Administration
Madison Hotel Building
Jefferson City, Missouri

Dear Mr. Crossley:

We are in receipt of the following letter from you:

"There are several state institutions who have bee allotted an allotment from the Federal Civil Works Administration funds which would pay for all labor involved, but at the present time these state institutions are unable to function with the Federal Civil Works Administration due to the fact that they are unable to furnish small tools to put their men to work. Our State Highway Commission has in storage at the present time the desired tools and equipment. If so placed in the hands of the state institutions these men would be able to go to work immediately.

I should like from you, and should appreciate it greatly, an opinion addressed to the State Highway Commission which would warrant the lending of these tools for use on the State Projects at the various institutions.

It is understood, of course, that the institutions will be responsible for the equipment used. The equipment to be a state charge against the institution. Of course, this is an emergency and I hope you can give instant approval."

We respectfully decline to comply with your request that our opinion be directed to the State Highway Commission on the matter sought, and in lieu thereof advise you in the premises. You have our approval to use this letter if it will assist you to accomplish what you seek.

You state that this is an emergency and many men will be placed to work if they are able to obtain the use of small tools which are the property of the State Highway Commission and in storage at the present time. We specifically remind you that the ownership and possession of these tools remains in the State Highway Commission and if same are loaned for use by the men on Civil Works Administration projects they must be returned to said Commission when it so directs. No right or interest in them accrues to the borrowers, if loaned to them.

We see no legal reason why these small tools not now used by the State Highway Commission may not be loaned to the men engaged in this public work and with your assurance that same will be taken care of and the institutions be responsible therefor we believe the State Highway Commission, to help out in this emergency, will honor your request.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

In re: Taxi-Drivers required to obtain contract hauler's permit to transport persons over irregular routes.

5264 (e) Laws 31
5270 Laws 31

January 14, 1933

FILED
20

Mr. S. P. Dalton,
Prosecuting Attorney,
Cape Girardeau County,
Cape Girardeau, Missouri.

Dear Sir:-

Your letter of December 8th, 1932 has been referred to me for attention.

In that letter you requested an opinion as to whether or not the information forwarded by you states a good cause of action against taxi-drivers operating over the highways without a permit, and also whether or not this matter is of such general interest as to justify an appeal from the court's order quashing the information.

It occurs to me that the information might be more specific and perhaps about in the following form, following the printed words, "willfully and unlawfully",

> " engages, as his principle business, in the transportation for compensation, of persons from place to place over public highways, under a contract and agreement with such person or persons, and as such contract hauler, and under a contract and agreement for compensation furnish transportation for the person of _____over the public highways, to-wit: From _____to _____ without first having obtained from the Missouri Public Service Commission a contract hauler's permit."

It also occurs to me that, Cape Girardeau and Jackson, Missouri are on a regular route within the meaning of Section 5264,(g) Laws, 1931, p. 305, then it would be well to charge the defendants for the violation of Section 5270 (e) Laws 1931, p. 310, because it would appear from your statement of the facts that the defendants are contract haulers within the meanin of Section 5264, (c), Laws, 1931, p. 305, and as such have no right or authority under any law to accept persons for transportation from a point on a regular route destined to a point on a regular route. In this connection, it might be well to draw the information following the printed portion in the following langu ge:

" engages, as his principle business, in transportation for compensation, ofpersons from place to place over public highways under a contract and agreement with such person or persons, and as such contract hauler and under a contract and agreement with _____ _____for compensation, then and there furnish transportation to _____from Cape Girardeau, Missouri, a point on a regular route, to Jackson, Missouri, a point on a regular route."

It appears that there are no cases in Missouri on the question raised by your letter, and that an appeal for test case in this instance by you would be feasible. In this connection, I am not unmindful of Section 11297, R. S. Mo. 1929, making it the duty of the Prosecuting Attorney to appear in the St. Louis Court of Appeals.

Yours very truly,

FRANKLIN E. REAGAN
Asst. Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER/mh

PUBLIC SERVICE COMMISSION: Commission does not have jurisdiction to discontinue train service where such action would burden interstate commerce.

Sec 5167 R S Mo 1929

February 3,1933

FILED
20

Honorable Elliott M. Dampf
Prosecuting Attorney
Jefferson City, Missouri

Dear Mr. Dampf:

Your letter dated February 2, 1933, makes inquiry as follows:

> "Will you kindly give me your opinion as to whether the Public Service Department of Missouri has the authority to authorize the discontinuation of service on the Bagnell Branch of the Missouri Pacific Railroad and the further authority to permit them to take up their tracks after such hearing".

We assume that the Bagnell Branch referred to is situated wholly within the state. Whatever power the Public Service Commission of the State of Missouri has with reference to the discontinuance of service of railroads, where the Public Service Commission has jurisdiction, is found in Section 5167, Revised Statutes Missouri, 1929. The authority therein delegated to the Public Service Commission by the legislature has been construed in State ex rel v. Public Service Commission, 270 Mo.429.

If, upon a hearing before the Public Service Commission, on application of the Missouri Pacific Railroad Company to discontinue its train service on the Bagnell Branch of such railroad, it appears that such branch of the railroad is being operated at a clear loss to the Company but if it should further appear that a continued operation of such branch road would be a burden on the interstate business of the railroad, in that the loss on such branch would have to be taken care of out of income collected from interstate business, then the Public Service Commission of Missouri would not have jurisdiction; the jurisdiction would be in the Interstate Commerce Commission since there was a

showing made that interstate commerce had been burdened by a continued operation of the road. We take notice that the Missouri Pacific Railroad Company is engaged in interstate commerce.
See, State of Texas, et al, v. R. R. Co.258 U.S.204,66 L.Ed.566,
State of Colorado v.United States,271 U.S.153,70 L.Ed.878,
Transit Commission, et al, v.United States, et al, 284 U.S. 360, 76 L.Ed. 342.

Assuming that the Bagnell Branch of the Missouri Pacific Railroad Company is wholly within this state and assuming that the Missouri Pacific Railroad Company is engaged in interstate commerce, and assuming that on a hearing it appeared that Bagnell Branch was being operated at a clear loss and that there was no public necessity for the maintenance or operation of service on the branch, and if it appeared from the evidence that the loss caused by the operation of the branch was reflected in or taken up by earnings of the Company gained from engaging in interstate commerce, then in our opinion the Public Service Commission of Missouri, under the cases above cited, would not have authority or jurisdiction to grant a certificate or make an order in the premises.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

ROADS AND BRIDGES: Taxation, Sections 10 and 22 of Art. 10 of the Constitution construed and applied.

7890.91 R S Mo 1929

May 12, 1933

FILED
20

Honorable Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of May 2nd, 1933, which is as follows:

> "Will you kindly give me your opinion as to whether the County of Cole, having a property valuation of $18,000,000.00, can levy a revenue tax in the sum of Fifty Cents ($0.50) on the Hundred Dollar valuation under Section 11, of Article 10, of the Constitution of Missouri and an addition tax under Section 22, of Article 10, not to exceed Twenty-five Cents ($0.25) on the Hundred Dollar valuation, for road and bridge purposes only."

Section 11 of Article 10 of the Constitution of Missouri, in part pertinent to your inquiry, provides as follows:

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. * * * "in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; * * *"

Section 22 of Article 10 of the Constitution of Missouri provides as follows:

> "In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county

court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each $100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

Section 7890 R. S. Mo. 1929, reads as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the "county road and bridge fund."

Section 7891 R. S. Mo. 1929, reads in part as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: * * * **

The Supreme Court in construing the above sections with the constitutional provisions supra, in the case of State ex rel. and to Use of Covington County Collector, v. Wabash Ry. Co., 3 S. W. (2) l.c. 380, used the following language:

> "* * * *We are clearly of the opinion that the tax levy required by section 10682 (Sec. 7890 R. S. Mo. 1929) is not a special or additional levy within the meaning of section 22, art. 10, of the Constitution. It has been several times held that a road tax levy under section 10682 is governed by section 11, art. 10. (Citing many cases).* * *"

And further:

> "* * * *There are intimations to the contrary in State ex rel. A., T. & S. F. Ry. Co., 310 Mo. 587, 600, 275 S. W. 932, but that case was overruled by State ex rel. v. Pemiscot Land & Cooperage Co., supra (295 S. W. l.c. 81).* * *"

And further:

> "Section 10682 refers to the same road tax that was dealt with by Section 9436, R. S. Mo. 1899, before section 22, art 10 of the Constitution was adopted. Section 10683 (Sec. 7891 R. S. Mo. 1929) is the one that provides for road taxes under section 22, art 10, of the Constitution. It authorizes a special or additional levy up to the full 25 cent maximum set by that section of the Constitution, and pre-empts the whole of that field. The application of the two statutes (section 10682 and section 10683) is this: Under the former a road tax of not exceeding 30 cents on the $100 valuation must be levied as a part of the general tax levy of the county within section 11, art 10, of the Constitution; and if additional road revenues are necessary, the county court may, in its discretion, levy an additional road tax up to 25 cents on the $100 valuation under section 10683 and section 22, art. 10, of the Constitution."

And further on page 381:

> "It is clearly within the right and authority of the General Assembly to pass laws authorizing counties to exercise the taxing power subject to limitations more confining than those set by the Constitution itself, except in instances where the Constitution gives the taxing authorities an uncontrolled discretion, as was done by section 22 of article 10."

In the case of State ex rel. and to Use of Kersey, Collector of Revenue, v. Pemiscot Land & Cooperage Co., 295 S. W. l.c. 81, the Supreme Court in Banc, said:

> "The rate fixed for county purposes in counties having $10,000,000 and not exceeding $30,000,000 is 50 cents on the $100 valuation; hence only 30 cents on the $100 valuation is left for other general county purposes. It is not likely the Legislature could, in fairness to other demands for county purposes, fix the maximum rate for road purposes higher than 20 cents on the $100 valuation. Again, if a higher rate was fixed it would apply to all counties in the state, and many of these counties would not need the amount of money realized from a higher rate of taxation. Therefore we conclude that the power granted to the county courts of this state by section 22 of article 10 of the Constitution to levy and collect, in their discretion, a special tax not to exceed 25 cents on the $100 valuation for road and bridge purposes, is a power to be used in emergencies, as in the judgment of the court an emergency exists, and that this power was lodged by the organic law with the county courts that these emergencies might be speedily taken care of. The fact that the fund realized from a levy under section 22 of article 10 of the Constitution is for county purposes is not controlling or even persuasive. Certainly, it cannot be classified under general county purposes, for this classification is fixed by law (section 12866 R. S. 1919) (Sec. 9874 R. S. Mo. 1929); and the Constitution classifies it as

a special road and bridge tax. It will be noted that the provision limiting the tax levy for county purposes to 10 per cent. In excess of the amount produced by the rate of levy for the previous year, is made a part of the statute limiting the amount of the annual tax for county purposes, which statute is authorized by section 11 of article 10 of the Constitution." " "

And further:

" " " "Having in mind the express grant of power to the county courts in section 22 of article 10 of the Constitution, and the evident purpose of the organic law in lodging this power in said courts, we hold that section 12865 (sec. 9873 R. S. Mo. 1929) as amended by the Laws of 1921 and 1923 (Laws of Missouri 1921, p. 678, now Laws of 1933, p.374), is unconstitutional and void in so far as it may have been intended by the Legislature to limit the power granted to the county courts in section 22 of article 10 of the state Constitution. In so holding we do not assume the Legislature intended to limit the power granted to the county courts in said section of the Constitution. We think the Legislature only intended, by section 12865, as amended by the laws of 1921 and 1923, to limit rates of tax levy for county purposes which it controlled by statutes fixing said rates. It follows that the county court of Pemiscot county could legally exclude the special road and bridge tax for 1925 in determining whether it was within the law requiring that the tax levy for 1925 should not be increased more than 10 per cent. of the amount collected for taxes for 1924. This conclusion disposes of the other assignment of error.

The case of State ex rel. v. Railroad, 310 Mo. 587, 275 S. W. 933, should be overruled," " " "

It is therefore our opinion that the county court may levy a revenue tax in the sum of 50¢ on the $100 valuation under Section 11 of art. 10, and an additional tax under section 22 of art. 10, not to exceed 25¢ on the $100 valuation, same to be used for road and bridge purposes only and not for any other purpose.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

J.H:MM

COUNTY WARRANTS:--Salary warrants held in possession of county clerk for purpose of distribution to payee not subject to garnishment.

June 13, 1933

FILED
20

Hon. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of June 8, 1933, which is as follows:

> "Will you kindly advise the undersigned if a Justice of the Peace may attach a salary warrant in the hands of the County Clerk, after said warrant has been signed by the County Treasurer and returned to the County Clerk for distribution to the officials."

A garnishment being directed to your county clerk makes it necessary for him to file an answer to same. In his answer he should state the facts regarding his holding the warrant for the owner as stated in your letter; also, that he does not have in his possession any goods, moneys or effects of the person mentioned in the garnishment; that he is a public officer; that the salary warrant is payable to the person it is issued to and must be presented by such person (or his assignee, executor or administrator) to the county treasurer for payment; that the warrant is an order on funds held by the county treasurer; and the county treasurer is not subject to garnishment. The filing of an answer makes up the issue in the matter.

Section 1396 R. S. Mo. 1929, reads as follows:

> "All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees."

You will note that this statute makes all persons subject to garnishment on attachment or execution if they have in their possession goods, moneys or effects belonging to the defendant or if they be a debtor to the defendant. The question then would be whether or not the county clerk was a debtor of the defendant or if he had in his possession goods, moneys or effects of the defendant? You state the county clerk is holding the salary warrant for the sole purpose of distribution to the person entitled to it. This brings us to the question as to what does the salary warrant represent and how county funds are held and disbursed?

Section 12136 R. S. Mo. 1929, provides that the county treasurer shall receive all moneys payable into the county treasury and disburse same on warrants drawn by order of the county court. Section 12163 R. S. Mo. 1929, provides that when a demand against a county is presented to the county court it shall (after determining the sum due from the county) order its clerk to issue a warrant therefor. Section 12171 R. S. Mo. 1929, provides that no county treasurer shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator. This section further provides that if there be no money in the treasury the treasurer shall so certify such fact on the back of the warrant. Section 12172 R. S. Mo. 1929, provides a form of assignment for the warrants.

You will note that the funds of the county are in the possession of the county treasurer and same are disbursed by warrants drawn upon the funds, and that payment of warrants are made to the person to whom they are issued after they are presented to the county treasurer by him or his assignee, executor or administrator. Thus no one except the person to whom they are issued have any interest in them and for any person to have an interest in them they must be assigned.

The law is well settled that a county treasurer may not be garnisheed. Section 1398 R. S. Mo. 1929, in part reads as follows:

> "* * *nor shall any county collector, county treasurer or municipal corporation, or any officer thereof, * * * *

be liable to be summoned as garnishee;* * *
Hawthorne v. City of St.Louis, 11 Mo. 59
Shepard v. Cape Girardeau, 1 S. W. 305."

From the foregoing it is our opinion the salary warrant held for distribution by the county clerk is not subject to garnishment on attachment or execution.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

J.H:MM

IN RE: STATE BOARD OF CHARITIES AND CORRECTIONS: POWER TO RETURN MINOR CHILD TO PARENTS.

Secs 14106-07 RSMo 1929

June 14, 1933. 6-14

FILED
29
28

Hon. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of June 8 in which you request an opinion from this office on the following state of facts:

> "Will you kindly advise the undersigned if the Executive Secretary of the State Board of Charities and Corrections has the right and power to return a minor child from the state institution at Carrollton to its parents, before said child has reached the age of twenty-one, when the Juvenile Division of the Circuit Court has ordered said child committed to the care and custody of the State Board of Charities and Corrections until she has attained the age of twenty-one years, and has not modified said order."

The State Home for Children, which was established at Carrollton in 1921 by an act of the Legislature, receives dependent and neglected children who are legally committed by the Juvenile Courts to the care of the State Board of Charities and Corrections. (R. S. Mo. 1929, 14095-14110).

Section 14101, R. S. Mo. 1929, so far as it is pertinent to the present inquiry provides:

> "All commitments to said home shall

be made by the juvenile court of the county of such child's bona fide residence. ********"

Section 14106, R. S. Mo. 1929, provides:

"Said board so far as practicable shall secure homes for such children in proper families, or the board may place the child with its parents, guardian or custodian without surrendering guardianship of said child or it may place such child in a proper family home during minority or for a shorter period. (Laws 1921, p. 89, Sec. 13.)

Section 14107, R. S. Mo. 1929, provides:

"Whenever any such child has become self-supporting or his parents, guardian or custodian have become able to provide for him and are otherwise suitable, the board may discharge him; whereupon the guardianship of the board shall cease, and he shall be entitled to his earnings, with power to contract for his services, or shall be returned to the custody of his parents, guardian or custodian as the board may direct. (Laws 1921, p. 89, Sec. 14.)

Therefore, in view of the foregoing, it is the opinion of this department that when a Juvenile Division of the Circuit Court has committed a child to the care and custody of the State Board of Charities and Corrections under Article 4. Chapter 125, R. S. Mo. 1929, the said Board of Charities and Corrections

may, under Sections 14106 and 14107 R. S. Mo. 1939, return said minor child from the State institution at Carrollton to its parents.

Very truly yours,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General

JWH/AJ

BEER BILL: Brewers or their agents may sell or give away taps, vents or other vending equipment.

8-10

FILED
20

August 3, 1933

Honorable Elliott M. Dampf
Prosecuting Attorney
Jefferson City, Missouri

Dear Mr. Dampf:

This Department acknowledges receipt of your letter dated June 29, 1933, as follows:

> "Will you kindly advise the undersigned if brewers or the distributing agents of the breweries can sell or give away taps and vents to fit beer kegs or if they can sell or give away any other beer vending equipment."

In an opinion issued by this office dated July 28, 1933, addressed to Dr. M. O. Raine, Food and Drug Supervisor, Jefferson City, Missouri, it was held that what is known as House Bill Number 23, or the Beer Bill, does not prevent brewers or their agents from selling or giving away tpas, vents or other beer vending equipment.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

SALES TAX: When country clubs serve rooms, meals and drinks strictly to their members and not to the general public, such sales are not taxable if the club itself conducts the selling of the rooms, meals and drinks; if same are sold in the name of the club by private individuals for profit, such sales are taxable.

10-31

September 11, 1935.

FILED
20

Honorable Joseph T. Davis,
Attorney at Law,
Boatmen's Bank Building,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter of August 28 requesting an opinion as to whether or not the Sales Tax Act, which became effective on August 27, 1935, applies to private country clubs. The second paragraph of your letter, which contains your precise question is as follows:

> "The strictly private country clubs located in St. Louis County are organized under the Pro Forma Decree Statute of this State, or are voluntary trusts. All of these clubs are operated for the social and athletic benefits of members, without gain, benefit or advantage of a financial, economic or pecuniary profit. The club does not furnish or sell any of its services, rooms, meals or drinks to the public, and is in no wise engaged in any business in which the public can participate or be served. All of its privileges and facilities are confined exclusively to its regular, subscribing and bona fide members, in which no non-member can participate except as a guest of such member, and even then, cannot participate except on the account of such member. In other words, a non-member of such a club cannot purchase any rights, privileges, services, meals or drinks in or upon the premises of such club for any consideration whatsoever."

We note you refer to the fact that most country clubs are organized under a Pro Forma Decree and state that "all of these clubs are operated for the social and athletic benefits of members, without gain, benefit or advantage of a financial, economic or pecuniary profit". Sec. 1 of the Sales Tax Act, sub-section (c) (Laws of Mo. 1935, p. 413-414) defines "business" as follows:

> "'Business', includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this act."

We interpret the above section to mean that it is not an essential element that the business so engaged in be organized for gain, benefit or advantage in such a manner as to profit financially or economically, or that a pecuniary profit be the object. On the other hand, if the business be not organized for the purpose of gain or profit financially but a benefit or advantage be the object or the result of the organization, then, we construe such business to be within the terms of the Act.

Sec. 1, sub-section (a) of the Act (Laws of Mo. 1935, p. 413) defines "person" as follows:

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporations, municipal or private, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

It is our opinion that the words "or any other group or combination acting as a unit" cover country clubs and other organizations organized by a Pro Forma Decree.

Having determined that private country clubs come within the term "business", we shall next consider whether or not the Act imposing the equivalent of 1% sales tax actually imposes the same on private country clubs. Sec. 2, sub-section (i) (Laws of Mo. 1935, p. 416) provides :

> "A tax equivalent to one per cent. (1%) of the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to the public."

Section 2 of the Act places a tax equivalent to 1% of the price paid or charged on the sale of all tangible personal property. Under sub-section (e) of Sec. 1 the term "sale at retail" is defined; when tangible personal property is sold for resale, such sale is not considered a sale at retail. The Act also contains certain definite specific, denominated and enumerated lines of business which do not sell tangible personal property but which render certain services, substances and things.

We are at a loss to understand why the Legislature saw fit to include meals and drinks in sub-section (i) supra, as the selling of meals and drinks unquestionably constitutes sales of tangible personal property. It is not a service such as the furnishing of rooms in hotels, taverns "or other places in which rooms, meals or drinks are regularly served to the public."

You state that meals, drinks and rooms are served exclusively to the members--that the public generally may not participate or purchase meals, rooms or drinks from the club; therefore, it cannot be said that rooms, meals or drinks are <u>regularly</u> served to the public. It is therefore the opinion of this department that when rooms, meals and drinks are served exclusively to bona fide members of a private country club, such sales are not subject to the 1% tax.

In arriving at this conclusion we are not unmindful of the decision in the case of State ex inf. v. Missouri Athletic and St. Louis Clubs, 261 Mo. 576, wherein Judge Walker, in discussing the question of the Missouri Athletic and St. Louis Clubs being eligible to obtain an intoxicating liquor license, said:

> "In view of the statute (Sec. 7188, R.S. 1909) declaring that 'no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper,' it is unlawful for an incorporated social or athletic club, without first obtaining a license as a dramshop-keeper, to dispense liquors to its members at a price paid or to be paid, whether for profit or otherwise."

The section under consideration in that case was a general one which placed no qualifications on the seller of the intoxicating liquor, while in the instant case the rooms, meals and drinks in question must be regularly served to the public in order to be taxed. This, the private clubs are not doing, according to your statement--the rooms, meals and drinks are only served to the members of the club and not to the general public.

We proceed to the next question which arises in this connection, i.e., if the members do not pay the tax, who is the user or consumer liable for the tax? Under the terms of the Act a sale of services is not defined, and as heretofore stated, there is no exemption for a resale as is the case with tangible personal property. It must be conceded that if rental of rooms "not regularly served to the public" is not subject to the tax, then the item of rooms passes out of the question and the State does not derive any tax from any one for such rooms.

At first blush there appears to be a conflict in the terms of sub-section (a) of Sec. 2, which relates to the tax of 1% on the price paid or charged for a sale of tangible personal property, and sub-section (i), which we have construed to be a special section relating solely to the taxing of sales or charges for meals and drinks furnished in any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, or other place in which rooms, meals or drinks are regularly served to the public, because sub-section (a) is a general section, dealing with every sale of tangible personal property wherein the same is not made for resale, while as we have stated before, sub-section (i) appears to deal definitely with the question of the items of meals and drinks when regularly

served to the public by the businesses mentioned in sub-section (i), regardless of the fact that same may be independent of and take precedence over sub-section (a).

We further conclude that when the meals and drinks are not served by the various lines of business enumerated in sub-section (i), they are subject to sub-section (a) because they are tangible personal property; in either event the tax is the same and is imposed in the same manner in both sections.

We are of the opinion that when a sale is made to the club of meals and drinks (not to the individual members of the club), said club is the user and consumer, and becomes liable as purchaser for the tax. The members of the club, we think, correspond to members of a family, house-hold or private boarding house, and hence the meals (groceries) and drinks are subject to payment of the tax at the time of purchase by the club.

In arriving at this conclusion, we have assumed that the members or officials of the club conduct or have under their personal supervision the selling of rooms, meals and drinks. If the rooms, meals and drinks are sold in the name of the club but said selling is conducted as a business by a private individual who makes a profit from the sales to the members, then, in that event, sales of rooms, meals and drinks to the members would be taxable.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

RAILROADS:

Employee of railroad company who merely authorizes Company to deduct portion of his pay for insurance premiums may revoke such agency at will.

FILED
20

September 29, 1933.

10-4

Hon. Delmar Dahl,
Marceline, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "With further reference to our conversation relative to deduction of insurance premiums in employees pay by railroad companies, I am setting out herewith an example of the handling of this proposition by the Illinois Central Railroad, and will certainly appreciate your opinion as to whether or not this deduction can be terminated by the employee when he desires to do so.
>
> The Illinois Central, on October 15th, submitted the plan of Group Insurance to their employees. The following is substantially the agreement which was signed by the employee at the time of entering this group plan:
>
> 'I hereby apply for the Group Insurance to which my occupation entitles me under the Illinois Central System plan and I authorize the Illinois Central System to deduct $_____ from my pay each month to cover my share of the premiums and to decrease or increase this amount in accordance with the Company's insurance plan and my increase in age and decrease or increase in insurance.'
>
> A great many of the employees have become dissatisfied with this and have attempted to withdraw from participation in this insurance plan, the railroad company refusing to permit withdrawal and continuing to deduct premiums from the pay checks of employees.
>
> I will certainly appreciate your opinion as to whether or not the railroad company can continue to properly make deduction after the employee has indicated his desire to withdraw."

You inquire whether or not an employee may discontinue his payments under the Group policy taken out by the Illinois Central System. Under the authorization set out in full in your letter we are of the opinion that all the employee did

was to make the railroad company his agent for the purpose of paying a portion of the premium which was to be paid by the employee. As we understand these Group policies, generally a portion of the premium is paid by the railroad company and the balance is paid by the employee. The portion paid by the railroad company, however, does not give them any interest in the subject matter of the insurance, or in the proceeds of the policy. They, no doubt, are prompted by a paternalistic attitude to assist in the taking of these policies for the protection of their employees. Such position upon their part is commendable. By such act, however, they acquire no interest whatever in the contract of insurance or in the proceeds of the policy. We do not understand that this contract of insurance is different so far as the employee is concerned from any other which he might acquire, so far as his being able to withdraw therefrom and quit paying premiums at his option.

The general law is that the principal may revoke the authority of his agent at will, unless such agency be coupled with an interest in the subject matter of the agency. The general rule is aptly expressed in Burke v. Priest, 50 M. A. 310, 312, where it is said:

> "The principle is rudimentary that as between principal and agent the authority of the latter is revocable at any time if not coupled with an interest. The authority of the agent to represent the principal depends upon the will and license of the principal. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent has no right to insist upon a further execution of the authority if the principal desiresit to terminate. It is a general rule that as between principal and agent the authority of the latter may be revoked by the former at his will at any time and with or without reason therefor, except where the agent's uthority is coupled with an interest."

In 31 Cyc. 1397, the question of authority coupled with an interest is discussed as follows:

> "The most important exception to the general rule above stated that an agency is revocable at the pleasure of the principal exists in the case of a power of attorney coupled with an interest in the subject-matter thereof. In the absence of a stipulation that the power may be revoked, it is from its nature irrevocable by act of the principal without the agent's consent, whether so expressed or not. To bring a case within the exception it is necessary: (1) That the power and the interest

should be coupled or united in point of time; that they should coexist. Hence the interest must exist in the subject-matter of the power, and not merely in that which is produced by an exercise of the power. If the agent's interest exists only in the proceeds arising from an execution of the power, the power and the interest are not coupled in point of time, since the power, in order to produce interest, mustbe exercised, and by its exercise it is extinguished. The interest does not come into being until the power is gone. (2) That the power and the interest should be coupled with reference to their subject-matter. They must exist with reference to the same thing. For this reason also it is necessary that the agent's interest should exist in the subject-matter of the power, and not merely in that which is produced by an exercise of the power. (3) That the power and the interest should be coupled with reference to the person in whom they are vested. They must be united in the same person. And (4) That the power and the interest should be coupled with reference to their source. They must be derived by the agent from the same person."

Under the foregoing rules we conclude that the authority given the railroad company by the employee is not an authority coupled with an interest in the subject-matter of the agency. The railroad company has no interest whatever in the contract of insurance, or the proceeds to be derived therefrom. It is the life of the principal which is insured and the beneficiaries may be anyone designated by the principal. Under no circumstances could the railroad company claim any right under the policy so far as the proceeds are concerned, or have any right to designate to whom the policy would be payable. In our opinion, therefore, the railroad company has no authority coupled with an interest in the policy. The fact that it voluntarily contributes toward the premium does not give it an interest in the subject-matter of the agency. The fact that it is interested in having all of its employees insured does not give it any interest whatever in the subject-matter of the agency, which is the insurance obtained. The only authority the railroad company has, under the above authorization, is to deduct the premiums from the employees' pay check. Such provision only goes to the convenience of collecting the amount the employee owes.

It is, therefore, the opinion of this Department that under the above authorization the railroad company is merely the agent of the employee for the purpose of paying his portion of the premiums; that the railroad company agency is not coupled with an interest in the subject-matter and, therefore, such authorization may be revoked at the will of the employee without the consent of the railroad company.

FWH:S

Very truly yours,

Frank W. Hagel

Assistant Attorney General.

APPROVED:

Attorney General

NEPOTISM:

County official permitting relative to render personal service to him does not violate Section 13 of Article XIV where relative fills no official position and does not render service to the State in such capacity.

October 4, 1933. 10/7

FILE 20

Mr. Elliott K. Dampf,
Prosecuting Attorney,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Will you kindly advise me if it is a violation of the Anti-Nepotism Law, for a county official to allow a member of his family to aid him in the duties of his office. This official has not the authority to appoint anyone in his office, and the county court does not make any allowance for this clerk's hire, and due to the family relation, her work is of a gratuitous nature."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above Section of the constitution, any officer who names or appoints any person related within the fourth degree to render service to the State shall forfeit his office. We believe, however, the proper construction to be placed upon that constitutional provision is that such person must be appointed to hold an official position existing under the laws or constitution of this State, and must render service to the State as such. We believe that there is a distinction between rendering service to the State in an official capacity and in rendering personal service to a member of the family who is a public officer. The test, as we understand it, is whether or not the person is appointed to fill an official position and whether he renders service to the State in such official capacity. Where a public officer has in his office a member of his family who does not occupy an official position nor render service to

the State in such capacity, but whose services are rendered personally and gratuitously to the officer by reason of the family relationship, we do not believe that such situation comes within the provision of Section 13 of Article XIV.

You state that the county official permits members of his family to aid him personally in the duties of his office; that such person does not hold an official position, and that her work is of a gratuitous nature.

It is therefore the opinion of this Department that the county official in permitting a member of his family to aid him personally in the duties of his office does not violate the provisions of Section 13 of Article XIV, such relative not holding an official position and not rendering service to the State in such capacity.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

ASSESSORS:

Assessor is entitled to compensation for making additional assessments on income tax returns.

10-13

October 11, 1933.

FILED
20

Mr. Elliott M. Dampf,
Prosecuting Attorney,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Will you kindly give me your opinion as to whether or not the County Assessor is entitled to receive the same fee for additional assessments on income tax returns as they are entitled to on the original return."

Section 10133, R. S. Mo. 1929, provides as follows:

"Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

Section 10132, R. S. Mo. 1929, provides as follows:

" * * *At any time within three years after any return shall have been filed the auditor shall have the right to examine, during the usual business hours, the business, records and books of any individual, corporation, joint stock company, joint stock association or partnership, and to issue a credit skip to any taxpayer, if more tax has been paid than legally due, which credit shall be taken as deduction of the suceeding tax or taxes based on incomes to the extent of such credit, and to certify to the assessor any deficiency determined by the auditor, and not returned by the taxpayer; and thereupon the assessor shall make an additional assessment in accordance with such certificate of the auditor, including all penalties provided; * * *."

Section 10133, R. S. Mo. 1929, states that the assessor shall be compensated in assessing income taxes in like manner as to the assessment of other taxes, and this provision applies whether the assessor is on a fee basis or a salary basis. Under Section 10132, when the auditor certifies that there has been a deficiency not returned by the taxpayer it is made the duty of the assessor to make an additional assessment. The assessor is compensated according to the returns filed and preserved for safe-keeping. If it becomes necessary for a new assessment to be made on account of a deficiency in the first return made by the taxpayer, we believe that the assessor is entitled to receive the same fees as he would have been entitled to had the return been an original one. In other words, the necessity for making the additional return was not the fault or failure on the part of the assessor. The return was necessitated by reason of the fact that the taxpayer in his original return failed to make a correct return. The statute requires the assessor to make the additional assessment and when he does make the additional assessment we believe that he is entitled to charge therefor.

It is therefore the opinion of this Department that the assessor is entitled to include additional assessments on income returns in determining the compensation due him as such County Assessor.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General

FWH:S

MUNICIPAL CORPORATIONS:-Municipal corporation is not entitled to refund of gasoline tax on purchases made for the use of the city.
GASOLINE TAX.

11-13

FILED
20

November 3, 1933.

57

Mr. Elliott M. Dampf,
Prosecuting Attorney,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Will you kindly advise me if the city is entitled to a refund of the two cents gas tax on cars and motor-cycles operated by city on official business and within the city limits."

Section 7794, R. S. Mo. 1929, provides as follows:

"For the purpose of providing funds to complete the construction of and for the maintenance of the state highway system of this state as designated by law, there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this article used in motor vehicles of the public highways of the state, which license tax shall apply and become effective January 1, 1925."

Section 7795, R. S. Mo. 1929, provides as follows:

"Every distributor shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into and distributed or sold by him within this state during such year."

Section 7796, R. S. Mo. 1929, provides as follows:

"Every dealer shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels sold or distributed by such dealer in this state during such year: Provided, however, that no motor vehicle

fuels sold or distributed by such dealer and which were refined, manufactured, produced or compounded and sold by a distributor in this state, and no motor vehicle fuels sold by such dealer which when purchased by him were contained in containers or packages, other than the original containers or packages in which the same was shipped, transported or imported into this state shall be included or considered in determining the amount to be paid by such dealer, but only such motor vehicle fuels as were shipped, transported or imported into this state and purchased by such dealer in the original packages in which they were so shipped, transported or imported into this state and then resold by such dealer after the breaking of such original package by him shall be included or considered for the purpose of computing said amount."

Section 7805, R. S. Mo. 1929, provides as follows:

"All motor vehicle fuels, as herein defined, distributed or sold in the state of Missouri by any distributor or dealer, shall be deemed to have been sold for use in operating motor vehicles upon the public highways of this state: Provided, however, that any person who shall buy and use any motor vehicle fuels, as defined in this article, for the purpose of operating or propelling stationary gas engines, farm tractors or motor boats, or who shall purchase or use any of such fuels for cleaning, dyeing, or other commercial use of the same, or who shall buy and use such motor vehicle fuels for any purpose whatever, except in motor vehicles operated, or intended to be operated, upon any of the public highways of the state of Missouri, as defined in section 7759, and who shall have paid any license tax required by this article to be paid, either directly or indirectly through the amount of such tax being included in the price of such fuel, shall be reimbursed and repaid the amount of such tax directly or indirectly paid by him, upon presenting to the inspector an affidavit accompanied by the original invoice showing such purchase, which affidavit shall state the total amount of such fuels so purchased and used by such consumer, other than in motor vehicles operated or intended to be operated upon any of the public highways of the state of Missouri, as hereinbefore defined, and shall state for what purpose used. Upon the receipt of such affidavit and invoice, the inspector shall cause to be repaid the amount of such tax to the consumer aforesaid, by a warrant drawn by said inspector on the state road fund which shall be audited and allowed by the state auditor and shall be paid by the state treasurer: Provided further, that application for refunds, as provided herein, must be filed with the inspector within ninety (90) days from the date of purchase on invoice."

Section 7794 above provides expressly that the funds arising under this Act shall be used to complete the construction and the

the maintenance of the state highway system of this state. Section 7795 provides for a tax of two (2¢) cents a gallon on each gallon of motor fuel refined, manufactured, sold, etc., by the distributor. Section 7796 applies the same tax to every dealer who shall sell or distribute motor fuel in the state. Section 7805 provides for the exemption of fuels from the tax when used for certain purposes and under certain circumstances. We find no exemption in Section 7805 which would exempt gasoline sold to a municipality, whether it be used in a governmental function or otherwise.

You inquire whether a municipal corporation is entitled to a refund of two (2¢) cents state gas tax on cars and motorcycles operated by the city on official business and within the limits of the city.

The municipalities and political subdivisions of the state are subject to be taxes by the State of Missouri, unless the State has in some way exempted them. The only exemption contained in the Constitution in favor of municipalities is found in Section 6 of Article X of the Constitution, which provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

We call your attention particularly to the fact that the above section exempts the real and personal property of municipal corporations from taxation. The Constitution does not exempt municipal corporations from taxes other than taxes upon real and personal property. The tax levied under Chapter 41 above is not a real or personal tax, but is a tax levied upon the dealer or distributor. It is true that the tax is added to the price of the gasoline sold, but it is equally true that all state taxes levied upon all dealers and distributors in other lines of business are reflected in the price of the product sold, whether it be to municipalities or to individuals. The question as to whether or not a municipality is liable for a gasoline tax such as we have in this state is a complicated one and the courts are divided in their opinions concerning it, depending a great deal upon the wording of the statutes and the constitution of the state involved.

There is one line of cases of which the case of O'Berry v. Macklenburg County, 67 A. L. R. 1304, is typical, to the effect that cities and counties are impliedly exempt from such a tax. The theory of these cases is found in the following quotation from page 1308:

> "Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the Constitution or a statute."

There is another line of authorities upholding the validity of such tax, as exemplified by the case of Crockett v. Salt Lake County, 60 A. L. R. page 867, where it is said at page 872:

> "The court pointed out that undoubtedly the amount of the tax finally falls upon the purchaser, as it would be natural for the seller to add the amount of the tax to the price of the commodity. In the course of the opinion, the court uses this language: 'The language of the later statute is definite as to the persons who are required to pay the tax therein provided. The municipalities are in no way relieved from the burden of paying any addition that may be added to the price of motor fuels which may be occasioned by the tax. There is no indication in the language of either of the statutes in question that it was the intention of the lawmakers to relieve municipalities from the burden of paying any such enhanced price."

We therefore have two lines of decisions dealing with this question. The determination of your inquiry, however, with the aid of those decisions, must depend upon the Constitution and statutes of this state. Section 6 of Article X above quoted does unquestionably exempt from taxation the real and personal property of municipal corporations. The tax levied under this statute is not a tax upon the property of a municipal corporation in any sense of the word. Under Section 7795 the distributor must pay the tax, and under Section 7796 the dealer must pay the tax. It is what is commonly known as an excise tax. It is true that the excise tax is, in all cases, always passed on to the ultimate consumer, but such is true of all taxes, whether they be excise, property or otherwise, because all taxes are included in the expense of doing business and ultimately are

passed on to the consumer. We therefore conclude that it would not be in violation of Section 6 of Article X for dealers who sell to municipal corporations to add the tax in question because under such circumstances the gasoline tax is not a tax upon the property, real or personal, of a municipal corporation.

Section 7805, R. S. Mo. 1929, provides that certain gasoline sold by dealers and distributors should be exempt from the tax and provides for refunds in favor of the persons named in said Section. The section does not exempt gasoline sold to municipalities by said dealers. It therefore must be assumed that when the Legislature passed a law exempting certain persons from the paying of the tax under certain conditions, that it impliedly expected all other persons not exempted to pay the tax. The tax itself is levied not for general revenue purposes but under Section 7794 for the completion and maintenance of the State highway system.

In Crockett v. Salt Lake County above, at page 571, it is said:

> "It thus appears that the tax is not for the purpose of raising revenue for the payment of the usual and ordinary expenses of state government, but for the construction and maintenance of public highways. These highways are open, not only for the use of the citizens of the state, but for others traveling within the state and for the counties and cities in the discharge of their public duties. While it is true the statute does not expressly provide that the municipalities of the state shall be subject to the tax, nevertheless there is no provision or language found in the act which indicates the intent of the Legislature to exempt or relieve counties or cities from paying the tax imposed upon all who use motor vehicle fuels for vehicles, engines, or machines, movable or immovable, within the state. On the contrary the admitted purpose of the legislation and the directions contained in the Act as to the disposition of the funds so raised not only fail to indicate an intention on the part of the Legislature not to exempt municipalities from payment of the tax, but negative any inference that such municipalities were intended to be relieved from the payment of the tax.
>
> The tax levied is by the statute designated an excise tax; that is, it is a tax for the privilege of selling motor vehicle fuels and likewise for the use of such fuels when purchased outside of the state and brought within the state for use. It is in no sense a general tax upon the property of the municipality, but is a tax charged against the municipality for the privileges included within the terms of the act and which are made subject to the tax. It does not purport to be a tax against any specific property, real or personal."

While there is authority to the contrary, we are inclined to adopt the position taken by the court in the Crockett case above, so far as deciding the question raised in your inquiry. Our statutes do not impose a property tax as would be exempted under Section 6 of Article X of the Constitution. It lays an excise tax on the dealer or the distributor. The revenue derived from the tax is not for the usual and ordinary expense of the state government, but is for the particular purpose of the construction and maintenance of the state highways. Our statutes provide for specific exemptions and fail to exempt municipal corporations from the payment of the tax. Considering the Constitution and the statutes involved, we are inclined to the view that the Legislature did not intend to exempt cities from the payment of this state gasoline tax, and such being true they would not be entitled to a refund of the tax after it had been paid.

It is therefore the opinion of this Department that municipal corporations are not entitled to a refund of the state gasoline tax paid by them in purchasing gasoline from dealers who pay the tax under the above Sections.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

TAXATION & REVENUE: Property bought in by County under foreclosure of School Fund Mortgage exempt from general taxes.

11-23

November 13, 1933.

FILED
20
58

Hon. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Dampf:

This Department is in receipt of your letter of October 30th, with request for an opinion, which letter is as follows:

> "Will you kindly advise the undersigned if Real Property upon which there is a loan of school money, secured by a Deed of Trust, is subject to taxation when the same has been taken over by the County Court for non-payment of the note and is in the possession of the County Court."

Replying to your question, which, as we understand it to mean, is whether or not real estate on which a school fund loan has been made by the county court is foreclosed under the provisions of the terms of the school fund mortgage and statutes, and title is taken in the county, whether that property thus foreclosed is exempt from general taxes, that is, state, county, township, road and bridge, and school taxes, etc.

Sections 9250, 9251, 9252 and 9253, R. S. Mo. 1929, provide the method and means by which the school money of the county may be loaned out on real estate by the county court and provide that in case of default in payment of the loans by the borrower, what procedure shall be taken by the county court. Section 9254 R. S. Mo. 1929, provides how the county court may make an order to sell said real estate under a sheriff's sale and Section 9256 R. S. Mo. 1929, provides:

> "AUTHORITY TO REPOSSESS PROPERTY BY PURCHASE.--* * * *, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. * * * * * *."

It will be seen that the title to said real estate may be lodged in the county. The question presented for determination here is whether the real estate, the title of which has been lodged in the county, under foreclosure as aforesaid, is exempt from taxation under Section 6, of Article X, of the Missouri Constitution and its correlated statute, Section 9743 R. S. Mo. 1929.

The section of the Constitution just referred to is as follows:

> "PROPERTY EXEMPT FROM TAXATION.--The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 9743, R. S. Mo. 1929, in part reads as follows:

> "* * * * *: fourth, lands and other property belonging to any city, county or other municipal

> corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; * * * * * * * * * * * * * * *."

In Cooley on Taxation, Fourth Edition, Vol. 2, Section 621, it is said:

> "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. * * * * * * *."

The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Counties being one of the political subdivisions of the State, and being specifically exempted, it is the opinion of this Department that the real estate purchased by the county under the conditions as set forth in Section 9256, R. S. 1929, is exempt from general taxes such as state, county, school, township, road and bridge, and is not therefore subject to taxation.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

SCHOOLS: The district may not charge pupils "incidental" fees.

12-1

November 28, 1933.

FILED
20
61

Hon. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Dampf:

This is to acknowledge your letter which reads as follows:

> "Will you kindly give me your opinion as to whether children attending high school in Jefferson City, from the 45th school district of Missouri, are required to pay a fee of $3.00 per month, which is supposed to be an incidental fee, in addition to the tuition of $50.00, which is a statutory requirement."

The purpose of the $3.00 per month charged as "incidental" fee to the student is explained in a form letter written by the Superintendent of Jefferson City's Public Schools, dated August 11th, 1933, addressed to non-resident high school students. We quote part of same:

> "As you probably know, the State has failed miserably in its agreement to pay high school tuition. We cannot expect to receive more than 25% of the amount due us on account of the attendance of non-resident pupils for the past year and for the next year. While it is true that the last session of the General Assembly passed a deficiency appropriation bill which will pay in full the tuition for 1931-32, we cannot hope to secure a deficiency bill at the next session of the Legislature to pay two years' delinquency in the state guarantee. High School districts over the state, pretty generally, are compelled to get revenue in some other manner.

> The Jefferson City Board of Education at its last meeting fixed a fee of $3.00 per month for each student of high school rank not resident of the district. This is an incidental fee which will be used to furnish facilities of education for these non-resident students.
>
> Boards of Education in each district will be expected to pay $25.00 for the year, or $6.25 quarterly, for each non-resident attending the Jefferson City High School from their respective districts. In cases where the Board is unable to pay this fee of $25.00, it will be charged to the student. It behooves non-resident students to receive the assurance of the Board that they will be able to pay this fee before enrolling for regular work."

It is readily ascertained, from above letter, that the $3.00 per month charged to non-resident students and termed "incidental" fee is nothing more than to take the place of that part of the $50.00 not received from the State. No matter by what name it is called, it is "tuition."

On September 30th, 1933, this Department rendered an opinion Re: "Schools: Tuition required and allowed for non-resident high school pupils", which answers your inquiry and we are attaching hereto a copy of same. We call attention to this found on page 2:

> "Before the enactment of Section 16 just quoted any high school receiving state aid was required to admit non-resident pupils, but the method of determining the tuition fee to be charged was only covered by the word 'reasonable'. However, in Section 16 a precise method of computing tuition to be charged as well as a requirement as to how and by whom it should be paid was provided, i. e., that the school district where the pupil resides must pay such pupil's tuition, with the amount of such tuition specifically provided for by the following provision:
>
> > 'But the rate of tuition paid shall not exceed the per pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term,'.

A school district cannot require a pupil resident therein to pay anything as tuition. 'Section 1 of Article 11 of our Constitution made it the duty of the General Assembly to establish and maintain free public schools for the gratuitous instruction of all persons in the state, between the ages of six and twenty years. Pursuant to the mandate free public schools have been established throughout the state, and District No. 107 is one of the free public schools established for gratuitous instruction. The right of children, of and within the prescribed school age, to attend the public school established in their district for them is not a privilege dependent upon the discretion of anyone, but is a fundamental right, which cannot be denied, except for the general welfare.' State ex rel Roberts v. Wilson, 221 Mo. App. 9, 297 S. W. 419, 420 (1927).

The Legislature by Section 16 of the 1931 Act (Amended-Laws of Mo. 1933, page 393) above quoted has made it compulsory upon school districts to receive non-resident pupils for high schools under certain fixed conditions, and to receive them without calling upon such pupils to pay any tuition, as before that Act it was compulsory to accept resident pupils without charging them any tuition, so it is believed that the above quotation from State ex rel Roberts v. Wilson would be as applicable to non-resident high school pupils under the 1931 Act as before 1931 it was applicable to resident pupils. <u>It is therefore clear that under the present law the district in which a non-resident pupil attends high school cannot require such non-resident pupil himself to pay any tuition.</u>"

And further, page 3:

"It is our opinion that any high school in this state receiving state aid must admit non-resident pupils whose tuition must be paid by the districts where such pupils reside, and that the tuition so paid must be the per-pupil cost of maintaining the school attended less a $50.00 deduction for each pupil."

It is our opinion that the non-resident high school pupils attending high school in Jefferson City are not required to pay $3.00, or any other amount, per month as an "incidental" (or by whatever name called) fee in addition to the tuition the district pays, such arrived at in conformity to the statute.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

OPINION: to Sup't. Mo. School for the Deaf, Fulton, Mo. on right of Board to have Secretary perform duties of Treasurer and act as such.

~~Atty Gen Jan 1924~~
178.140

February 1, 1933.

FILED
21

Hon. Herbert E. Day, Sup't.,
Missouri School For The Deaf,
Fulton, Missouri.

Dear Sir:

You submit the two following questions: First - Legally, may the office of Secretary of the Board of Managers and that of Treasurer of the school be combined and one person act both as Treasurer and Secretary. Second - Will you please advise us as to the best way of collecting accounts long over due owing by counties to the school.

Answering your first inquiry, I presume you intend, although you do not so say, that the consolidation of Secretary and Treasurer of the Board as officers be brought about by action of the Board, and on this assumption it is my opinion that the Board has no power to consolidate the two positions.

There is no doubt but both the Treasurer and the Secretary are public officers within the meaning of the laws of Missouri. Our Supreme Court has said:

> "A public officer is one elected or appointed in a manner prescribed by law as an agent of the public in the performance of duties imposed by law and exercise of authority necessary and incidental to a public discharge of such duties"
>
> Zevelly vs. Hackmann, 300 Mo., p. 59
> Hastings vs. Jasper County, 314 Mo., p. 144

Section 9704 Revised Statutes of Missouri, 1929, among other things, provides:

178.140

> "At the regular meeting of the Board held in March of each odd numbered year there be elected one of their members president and also, ~~a secretary, who may or may not be one of their number; provided, that in either school that employes a secretary or bookkeeper, such secretary or bookkeeper shall be secretary of the Board of Managers thereof.~~" + one Vice Pres + other officers

Here you see, a Secretary is by law made an officer.

Section 9694 Revised Statutes of Missouri, 1929 provides:

> "There shall be a Treasurer of each school appointed by the Board of Managers of the school, who shall give bond for the faithful performance of his duties in such sum and with such surety as shall be required by the Board."

This provision of the statute clearly makes the Treasurer an official.

I have examined the statutes of the state and so far as I can ascertain there is no direct authority authorizing the Board to consolidate these two offices - the Secretary and Treasurer. In my opinion if consolidation is desirable of these two offices, an act of the Legislature should be passed bringing about the desired results in providing for this consolidation.

Replying to your second question, I beg to say that you can present the claim to the County Court for allowance and issuance of warrant to pay the same, or you can have a suit instituted in the Circuit Court of your county or counties in default. The jurisdiction in each case would be in the county where the default occurred and in the Circuit Court of said county. Presentation of your claim to the County Court and a rejection thereof by the County Court or a neglect to act thereon would not bar a subsequent suit upon the same claim in the Circuit Court.

I find in examining the statutes that evidently some legislation should be enacted that would provide for speedy collection where the claim is uncontested.

The statute might provide for mandamus in those cases where the county ordered the student sent to the school and does not dispute the validity of the claim. An action of mandamus, of course, would be much more speedy than an ordinary civil suit against the county, although under our law the county can be sued in the ordinary civil proceedings.

The Supreme Court of this state in State ex rel vs. not Carroll County, 109 Mo., p. 248 held that a mandamus action could/be instituted in the Circuit Court or in the Supreme Court to compel payment of a claim that had been rejected, but a claim that has been allowed by the County Court can be enforced by an action of mandamus, and our Supreme Court has so held in

State ex rel Whitehead vs. County, 29 Mo. 138
State ex rel vs. County, 48 Mo. 475
State ex rel West for the use of the County vs. Co. court Judges. 255 Mo. 340

I suggest that if these claims have not been allowed by the County Court that you proceed at once to present the same in any county where the court will allow the claim, although it might refuse to give you a warrant therefor. You can then begin a mandamus action in the Circuit Court or in the Supreme Court to compel the County Court to pay the claim. Also, in any case where the county court may refuse to take up the claim and consider it, a mandamus action can be commenced to compel the court to consider the claim and either refuse it or allow it.

Of course, these claims should be looked after promptly and the interest of the state protected by seeing that, if possible, the counties are made to pay. You understand a mandamus proceeding is one that is preemptory and gives much quicker results than you would get from the ordinary action in suing the county.

These are about all the suggestions I would have to make at this time, but if there is any further information that you desire, write me and if I can, I will be glad to give it to you.

It is self-evident that these claims where the counties refuse to pay shoudd not be allowed to drag. It should be brought to the point where the county will either positively refuse to pay or will audit the claim and allow it and perhaps then refuse to issue the warrant, or will audit the claim and pay same.

Very truly yours,

E. C. CROW,
Assistant Attorney General

ECC:AH

APPROVED:

Attorney General

NECESSITY FOR STATE LICENSE WHERE BEER IS SOLD AT CHURCH PICNICS.

6-20

June 17, 1933

FILED
21
29

Rev. Isidore Diebold
St. Mary's Church
Maryville, Missouri

Dear Father:

Your letter of June 5th requesting an opinion of this office is in words and figures as follows:

> "We are planning to have a picnic here similar to the one at which you spoke in Abolt two summers ago. Now in case we should decide to have for sale the modern 3.2%, would we have to pay the same amount as any retail company for a permit?
>
> Be assured that a good number of the community here are behind your activities in the state."

I am very sorry but after a thorough study of the recent beer law, we are of the opinion that to retail beer at your picnic would require a Missouri state license, as a condition precedent, if the law of this state be complied with, and the cost to you would be the same as required of any dealer.

Very truly yours,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

Attorney General.

WOS:MM

ADMINISTRATION OF ESTATES:

Debts due the United States under the State and Federal statutes are entitled to priority over other debts due by the deceased.

October 9, 1933.

Sec 3152 R.S. Mo 1929

FILED

Mr. D. B. Deem,
Probate Judge,
Poplar Bluff, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Does the debts due, under the Federal Loan Bureau, or under the Farm Bureau, supercede our state laws? Under our laws we grade the debts owing by a deceased, funeral expenses first, expenses of last illness second, etc. See Section 182, Revised Statutes of Missouri, 1929, which says demands against an estate shall be classed.

Shall I class Federal claims ahead of funeral or other claims? I have a letter which claims that I should class Federal claims ahead of all other claims, but I do not intend to do this unless I am compelled to by law. Please advise me in this matter."

Section 3152, R. S. Mo. 1929, provides as follows:

"Whenever any person indebted to the state of Missouri is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the state of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with the priority of the United States as secured by law, or the payment of the expenses of the last sickness, wages of servants, demands for medicine and medical attention during the last sickness of the deceased, nor funeral expenses."

Under the foregoing Section the state of Missouri expressly

recognizes the priority to which the United States is entitled over and above other obligations.

Section 191 of chapter 6, title 31 of Mason's United States Code Annotated, provides as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the handsof executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Under the foregoing Section the United States, by statute, has reserved to itself priority over all other persons whenever the estate of any deceased debtor is insufficient to pay all the debts due from the deceased. The rule relating to the right of the United States to priority is stated in 24 C. J. 325, as follows:

> "The statutes of several states in regard to the presentation of claims have, as a rule, no application to claims due the United States, either as a bar to the claims or as affecting their enforcement in the Federal Court."

Debts contracted in favor of the United States, therefore, are entitled to priority when the estate of a deceased is not sufficient to pay all debts. An obligation arising under the Federal Farm Loan Act we think is a debt "due the United States" within the meaning of Section 191, above cited. In view of the foregoing Sections, we are of the opinion that a debt due the United States is entitled to priority over and above all other debts and should be paid first after the expenses of administration have been paid. We think that the cost accruing from administration is entitled to be paid first, and after the cost of administration, debts due the United States are entitled to be paid next, before the demands which are classified in Section 182, R. S. Mo. 1929, are paid.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

FWH:S

APPROVED:

Attorney General.

5034 Laws 33

DRAINAGE DISTRICTS: Laws of Missouri, 1933, page 419, provides for the deduction of the unpaid principal benefits, which are not delinquent, from the land as valued with the improvements, in arriving at valuation for assessment; amount of unpaid benefits shall be ascertained on each tract according to the records of the distri .

October 14, 1933.

10-23

FILED
21
52

Mr. Walter L. DeLisle,
Portageville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"As chief deputy of Mr. John Moylan, Assessor, it is my duty to run the Real Estate and Personal Tax books.

A new law just enacted in the past year concerning Taxation and Revenue relating to valuation of Land and other property in drainage and levee districts, which is an act to prevent double taxation is found in Book page 419. I am writing you in regards to this law as it seems to be a puzzle to the parties who should furnish me with information.

In New Madrid County we have twenty-five or more different drainage districts and as many as five different districts are assessed on a tract of 160 acres of land. I have to deal with two levee districts, the Little River Drainage District and also the various county Drainage Districts. Each Drainage district has a different assessed amount of valuation per acre on even a forty acre tract and, therefore, it means a lot of extra work for the Assessor.

I had a thought that the percentage of unpaid bonds for each drainage District would work, but I realize or believe that the law reads differently. I desire some information from you, a letter explaining in detail just how to arrive at an easy way to figure the unpaid benefits.

I have to seek information from different ones of the drainage districts and I desire to be able to let them know exactly what I want so I will get the correct information the percentage basis wo work on."

Section 1, Laws of Missouri, 1933, page 419, provides as follows:

"That in determining the assessed valuation of lands

and other property for general taxable purposes on which benefit assessments have been levied and/or assessed and which are now or hereafter may become liens thereon, by authority of drainage or levee districts, now organized or that may be hereafter organized under the laws of this state for reclamation and/or protection purposes, the county assessors and township assessors in counties that have now adopted or hereafter may adopt township organization, state tax commission, the state and county boards of equalization and appeals, shall ascertain and determine the amount and/or amounts of the portion of existing benefits assessed and/or levied under and by authority of such drainage or levee districts, and for which portion of assessed benefits no levy and/or assessment for principal has been paid, exclusive of delinquent levies and/or assessments, and take into consideration the amount thereof in determining the value of such lands and other property for assessment for taxation for general purposes, and the difference, if any, between the value of such lands and other property, taking into consideration the drainage and/or levee improvements and the amount of the portion of then existing benefits assessed and/or levied under and by authority of such drainage or levee districts, and for which portion of assessed benefits no levy and/or assessment for principal has been paid, exclusive of delinquent levies and/or assessments, shall be and become the assessed valuation upon which such lands and other property shall be taxable for all general purposes, so long as such lands and other property are charged with and subject to such special assessments for principal on assessed benefits for reclamation and/or protection purposes; and the action of the state board of equalization, or any agency to which said authority may be hereafter delegated, thus equalizing said assessed valuation of such lands and other property for taxation for general purposes shall be certified by the state auditor to the several county clerks in this state in counties in which such reclaimed or protected lands and other property are situated, and such assessed valuation of such lands and other property as in this manner equalized, shall be and become the basis upon which same shall be taxable for general purposes. And it shall be the duty of the county and township assessors and the county board of equalization and appeals, or any agency to which said authority may be hereafter delegated, in assessing, equalizing and/or adjusting the value of such lands and other property to conform to the provisions of this act; provided, however, the value of no land or other property shall be equalized for assessment for general taxable purposes at a less sum than the value of such land or other property without taking into consideration the drainage and/or levee improvement."

You inquire how to figure the unpaid benefits. Under the foregoing section the assessor shall first ascertain the amount of the then existing benefits assessed against a tract of land by

authority of such drainage district for which portion of assessed benefits no levy for principal has been paid, exclusive of delinquent li~ies, and shall take into consdieration the amount of the unpaid principal benefits in determining the value of suchland and the difference, if any, between the value of such lands taking into consideration the drainage improvements and the amount of the then existing benefits assessed for which portion of assessed benefits no principal has been paid. Or, to use language more simple than that contained in the statute, the assessor shall value the land, taking into consideration the enhancement thereof made by the improvements of the district. From this figure he shall deduct the amount of unpaid principal benefits which have been assessed but have not been paid and are not delinquent, and the difference between the two shall represent the assessed valuation. As an example; assume that the land as it now stands plus the improvements resulting from the drainage district is valued at $50.00 per acre. Assume that there is an unpaid assessment benefit to the amount of $10.00 per acre against the land, then the land shall be assessed for taxation for general purposes in the sum of $40.00 per acre.

The statute expressly provides that the delinquent or past due assessments for a principal benefit shall not be considered in arriving at the assessment for taxation. It is only that portion of the unpaid principal which is not delinquent or past due that may be deducted in arriving at the value for assessment. The purpose of the Act was to avoid double taxation. At the time the original benefits were assessed, presumably the land was increased by that value, but the unpaid benefits are paid over a period of years and from the entire benefits assessed originally, the taxpayer is entitled to deduct that portion of the benefits originally assessed, which are now a lien against his land and for which he still owes. The delinquent and past due assessments should have been paid when they were due, and the Legislature has provided that they may not be taken into consideration or taken advantage of in order to reduce the assessed valuation.

You inquire how would be an easy way to figure these benefits. According to the way we understand the organization of drainage districts and the terms of the above section of the statute, there is only one just and fair way in figuring the amount of the unpaid principal benefits. At the time the district was formed there was assessed against each tract of land a principal benefit according to how each tract was benefitted. The various tracts of land contained in the district were not necessarily benefitted to the same extent nor were the principal benefits against each tract assessed in the same amount. The principal benefit assessment was pro-rated by the officers of the district over a period of years, and an amount was levied upon each tract each year in the form of taxes, to eventually discharge and pay the principal benefit. The tax levied each year might also include interest and other charges, but the amount collected from each tract of land which went to pay the principal benefit should be easily ascertained from the records of the district. The unpaid

principal benefit that remains assessed against each tract of land should be shown by the books of the district and that amount is the amount to be deducted in arriving at the assessed valuation. Unpaid delinquent principal benefits shall not be taken into consideration in making this computation. Where a tract of land is located within the limits of more than one district, then the same process would have to be gone through for each district. The assessor should ascertain the total amount of principal benefits from the districts in which the land lies, and the total amount of unpaid assessed benefits should be deducted from the land as valued with the improvements thereon to arrive at the proper valuation for assessment.

You suggest that a percentage of the unpaid bonds might be the easiest way by which to figure these benefits. We believe that such a method would not be proper. All the lands in the district were not assessed at the same figure for principal benefits. One acre of land might have been assessed at $10.00 and another acre at $3.00. While it is true that the amount of unpaid bonds might and should represent the total amount of unpaid benefits, yet the statute forbids taking into consideration the delinquent unpaid benefits. Unless the bonds, as they became due, were retired from a sinking fund or in some manner the unpaid delinquent assessment benefits would be reflected in the present outstanding bond issue.

We are of the opinion, therefore, that under the above section, it will be necessary for the clerks of the district to ascertain from the records of the district the amount of unpaid principal benefits which is now assessed against each tract of land. In arriving at the amount to be deducted the delinquent assessments shall not be considered. We do not have before us sufficient information or figures from which we can figure a percentage for you to work with. We believe that the statute requires the benefits to be figured in the way we have outlined above, although it may not be as easy a method as one that might be worked out by you in going over the records of the district, yet we believe that the unpaid benefits of each tract of land must be separately ascertained without considering such delinquent assessments.

Very truly yours,

Frank W. Hoyt

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

11179-11553-7)-11606 R S Mo 1929

County Surveyors:

11-13

1. County surveyor must keep records and leave same for new County surveyor.
2. County Court may employ surveyors other than County surveyor to survey river bars and other accreted lands.

November 3, 1933.

FILED
21
37

Mr. J. B. Dearmont
Prosecuting Attorney
Mound City, Missouri.

Dear Mr. Dearmont:

We have received your letter of September 18, 1933, in which was contained a request for an opinion as follows:

> "I have been requested to ask from your office an opinion on Section 11606 R. S. 1929 as to the duty of county surveyor to leave a record for the new county surveyor. The outgoing surveyor did not record any of the surveys made by him out of his office. Among the numerous surveys made during the four years were: a river bar survey, of about 2200 hundred acres; several small bars; an addition to the cemetery in Oregon, and many others. He refuses to give any information to the present surveyor and there is no record left by him.
>
> Can the county court under Section 11179 employ surveyors other than the county surveyor to survey river bars and deprive the county surveyor of the work and a recorded record outside said surveyor's private record.
>
> Thanking you in advance for these opinions, I remain"

As to the first question above quoted, it is the opinion of this office that it is the duty of the county surveyor to leave with the recorder of deeds of said county a record to which the new surveyor shall of course have access, and that failure to perform such duty shall subject him to the penalty provided in Section 11606 R. S. Mo. 1929, in addition to the liability on his bond provided in Section 11573 R. S. Mo. 1929.

Section 11583 R. S. Mo., 1929, Art. 1, Chap. 75, provides in part as follows:

> "Surveyor to keep a record - The county surveyor of every county or city shall: First, keep a fair and

correct record of all surveys made by himself and his deputies, in a well-bound book, with a convenient index, to be procured at the expense of the county or city for that purpose, which books and indexes shall be the property of such county or city, and shall be known as the "Record of surveys," and every such surveyor shall record in such book a full and complete description of all corners established by him or his deputies, within two weeks after the survey has been certified to, and such books shall be preserved by the recorder of deeds the same as the records of conveyances of such county or city and subject to inspection by any person interested therein, under the supervision of the recorder of deeds for such county or city;"

Section 11573 R. S. Mo. 1929, Art. 1, Chap. 75, provides as follows:

"Oath of office and bond. - Every county surveyor shall, within sixty days after receiving his commission, and before entering upon the duties of his office, take the oath prescribed by the Constitution, and enter into bond to the state of Missouri, in a sum not less than one thousand nor more than five thousand dollars, to be determined by the county court, conditioned that he will faithfully perform all the duties of the office of county surveyor, and that at the expiration of his term of office he, or in case of his death, his executors or administrators, will immediately deliver to the recorder of deeds of the county all the records, books and papers appertaining to his office; and it is hereby made the duty of the clerk of the county court to deliver to the recorder of deeds of their respective counties all the books plats and copies of surveys of any county surveyor, or which may be on file in their respective offices, and take the recorder's receipt for the same."

Section 11606, R. S. Mo., 1929, Art. 1, Chap. 75, provides as follows:

"Penalty for failure of surveyor to perform duties.- Any county surveyor who shall fail to perform the duties required of him by this chapter shall be fined in a sum not exceeding ninety dollars, to be recovered by civil action, at the suit of the injured party."

A diligent search has provided us with no authorities in the State of Missouri on this question but the language of the above quoted statutes is perfectly clear. These sections being all part

of the same article and chapter can be read together and when this is done it is evident that not only is the duty provided for but also the liability both on the bond and under the statutory penalty.

As to the second question in your letter above quoted, we can find nothing in our statutes or decisions to prevent the county court from employing surveyors other than the county surveyor to survey river bars without providing the county surveyor with a record thereof.

Section 11179, R. S. Mo., 1929, Art. 6, Chap. 66, provides as follows:

> "County court may employ surveyors and attorneys. - The county court may employ surveyors to survey said lands and islands, and attorneys to represent them in any suits pertaining thereto, and shall pay such surveyors and attorneys reasonable compensation for their services, to be paid out of any funds arising out of the sale of such lands and islands, or out of the general revenue fund of the county as may be agreed upon at the time such surveyors and attorneys are employed."

The above quoted section which is found in the above numbered article entitled Accreted Lands clearly gives the county court the power to employ surveyors for the surveying of such lands and since county surveyors are not mentioned the word "surveyor" must be taken to mean any surveyor. The duties of surveyors as to keeping and furnishing records, mentioned in the first part of this opinion, apply only to county surveyors and cannot be held to apply to all surveyors doing work for the county court. The power given by the above section seems rather broad but since it stands alone and is not qualified by other sections we are bound by its terms.

Very truly yours,

Charles M. Howell, Jr.,
Assistant Attorney General.

Approved:

_____
Attorney General.

Expense of conveying prisoners to Boys' Reformatory at Boonville, Mo. should be the actual outlay for conveyance of Sheriff and prisoners by the method and route from starting point to Boonville which is cheapest. If automobile cheaper than rail, former method should be used and if rail is cheaper, train should be used. Total cost of actual necessary traveling expenses should determine the method.

April 22, 1933.

FILED
22

Hon. Gordon P. Dorris,
Prosecuting Attorney,
Alton, Missouri.

Dear Sir:

Your letter reads as follows:

> "The County Court has requested me to write your office for an opinion as to how they should calculate the 'necessary expenses' of a Sheriff for conveying a prisoner to the Boys' Reformatory at Boonville. Sec. 8357 provides in case of a misdemeanor these costs are payable by the county from which the prisoner is sent, and provides that the Sheriff shall be allowed "the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time, etc." The question before our Court is whether the Sheriff would be allowed a sum equal to the actual railroad fare should such Sheriff convey the prisoner by automobile, and what would be 'necessary traveling expenses' if conveyance is by automobile?"'

If automobile method of conveying prisoner to Boonville is more expensive than using the railroad, then the railroad should be used. In no event should a method of transportation be used that will incur expense in excess of the usual cost of ordinary means of travel of making the trip from Alton, Missouri to Boonville.

If automobile is used, the necessary oil and gasoline and the lodging at hotel and payment for meals is all the Sheriff should charge, plus, of course, Sheriff's per diem. If his machine should need repair or he had to buy enroute one or more tires, I do not think he could charge same as necessary traveling expenses.

Very respectfully,

EDWARD C. CROW.

APPROVED:

Attorney General

ECC:AH

TAXATION: Sale of real estate for taxes provided for in Section 9952-A enacted by 57th General Assembly.

June 3rd, 1933

FILED
22

Hon. Gordon P. Dorris,
Prosecuting Attorney,
Alton, Missouri.

Dear Mr. Dorris:

Acknowledgment is herewith made of your request for an opinion reading as follows:

> " The County Collector of this county is preparing notices to mail to all delinquent tax payers and he has requested me to secure information from your office as to date he will be compelled - under the new law - to begin filing suits on delinquent taxes. We do not understand if such suits will be brought after November, 1933, or November, 1934."

Senate Bill 94 as enacted by the last General Assembly and approved by the Governor on April 7th of this year, repealed Section 9952 or the Revised Statutes of Missouri 1929 along with a number of other Sections and enacted some fifty-two Sections in their stead, Section 9952-A reading as follows:

> "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this Act on the first Monday of November of each year, * * * "

By the provisions of this Act, suits upon delinquent taxes are practically abolished and a system of advertising and sale of the property for the taxes is established. It would accordingly, seem proper to place on your statement that the land will be sold for taxes on the first Next Monday of November 1933 if by that time the taxes are not paid.

Yours very truly,

G. WALTNER, Jr.,
Assistant Attorney-General

D:

ROADS AND BRIDGES:

County Court, under Section 7900, required to pay all of repairs where the repairs exceed $50.00 for one time.

June 9, 1933.

FILED
22

Mr. William A. Dollarhide,
Prosecuting Attorney,
Hermitage, Missouri.

Dear Sir:

We are acknowledging receipt of your inquiry of June 3, 1933, as follows:

"Please let me have your opinion as to the meaning of Section 7900 Revised Statutes of Missouri, 1929, in the following respect:

When a bridge is attached to a road district and the repairs necessary to be done at any one time exceed fifty dollars should the county pay the whole amount or that in excess of fifty dollars?

Please let me have your opinion reasonably soon."

Section 7900 R. S. Mo. 1929, provides as follows:

"The county court may order any bridge built by the county to be attached to a road district, for the purpose of being kept in repair by such road district; but when the repairs necessary at one time shall exceed in value fifty dollars, the same shall not be required to be done by such road district."

It is our opinion that under the above section repairs which cost $50.00 or more shall be done at the expense of the county, and that no portion thereof can be taxed against the school district. The word "same" used in the last line of the section refers back to the word "repairs" and means that when the cost of repairs exceeds $50.00, that such expense shall be borne by the county. No provision is contained in the section which would give the construction that only the excess above $50.00 should be paid by the county court.

It is, therefore, the opinion of this Department that under section 7900, the particular section to which you refer us, that if the repairs exceed $50.00 in cost, the whole cost of the repairs must be borne by the county court. If the cost of repairs is less than $50.00, the whole cost must be borne by the road

district. No provision is made for taxing a part of the cost against the road district where the repairs amount to $50.00 or more, and in such an event, the entire cost of the repairs when they exceed $50.00 must be met by the county court.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

NEPOTISM: Daughter of director's cousin not within prohibited degree; wife of director's brother-in-law not within prohibited degree.

October 12, 1933

Filed: #22

FILED
22

Mr. Gordon P. Dorris,
Prosecuting Attorney,
Alton, Missouri

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Your opinion of August 25th, relating to the Nepotism amendment received and for which we thank you.
>
> Will you please give us your opinion as to who are included as relatives within the fourth degree, either by consanguinity or affinity. If you do not have opinion prepared on that can you give us example from which we may determine the relationship. As an example, is the wife of a director's brother-in-law within the prohibited degree? Is the daughter of a director's cousin within the prohibited degree?"

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under that amendment a director who appoints anyone within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office. Affinity is defined in 2 C. J. 378, as follows:

> "The connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same

> reciprocal connection with the relations of the husband."

Consanguinity is defined in 12 C. J. 510 as follows:

> "Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor."

Under the rule laid down in 12 C. J. 511, there are two methods of computing the degrees of consanguinity as follows:

> "One by the canon law, which has been adopted into the common law of descents in England and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

We do not find that the courts of this state have laid down any rule as to how the relationship of Section 13 of Article XIV is to be computed. In other states, where anti-nepotism provisions are in force, courts have generally applied the civil rule. We believe that the courts of this state, when the matter is presented for consideration, will adopt the civil rule in computing the degree of relationship under Section 13 of Article XIV. The civil rule denotes that any relationship closer than second cousin would be prohibited under the Constitution. In other words, the official may appoint a second cousin without violating the rule, but the appointing of anyone related to such official as a first cousin or a closer relationship, either by blood or marriage, would be a violation of the Section.

In 2 C. J. 378, it is said:

> "Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, 11th Ed. Vol 1, page 301, the author has the following to say about affinity:

Mr. Gordon P. Dorris,

> "The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

You inquire whether or not the wife of a director's brother-in-law is within the prohibited degree. The brother of the director's wife is by affinity the brother-in-law of the director. When the brother-in-law of the director married, his wife became by affinity a sister-in-law of the director's wife, but under the rule announced above there is no relationship between the wife of the director's brother-in-law and the director.

It is therefore our opinion that under Section 13 of Article XIV of the Constitution, relationship shall be computed under the civil rule, and that in applying that rule, persons who are related as first cousins, or in a closer relationship, would come within the prohibition of the Constitution. It is also our opinion that the wife of the director's brother-in-law is not related to the director within the prohibited degree, as the term "affinity" does not include persons related to the spouse simply by affinity.

Very truly yours,

/s/ Frank W. Hayes
Assistant Attorney General.

APPROVED:

_____
Attorney General

NEPOTISM: Director who is grandfather by marriage to teacher and director who is uncle of teacher are within prohibition of Section 13 of Article XIV; the appointment of director's wife's brother's wife, or second cousin, is not within the prohibited degree.

FILED
22
52

October 17, 1933.

10-23

Mr. Gordon P. Dorris,
Prosecuting Attorney,
Alton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We are in need of an opinion from your office in regard to relationship of certain parties, under the state anti-nepotism laws, and would like to know if the following persons are within the prohibited degree:

Example one: A director is the step-father of the teacher's mother.

Example two: A director is the half-brother of the teacher's mother.

Example three: A director's wife's brother's wife is teacher.

Example four: A director who is a first cousin of the teacher's father.

Trusting you will advise us promptly on these questions, we remain."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Affinity is defined in 2 C. J. 378, as follows:

"The connection formed by marriage, which places the husband in the same degree of nominal propinquity to

the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband."

Consanguinity is defined in 12 C. J. 510, as follows:

"Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor."

Under the rule laid down in 12 C. J. 511, there are two methods of computing the degrees of consanguinity as follows:

"One by the canon law, which has been adopted into the common law of descents in England, and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.' By the civil law the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

We do not find that the courts of this State have laid down any rule as to how the relationship under Section 13 of Article XIV is to be computed. In other states, where anti-nepotism provisions are in force, courts have generally applied the civil rule. We believe that the courts of this state, when the matter is presented for consideration, will adopt the civil rule in computing the degree of relationship under Section 13 of Article XIV. Under the civil rule, it would be illegal for an official to appoint his first cousin or anyone more closely related. The official, however, may appoint a second cousin without violating the rule.

In 2 C. J. 376, it is said:

"Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, 11th Ed. Vol I, page 301 the author has the following to say about affinity:

"That marriage having made them one person the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relationship is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

In applying the above rules to the questions contained in your inquiry, we advise you as follows:

One: You inquire if a director who is a step-father of the teacher's mother may appoint the teacher. The director is the husband of the teacher's grandmother. By affinity the husband of the grandmother is the grandfather of the teacher. Such relationship is within the fourth degree as prohibited by the Constitution and would be in violation thereof.

Second: You inquire whether a director who is a half-brother of the teacher's mother is within the prohibited degree. The half-brother is the uncle of the teacher. The fact that the director is a half-brother of the teacher's mother does not prevent him from being the uncle of the teacher. The director being an uncle of the teacher, such relationship is within the fourth degree, and the appointment of such teacher by such director would be in violation of said provision of the Constitution.

Third: You inquire whether a director's wife's brother's wife is related to the director within the prohibited degree. There is no relationship of consanguinity between the director and the teacher. The director is related by affinity to the wife. The wife of the director is related by affinity to the teacher, who is the wife of her brother. There is no relationship by affinity under the above rules between the director and the director's wife's brother's wife, and such election would not be in violation of the constitutional provision.

Fourth: You inquire whether a director who is a first cousin of the teacher's father is within the prohibited degree. The director would be related by consanguinity to the teacher as a second cousin. A second cousin, according to the application of the civil rule, would not be within the fourth degree, as prohibited by the Constitution. The director, therefore, may vote to elect his second cousin without violating the above constitutional provision.

Very truly yours,

Frank W. Lyons

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

INTOXICATING LIQUOR: LICENSE (IN RE: LICENSE FOR ARDENT SPIRITS.)

12-19

December 19, 1933.

FILED
22

64

Honorable Phil Donnelly
House of Senate
Jefferson City, Missouri

Dear Sir:

Your Committee asked this department for an opinion on Section Twenty-three of Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, 57th General Assembly (Extra Session). This is the first opportunity the department has had to comply with that request for your Committee. The department was busy with other matters for the Committee on yesterday.

This department is of the opinion it is advisable to revise Section Twenty-three of Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, as same was printed; and, accordingly, the Department submitted to your Committee on December 18, a proposed substitute for said Section Twenty-three.

This department desires to call the attention of your Committee to two decisions of our Supreme Court upon the question of license for the sale and the manufacture of spiritous and malt liquors.

The first case is State v. Bixman, 162 Mo. page 1., and it is the opinion upholding the State Beer Inspection Act, passed in 1899. In this case, the validity of the Statute was attacked on the ground it was a tax on property and also invalid because the amount of the inspection fees was measured by the amount of beer inspected. The Court held the inspection fees were not a tax on property.

On the question of right of State to measure the license fees by amount of beer inspected, the Court said in 162 Mo. l.c. 30:

"Learned counsel strenuously urge that this case cannot be a tax or burden placed upon the business, in contradistinction to a tax upon a property, as we have hereinbefore decided, because, they say, an occupation tax involved two elements - payment of a fixed amount for a fixed time, and a permit to carry it on for a fixed time. This assumes that in some way the Legislature is restricted to this exact method, but we hold that it is competent for the Legislature to fix the amount in proportion to the business done or the output sold as in this case. This is a matter for the lawmaking power to determine, and, as we have already said, it does not follow that a license must issue for a fixed period. The imposition of the tax is one thing; the license, another. Certainly, a statute providing for licensing the manufacture and sale of beer, and containing the inspection features of the act before us, and requiring the payment of the fees prescribed therein as a condition precedent for the carrying on business under such license, would be a valid exercise of police power and such is the effect of this law when considered with the other statutes in pari materia. Much indignation is expressed in one of the briefs that the Legislature has assumed to itself to prescribe the cereals which shall be used in the manufacture of beer, especially in excluding wheat and corn. Counsel must assume that the two cereals make a perfectly innocuous beer. As to this we need only say that the Legislature can absolutely prevent the brewing of beer or other intoxicating liquor as it sees fit, and in the exercise of its police power it may exclude any cereal that in its judgment would

> be deleterious to the health of the people of this State, and, if there be a doubt as to the noxious character of the cereal, then the legislative determination of the fact is conclusive. This court cannot say, as a matter of judicial knowledge, that the fusel oil, resulting from the oily substance in corn, is not deleterious in beer made from corn. In the course of the argument, it appeared that, in a congressional investigation of food products, Mr. Adolphus Busch, a brewer, of great experience, testified that he never used corn in making beer; that corn andbarley did not make a high grade of beer; that fusel oil was not a particularly healthy article. However, the sale of intoxicating liquors is not a natural right, and the State may prescribe how they shall be made for sale, if at all. "

In the above opinion, the Court held, the Legislature could fix the amount of license in "proportion to the business done or output sold."

This case was decided in 1901. In 1903, the Act providing for inspection of ardent spirits was before our Court and is reported in 170 Mo. Page 81. In this case, State v. Bengsch, 170 Mo. l.c. 112, the writer of the opinion said relative to right of State to levy a tax the amount thereof dependent on the amount of goods sold:

> "But pursuing other branches of the subjectmatter presented by the record, we come to the ruling made in Walton v. Missouri, 91 U. S. 275; where it was settled that a tax the amount of which is dependent on the amount of the property sold, is in fact, a tax on the property itself. Such being the case, the act under review must be held to impinge on the provisions of section 3. Article X. of our Constitution, which declares concerning taxes, that: 'they shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.'
>
> "In City v. Spiegel, supra, where it was held that a license fee was a tax, such tax was held invalid as not conforming to the constitutional provision above quoted, in that it discriminated in favor of a

meatshops in one portion of the city, and against others in another portion thereof; imposing in the first instance a tax of $25. and on the second tax $100."

Section 4. of said Act reads as follows:

"Section 4 of the act has these provisions: 'There shall be paid for the right and privilege to manufacture for sale in this state distilled liquors including whiskey, brandy, rum, gin, and distilled spirits of all kinds, wines of any kind and every class of vinous liquors, and for the right or privilege to sell all such distilled or vinous liquors or products, brought or shipped into this state for the sale herein, a special license tax of 10 Cents for every gallon and at a like rate for any other quantity or fractional part of a gallon contained in a receptacle of any kind or character whatever'."

The Court first held the indictment not sufficient under the said section 4. (170 Mo. l.c. 104).

Next the court held The Title of the Act was sufficient and said the following would be sufficient title for an act for sale and manufacture of liquors and license therefor:

"An Act relating to the manufacture and sale of distilled and vinous liquors", 170 Mo. l.c. pages 105-107.

Next the writer of the opinion held the license fee for privilege of selling fixed at so much per gallon was a tax on property for two reasons: first, - the writer of the opinion pointed to the title of the Act which reads as follows: "A state license tax on distilled liquors." The writer of the opinion further held that the license fee was shown to be a tax because the emergency clause provided as follows:

"There being a deficiency in the revenues of the State creates an emergency" (170 Mo. l.c. page 107.

The writer of the opinion further held, when it is ascertained a license fee is imposed mainly for revenue, as he held was the case in 170 Mo. l.c. 109, such license fee is a tax. (170 Mo. l.c. page 109), and again in same opinion the writer thereof on page 112 holds the case of Welton v. Missouri, 91 U. S. 275, settled the question that a tax the amount of which is dependent on the amount of property sold is in fact a tax on the property itself. The case cited was a peddler's license tax and had no relation to the licensing of intoxicating liquor. The peddler's business was one that could only be regulated not prohibited as liquor can be.

The writer of this opinion held - first, the act was a tax because of the title, and the emergency clause both treated the Act as a tax measure. Second, that the license fee was a tax on property. Third, that it failed to tax liquor manufacturer making liquor out of state and shipping same into the state. But the members of the Court were badly divided. Two judges concurred with the writer of the opinion in all his conclusions. One judge concurred in holding the Act unconstitutional, and concurred for that reason in result. One judge, in addition to the other two and the writer of the opinion, agreed to first and tenth paragraph of the opinion, which dealt respectively with the insufficiency of the information and the invalidity of the Act, because it required manufacturer for sale in Missouri to pay ten cents per gallon, yet manufacturer in this state who sold in another state was exempted from paying the ten cents per gallon and hence the Act violated equal protection clause of the Federal Constitution. Another judge agreed the information was insufficient and the act unconstitutional because the title was insufficient and not appropriate to an act laying a license tax. Another judge wrote an opinion and held the whole act showed it was a property tax.

This department submits to you the above two opinions for your consideration in connection with the proposed legislation relating to license fees for manufacture and sale of ardent spirits. Permit this department to make the suggestion that the mistakes made in the title and the emergency clause of the case reported

in 170 Mo. page 81, be avoided when the Committee Substitute for Senate Bills 6, 21, 22, 23, 24 and 25, is put into final shape.

This department submitted to your Committee on yesterday a proposed substitute for Section 23 of the above named Committee Substitute for Senate Bills 6, 21, 22, 23, 24 and 25.

Joyce on "Intoxicating Liquor" says:

> "The legislature in the exercise of its power to impose a tax upon the liquor traffic and to classify for that purpose may provide that the amount of the tax is to be determined on the basis of the amount of business done, and such a law is not subject to the objection that it is not uniform."

Mr. Joyce cites the following cases as supporting the above quoted excerpt from his work.

> Parrish v. Gurth, 26 La. Ann. 140;
> Ex Parte Marshall, 64 Ala. 260;
> Albertson v. Wallace, 81 N.C. 479;
> Albrecht v. State, 8 Tex. App. 216.

We are submitting herewith the form of Substitute for Section 23 of Committee Substitute of Senate Bills 6, 21, 22, 23, 24 and 25, providing for inspection and gauging of intoxicating liquors and fees for said services fixed at same amount on the gallonage basis as is provided in said Section 23 as same now appears in the above mentioned Committee Substitute for Senate Bills.

Your Committee now has before it the two forms of Section covering license fees to be charged by the State for intoxicating liquors, to-wit: One in the form of occupation tax and the other in the form of inspection fees.

Very respectfully,

EDWARD C. CROW
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

CITY ASSESSORS:

All personal property owned by a resident though held outside the city is assessable for city taxes.

Sec 9745 - 6994 RS Mo 1929

11-13

November 10th
1 9 3 3.

FILED
23
58

Mr. Gene H. Duebbert,
City Assessor,
Wellington, Missouri.

Dear Mr. Duebbert:-

We are in receipt of your letter of September 2, 1933, in which was contained a request for an opinion as follows:

"As City Assessor for Wellington please inform me if personal property held out of this city is assessable for city taxes when a person is a resident and makes his home in this city.

"Would the same ruling hold for all personal classification, such as machinery, notes and live stock.

"Wellington has a population of 676.

"Thanking you for this information, I am

Yours truly,
(Signed) Gene H. Duebbert
City Assessor,
Wellington, Mo."

Section 9745, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 9745. PERSONAL PROPERTY TO BE ASSESSED IN COUNTY OF OWNER'S RESIDENCE - EXCEPTIONS. All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held."

Section 6994, Revised Statutes of Missouri, 1929, provides as follows:

> "Sec. 6994. ASSESSMENT OF PROPERTY- DUTY OF ASSESSOR AND OTHER OFFICERS- LIEN IN FAVOR OF CITY. In assessing property, both real and personal, in cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes. The assessment of the city property, as made by the city and county assessor, shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the board of aldermen: PROVIDED, that in cities which do not elect an assessor the mayor shall procure from the county clerk of the county in which such city is located, and it shall be the duty of such county clerk to deliver to the mayor on or before the first day of July of each year a certified abstract from his assessment books of all property within such city made taxable by law for state purposes, and the assessed value thereof as agreed upon by the board of equalization, which abstract shall be immediately transmitted to the council, and it shall be the duty of said council to establish by ordinance the rate of taxes for the year. A lien is hereby created in favor of such city against any lot or lots or tract of land for any such tract assessed by such city against the same, which said lien shall be superior to all other liens or encumbrances except the lien of the state for state, county or school taxes."

In so much as the city of Wellington is a city of the fourth class, our opinion in this matter must be based on a construction of the two statutory provisions above quoted. In construing these two sections we are fortunate to have a decision of the Supreme Court of Missouri, sitting in Banc, squarely in point. State ex rel. Divine vs. Collier, 256 S.W. 455, 301 Mo. 72 (1923). In this case the city of Greenfield (a city of the fourth class) had assessed and levied taxes on personalty consisting of horses,

cattle, mules, sheep, hogs, implements and machinery owned by a resident, said personalty being located outside the city. The Circuit Court held the taxes valid and the Supreme Court affirmed that judgment. In its opinion the Supreme Court quoted Section 12755, Revised Statutes of Missouri, 1919 (now Section 9745, Revised Statutes of Missouri, 1929, above quoted) and Section 8445, Revised Statutes of Missouri, 1919, (now Section 6994, Revised Statutes of Missouri, 1929, above quoted), hence, we have a decision of the highest court of this state on our identical question. This decision has never been overturned or controverted by any later case and must, therefore, be accepted as the law of this state.

The court in its opinion, State vs. Collier, 256 S.W. l.c. 456, stated as follows:

> "We are of the opinion that the trial court reached a correct conclusion in its disposition of this case and that its ruling is sustained by the following authorities: 26 R. C. L. Sec. 241, pp. 273, 274; State ex rel vs. Pearson, 273 Mo. l.c. 78, 199 S.W. l.c. 943, 944; State ex rel vs. Shepherd, 218 Mo. 656, 657, 117 S.W. 1169, 131 Am. St. Rep. 568."

Further, in the case of State ex rel vs. Timbrook, 145 Mo. A. 368, a case involving the taxing by a city of the fourth class of personalty consisting almost entirely of secured promissory notes, said notes being held outside the city; the court in construing Section 9121, Revised Statutes of Missouri, 1899, (amended, Laws 1903, p. 255) (said section as amended now being Section 9745, Revised Statutes of Missouri, 1929) at page 371, stated as follows:

> "* * *the Legislature was actuated by the purpose of providing a uniform and practical method of taxing such movable property and of preventing vexatious, wasteful and unnecessary litigation. We think the evident intent was to fix the situs of the personal property for all purposes of taxation, including taxation by municipalities."

From a review of the statutes and authorities of this state, therefore, and with particular advertance to the above, this office is of the opinion that a tax assessed against personal property of all kinds is to be assessed against the owner thereof at the place of his residence, because in contemplation of law his movable property accompanies him wherever he goes. Some very old cases hold to the

contrary but the above is the law as held by our courts today.

Very truly yours,

CMH jr-MB

CHARLES M. HOWELL, Jr.
Assistant Attorney-General.

APPROVED:

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Attorney-General.

SCHOOL FUND ... Profits derived from sale of corpus of school fund created under and by virtue of Art.II, Sec. 8 of the Constitution of Missouri must be considered as "increment to principal" as differentiated from "income".

March 3, 1933

FILED
24

Board of Education of St. Louis, Mo.
St. Louis, Mo.

Gentlemen:

In answer to your oral inquiry of recent date pertaining to the disposition of profits arising from a contemplated sale of certain bonds now held by the Board of Education in the City of St. Louis, Missouri in its permanent school fund, it is our opinion that such profits should be considered as an increment to principal rather than as income and hence should not be transferred to the General Revenue Fund.

Briefly, our reasoning is as follows:

We assume that the fund referred to by you is the fund referred to in Article II, Section 8 of the Constitution of Missouri. That section provides:

> "All moneys, stocks, bonds, lands and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Since the City of St. Louis is to be considered as a county under the above section of the Constitution (See Railroad

v. Gildersleeve, 165 Mo. l.c. 379), the answer to your quaere and the test of the sufficiency and correctness of our opinion depends upon the meaning of the word "income" as used in the above quoted section.

We find under the authorities the word "income" as differentiated from "principal" or "capital", has varied meanings depending to a large extent upon the circumstances surrounding its use.

See:

CORPUS JURIS, Vol. 31, page 397;
WORDS AND PHRASES, First Series Vol. 4, page 3501;
WORDS AND PHRASES, Third Series, Vol. 4, page 163.

As used under the income tax laws of the United States and of the several states, the word "income" has been generally defined as "the gain derived from capital, from labor or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets."

See:

EISNER v. MACOMBER, 252 U.S. 189, l.c. 207, 64 Law. Ed. 521, l.c. 528, 40 Sup. Court Rep. 189, cited with approval in MERCHANTS LOAN AND TRUST CO. v. SMIETANKA, 255 U. S. l.c. 578, 65 Law Ed. l.c. 755.

But as shown by the decisions so holding such definitions of income as used in the income tax law depends upon the words used in such laws, such laws being much more explicit than the section of the Missouri Constitution now under consideration.

See:

Chap. 19, Title 26 U. S. C. A., and particularly Sec. 954 thereof.

Many other authorities content themselves by saying that income should be defined as being any material gain or product from

either capital, labor or both.

See:

CONNECTICUT GENERAL LIFE INS. CO. v. CATON, 218 Fed. 188, 205;

GAVIT v. IRWIN, 275 Fed. 643

If either of the above definitions are accepted, it would appear that the contemplated profit under consideration should be considered as income, but whether or not it is to be so considered depends in the last analysis upon the intention of the framers of the Constitution as expressed in the above quoted section.

STATE ex rel HARRY L. HUSSMAN REFINING CO. v. CITY OF ST. LOUIS, 5 S. W. 2nd, 1080;

STATE ex rel ROSEBROUGH MONUMENT CO. v. CITY OF ST. LOUIS, 11 S. W. 2nd, 1010.

We believe that the intention of the framers of the Constitution as expressed in the above section is clear in that it is intended that the fund therein provided for should be permanent as shown by the extremely strong words "shall be securely invested and sacredly preserved, so that the income of such fund could be used for general school purposes forever."

The object to be attained by the above provisions of the Missouri Constitution differs materially from the objects to be attained by the statutes relating to taxes heretofore referred to. The object or objects of the above quoted section of the Missouri Constitution compare favorably with the object a testator has in mind when he leaves a fund in trust, the income of which is to be given to A for life, and the remainder, after A's death to B. In

fact the fund herein considered has been referred to as, and in fact is, a trust fund for the purposes set forth in the Constitution (See Railroad v. Gildersleeve, supra). Therefore we deem the established law relative to testamentary trusts as to what is or is not income as being very pertinent to the question that confronts us here.

We find that in the case of testamentary trusts where the income is given to a person for life with the remainder to another, that the courts have consistently held that profits derived from a sale of part of the trust "res" or "corpus" during the life of the life tenant must be treated as an increment to the corpus or res rather than as income:

> In Re McKEOWNS ESTATE, 363 Pa. 78, 106 A. 189, l.c. 192, it is said: "If a stock is sold which belongs to the principal, ordinarily all of the proceeds thereof also belong to the principal."
>
> The Supreme Court of Error for Connecticut, in CARPENTER v. PERKINS, 83 Conn. 11, 74 A. 1062, said in referring to an increase in the value of a fund by reason of a sale of a part of the fund held in trust to pay the income for one for life and on his death to transfer the res or fund for another that "The increase in its value (referring to the fund) added to the capital not the income." The Court cited BOARDMEN v. MANSFIELD, 79 Conn. 634, 66 A. 169.
>
> In JORDAN v. JORDANS TRUST ESTATE 111 Me. 124, 88 A. 390, the Supreme Court of Maine quoted In re GERRY, 103 N. Y. 445 with approval: "If the will had required the trustee to invest in real estate, the rents, income and profits of which were made payable to the life tenant with the remainder over, it can not be questioned but that any increase in the value of the land from natural causes would have been an accretion to capital and inured to the benefit of the remainderman."

> In WILLIAMS v. INHABITANTS OF BOSTON, 215 Mass. 1, 102 N.E. 355, it is said: "In case of a trust, * * * any gain made by a change of investment is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the fund."
>
> Similar expressions are to be found in:
>
> VANATTA v. CARR, 229 Ill., 47, 82 N. E. 367;
>
> In re STEPHENS 80 N. E. 358, 187 N. Y. 471, 12 L. R. A. N. S. 814;
>
> In re GERTENLAUB'S ESTATE, 24 Pacific 348, 198 California, 204;
>
> CHASE v. UNION NATIONAL BANK (Mass.) 176 N. E. 508;
>
> TOWNSEND v. U. S. (N. Y.) 3 Redf. Sur. Rep. 230;
>
> See also:
>
> 13 A. L. R. 1009;
>
> 56 A. L. R. l.c. 1317;
>
> BOGERT TRUST p. 385 and cases cited therein;
>
> PERRY ON TRUSTS, 7th Ed. Vol. II, pp. 885 et seq.

We have been unable to find a Missouri decision bearing directly on the question under consideration - - even when involving a trust fund created by a will, but in the case of Hayes et al. v. St. Louis Union Trust Company et al, 298 S. W. 91, Ellison C. said:

> "It may be readily admitted for the purpose of discussion that everything in the nature of a return collected by the trust estate should be credited to the income account thereof; but it must be a <u>return</u>, not simply <u>capital increment</u>, and it must be <u>collected</u>."

The Court further adopted the Massachusetts rule in regard to stock dividends as differentiated from cash or property dividends, thus holding that stock dividends issued by a corporation in which the trustees of a fund held stock, became a part of the corpus of the trust estate there under consideration, as differentiated from income. The rule of decision established in the Hayes case indicates as an afortiori principle that the Missouri Supreme Court will follow the great weight of authority in holding that the profits from the sale of the trust res, or a part thereof, must be regarded as an accretion to the res or principal.

Therefore, if the fund created under authority of Article XI, Section 8 of the Constitution of the State of Missouri is to be treated as a trust fund (which it is), and is subject to the same rules of law governing trust funds in general (which we believe it is), the profits derived from a sale of the bonds in question must be considered as a part of the corpus and not as income. In other words, it is our opinion that the term "income" as used in the above section of the Constitution refers to the proceeds and profits from the trust res and <u>not</u> to the <u>gains in the fund itself</u> from an appreciation of its value as derived from re-investment. To further impress the point we dare say that in the event the value of the bonds under consideration had depreciated no one would contend that the loss incurred by a sale thereof should be deducted from the <u>income</u> as derived from the interest coupons, yet if the profits are to be so considered in one instance they are to be so considered in all instances.

In writing the above opinion, we are aware that the distinction made by us between capital and income differs in many material respects from the opinion of certain able economists. This difference is due to a difference in point of view -- economists attempt to ascertain the actual facts governing what is or is not income; we on the other hand, endeavor to ascertain the intent of the framers of the Constitution as expressed therein.

Yours very truly,

POWELL B. McHANEY,
Assistant Attorney General

PBMcH...iac

Approved:

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Attorney General

Contr ct hool Board employing Superintendent for 3 years is not one that is p a Facie illegal in Missouri but if any collusion shown would be invalid.

FILED
24

May 1, 1933.

Board of Education,
City of Columbia,
Columbia, Missouri.

Gentlemen:

My understanding of the facts is a contract in writing has been made by the School Board of the City of Columbia employing a Superintendent of the Public Schools for a period of three years, and the question that presents itself is whether or not the School Board has authority to make a contract for that length of time.

I assume that the school district of the City of Columbia is organized under Article IV, Chapter 57, R.S. Mo. of 1929 relating to schools. Section 9327 R.S. Mo. of 1929, as to such districts in cities and towns, provides:

> "The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified ***"

Section 9328 R.S. of Mo. of 1929 provides:

> "The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district *** who shall hold their office for three years ***"

Section 9329 R.S. of Mo. of 1929, among other things, provides:

> "***A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor ***"

I am assuming without knowing anything to the contrary that a majority of the <u>whole</u> board voted for the contract of employment of the School Superintendent.

Section 9333 R.S. Mo. of 1929 provides:

> "The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state. ***"

We are
~~I~~ am further assuming that the public schools of Columbia are in a district of the fourth class under Section 9194 R.S. of Mo., being in a city of either the first, second or third class and known as a city school district.

According to Section 9333 the board of education of the town or city district has the same power to perform the same duties except wherein it is otherwise specifically provided, as the boards of other school districts acting under the general laws of the state.

Turning now to Article II of Chapter 57, which is an article containing the statutory law applicable to <u>all classes</u> of schools, we find Section 9209 provides specifically for employment of teachers, and as Article IV of Chapter 57 (being the article applicable to city and town schools) does not specifically provide the method of employment, therefore under Section 9333 Section 9209 would apply to the hiring of teachers and superintendents of schools in city and town schools, and we find that Section 9209 provides as follows:

> "The board shall have power, at a regular or special meeting, to contract with and employ legally qualified teachers for and in the name of the district; *** The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. ***"

Turning now to Section 9210 R.S. Mo. of 1929, we find the contract provided for by Section 9209 is construed by Section 9210 as follows:

> "The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby. Neither party shall suspend or dismiss a school under said contract without the consent of the other party. The board shall have no

> power to dismiss a teacher; but should the teacher's certificate be revoked, said contract is thereby annulled. The faithful execution of the rules and regulations furnished by the board shall be considered as part of said contract; Provided, said rules and regulations are furnished to the teacher by the board when the contract is made. ***"

In so far as we can discover, there is so specific limitation fixed by the statute upon the term or time for which a legally organized school board may employ a teacher or superintendent of schools, but of course, this general rule would apply to-wit: that the time must not be an unreasonable one under all the circumstances.

We do not find any case in Missouri where the contract has been made and sustained for a period in excess of the school term for the following ensuing year after the making of the contract, but we do find a case decided recently wherein a common school district in December made a contract to employ a teacher for a term of eight months beginning the succeeding August. The members of the school board employing this teacher went out of office in the following April and the new board employed another teacher for the term beginning in August and notified the teacher with whom the written contract had been made in December that her services were not needed and would not be accepted.

This teacher with the December contract went to the school house in August and undertook to teach the school and was prevented from doing so; she then sued the district upon the contract and alleged that she had been unable to secure other employment, and the Supreme Court, Division No. 1, on December 31, 1929, sustained the contract and affirmed the decision of the lower court, wherein upon a jury trial she was awarded the full amount of her contract for the eight months school at $90.00 per month.

The defendant school board set up, among other things, the defense that the school board in December, which went out of office in April next ensuing, had no authority to make a contract or to employ a teacher beyond the term of the board, because one member of the Board's term expired in April (and it subsequently developed the other two resigned), and this was one of the questions the court passed upon, and upon this question the court in

Tate v. School District No. 11 of Gentry County,
23 S.W. (2d) 1020-1021-1022

said:

> "The foregoing statutes reflect the clear and unmistakable intention of the General Assembly, which is the law-enacting authority of our state, that the government and control of each of the common school districts in the state shall be

vested in a board of directors composed of three members, whose terms of office shall not expire concurrently, but that the term of office of only one of the three members composing said board shall expire during each school year, thereby reflecting the intention of the General Assembly that such governing board of directors of a common school district shall be a continuous body or entity, of which a majority of the members composing the board shall continue in office during the next succeeding school year. While provision is made in the statutes for a change in the personnel of the membership of the board of directors by the vote of the qualified electors of the school district at each annual meeting of the school district, yet the intention of the Legislature is clearly reflected in the statutes that the board of directors of a common school district is a continuous body or entity, and that transactions had, and contracts made, with the board, are the transactions and contracts of the board, as a continuous legal entity, and not of the individual members.

Section 11137 R.S. 1919, provides, interalia: "The board shall have power, at a regular or special meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place, and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term."

The legislative grant of power to the board of directors of a school district to employ, and to contract with, legally qualified teachers, is made general by the statute. No express limitation is made upon the grant of power by any language of the statute; nor is any limitation upon the power granted to be reasonably implied from the language and context of the statute. The statute does not limit, or undertake to limit, either expressly or impliedly, the period of employment of a teacher to the single and particular school year in which the contract of employment is made by the school district board of directors.

In support of its contention and insistence that the board of directors of the defendant school district had no lawful power or authority to make the contract of employment with plaintiff for her services as teacher for the next ensuing school year, appellant has placed reliance upon the rulings made in Loomis v. Coleman, 51 Mo. 21, Crabb v. School Dist., 93 Mo. App. 254; and Burkhead v. Independent School District, 107 Ia. 29, 77 N.W. 491. All of the cited cases are clearly

distinguishable from the case at bar. The Loomis Case, supra, involved the construction of the Public School Act of March 19, 1870 (Laws of Mo. 1870, pp. 138-158). That act (Sec. 2 Id. p. 140) provided for a board of directors for each school district in the state, composed of three directors, all of whom were elected annually, by ballot, by the qualified voters of each school district, and "who shall hold their office for the period of one year, and until their successors are elected and qualified." Under said act, the board of directors of a school district was not made a continuous body, such as is provided by the present and existing statute. In the Loomis Case, it appeared that the three members of the new board of directors of the school district were elected on Saturday and qualified on the next succeeding Monday, before the contract of employment was signed by and between the plaintiff, Loomis, and the old board of directors. Hence, it was properly ruled by this court in the cited case that "it is clear that the old directors were then out of office and that their assumed action was wholly ultra vires." In the Crabb case, supra, it was contended that the contract of employment of plaintiff as teacher of a district school was void for uncertainty and indefiniteness, in that the contract specified no time at which plaintiff's employment was to begin. It was ruled by the Kansas City Court of Appeals in that case that the law implies that the services of the teacher are to be rendered within the ensuing school year and that the contract of employment was referable to the time when defendant's board of directors should fix the beginning of the school term within the ensuing school year. The power of the board of directors of the defendant school district to make the contract of employment was not involved in the cited case, and was not a question or issue for decision in that case. In the Burkhead case, supra, a contract of employment whereby plaintiff was employed as superintendent and teacher of the schools of defendant's school district for the period of five years, was held to have been made in violation of certain statutes of the State of Iowa, which by implication were deemed to reflect the intention of the Legislature of that state that such contracts of employment shall be limited in duration to the single and ensuing school year, as determined by the board of directors of the school district. In ruling such case, however, the Supreme Court of Iowa said (77 N.W. loc. cit. 492): "By section 2743 of the Code, the school district is a body politic and as such may sue and be sued. The board of directors represents the district from a legal standpoint, is the district. It is a continuous body. The officers change but the corporation continued unchanged. The contracts are of the corporation, and not of the members of the board individually. It is not essential, then that contracts be limited to the terms of office of the individuals making up the board."--citing numerous authorities in support of the rule so announced.

The prevailing weight of judicial authority on the subject is thus stated in 35 Cyc. 1079, 1080: "In the absence of a statutory provision limiting, either expressly or by implication the time for which a contract for employment of a school teacher may be made to a period within the contracting school board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion and for a reasonable period of time; and the succeeding board or officers cannot ignore such contract because of mere formal and technical defects, or abrogate it without a valid reason therefor."

The prevailing rule is thus stated in 24 R. ca. L. 579: "In the absence of an expressed or implied statutory limitation a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract, if made in good faith, and without fraud and collusion, binds the succeeding board. It has even been held that, under the proper circumstances a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole. The fact that the purpose of the contract is to forestall the action of the succeeding board may not of itself render the contract void,but a hiring for an unusual time is strong evidence of fraud and collusion, which, if present, would invalidate the contract. Of course, any statutory implication that the powers of the board are limited to the current term would invalidate contracts for a term extending beyond that of the board."

* * * * * * * * * *

The prevailing rule is sound and, is grounded upon good sense and reason. The contract of employment between plaintiff and defendant school district, here in controversy, cannot be held to be void or illegal for any lack of power or authority in the then board of directors of defendant school district to make such contract on December 18, 1924. The eight-month period of plaintiff's employment prescribed by said contract occurring within the next ensuing school year, cannot be well said, as a matter of law, to be such an unreasonable or unusual period of employment as to bespeak, or to indicate fraud in the making of the contract. The trial court rightly overruled

> the demurrer to plaintiff's petition, and rightly refused the preemptory instructions requested by defendant. The assignments of error respecting the aforesaid actions of the trial court must be denied ***."

Section 11137 R.S. of Mo., 1919 corresponds to and appears as Section 9209 R.S. of Mo., 1929. It will be seen from the foregoing opinion that the court holds the school districts of Missouri are a continuous body or entity of which a majority of the members composing the board continue in office during the next ensuing year. The court also holds that the weight of authority is in the absence of a statutory provision limiting expressly or by implication the time for which a contract for employment of a school teacher may be made to a period within the contracting school board's term of office; such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office or for the term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion and for a reasonable length of time.

It seems to be an established rule according to our court that in the absence of an expressed or implied statutory limitation a school board may enter into a contract to employ a teacher for a term extending beyond that of the board itself, and if such contract is made in good faith and without fraudulent collusion, it binds the succeeding board, but a hiring for an unusual time, the courts hold is strong evidence of fraud and collusion, which if present, would invalidate the contract. Of course, any statutory implication that the powers of the board are limited to one current term would invalidate contracts extending beyond the term of the board.

According to the decisions a three year contract might be said by our court as a matter of law to be such an unreasonable or unusual period as to bespeak or indicate fraud in the making of the contract, but I have been unable to find any contract for three years that has been so declared to be legal or illegal in this state. In the case referred to, State v. School District, supra, in the course of the opinion, the court said:

> "The eight months period of plaintiff's employment prescribed by said contract occurring within the next ensuing school year cannot well be said as a matter of law to be such an unreasonable or unusual period of employment as to bespeak or indicate fraud in the making of the contract."

We see, therefore, that this Missouri decision I have referred to does not decide the identical question as to whether or not a three year contract would be such an unreasonable period of time as

to void the contract or even to indicate fraud in the making of it.

In what I have said, of course, I have assumed that no facts surrounding the making of the contract or in connection therewith show any fraud or collusion and that the fraud or collusion, if found at all, would have to arise from the mere fact of the contract being made for three years.

The court in the Missouri decision referred to does say, however, that there is nothing in the Missouri statutes that impliedly prohibits the members of a school board from making a contract in good faith, without fraud or collusion for a reasonable length of time beyond the term of office of the members of the board.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AH

SCHOOLS.
SCHOOL DISTRICTS.
TEACHERS WARRANTS.

As to when suits may lie on a teacher's contract against the school district and manner of paying teachers' warrants.

Dec 9 1933 RS No 1129 10-28

October 25, 1933

FILED
24
55

Board of Education
Carl Junction, Missouri

Gentlemen:

This Department acknowledges receipt of your letter dated October 14, 1933, as follows:

> "Owing to the fact this school district is a large consolidated district and supported mostly by State Aid or Guarantee, the past year has left us practically broke, because of lack of funds in the State Treasury to meet their obligations.
>
> We finished last year with four months of teachers warrants outstanding, since that time we have been enabled to take up one more warrant, but the teachers still hold three warrants, each. We have searched the School Laws carefully and we cannot find anything covering the payment of these warrants, yet the teachers inform us they have contacted an Attorney and he informs them that they can sue the School district for this back salary get judgment in Circuit Court, and Mandamus the Board, and the court will order the board to issue Judgment Bonds in the amount of the judgment, to bear interest at 5%. Is this true? If so, why is it not outlined in the school laws? We are preparing to issue $5000. Repair bonds, with which to catch up on our buildings, this $5000. will bring our bonded indebtedness up to the maximum of 5% of our assessed valuation. If this issue passes and we are bonded for the legal limit, can

the teachers still force us to issue judgment bonds in excess of our legal bond limit?

Will you please give this matter your immediate attention, as we have a meeting with the teachers Thursday night, Oct 9th and wish to have this information at that time."

Section 9312 Revised Statutes Missouri 1929, provides that the treasurer of a school district shall set up on his books three separate accounts; (a) "teachers' fund," (b) "incidental fund," (c) "building fund", and provides that every warrant shall be paid from its appropriate fund and no partial payment shall be made upon any school warrant.

Section 9233 provides as follows:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9257, and no school warrant shall bear interest."

Under the latter section the treasurer of a school district is not entitled to honor a warrant against a school district except out of the revenue provided or anticipated for the school year in which the service was performed and the warrant drawn.

In Jacquemin, et al. v. Andrews 40 Mo.App. 507, the court at 510 of the opinion said:

> "We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said warrant on the treasury, unless there was money on hand of that fund, out of which it could be paid, still this prohibition must not be construed so as to preclude the directors from anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury for that school year, from either or all of the three sources from which that fund, by law, is derived."

While the court indicated that the statute prohibited the drawing of warrants when it was known there were no funds in the treasury for their payment, yet, the court relieved the directors from individual liability on the ground that the directors had a right to anticipate that the revenue provided for would be collected, and therefore would be sufficient to pay the warrants.

The pecuniary liability of a school district, under the holding in Tate v. School District, 23 S. W. (2nd) 1013, is created from month to month as the services of the teachers are performed. A warrant is a mere order upon the treasurer which by mandamus he may be compelled to pay, if there be funds on hand as provided for in the statute, however, this does not mean that the board of directors of a school district could be compelled to draw warrants in favor of a teacher when there is no money in the teachers' fund with which to pay the warrants, and no expectation that such money will be paid into the treasury of the school district from proper sources.

The fact that the board of directors might not be compelled, under such circumstances, to issue a warrant does not mean that a teacher under contract with the school district might not obtain a judgment against the district for the debt created by reason of the execution of the contract between the teacher and the school district, and the performance of service by the teacher. We quote from Rudy v. School District 30 Mo. App. 113, 119:

> "In support of this defence the defendant invokes the provision of section twelve, article ten, of the constitution of the state. This, so far as material, reads as follows: 'No county,city, town, township, school district, or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' But the defence here set up fails to show that the revenue 'provided for' for the school year in question was not sufficient to pay all the teachers; it merely shows that there was a failure to pay into the school district treasury enough for that purpose. If this is a sound view, then the rights of the teacher, under his contract with the district, may be displaced by the negligence or fraud of the tax collector. If the collector negligently fails to collect the school taxes which are levied, or collects them and fails to turn them over, the directors for this reason may, even upon the brief notice of five days, cancel the contract with the teacher. We are of opinion that this is not the law. Undoubtedly the constitutional provision above quoted is self-enforcing. (Citations omitted). But, in order to make it appear that the contract with the teacher was ultra vires on the part of the directors, it must appear that not enough revenue was 'provided' longer to continue the school and not merely that not enough was collected and turned over to the treasurer of the school board."

The teacher may recover on his or her contract for services performed, unless the contract between the teacher and the district be ultra vires, and to make the contract ultra vires under the opinion last quoted from it must appear that enough revenue was not "provided for" to take care of teachers' warrants for the particular school year under consideration. If, in your case, sufficient revenue was "provided for" for the school year in which the warrants mentioned were issued and the service performed, then the teacher, under whose contract the warrants were issued could secure judgment against the district. Mandamus would not lie against the board to pay the judgment unless they had funds on hand applicable for the payment of the warrants which the judgment represents.

There is no such thing known to the law of Missouri as "judgment bonds" such as mentioned in your letter. The statement last made will also answer your inquiry with reference to the $5000.00 repair bonds.

The warrants held by the teachers of your school issued during the last school year, must be paid out of such back taxes or other funds that may properly come into the treasury of the school district from the revenue provided for for such school year.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

IN RE: Privately owned motor vehicles used in mail service require Missouri license plates.

FILED
25

April 18th,1933

Hon. Lewis Ellis, Sup't.,
Missouri State Highway Patrol,
Jefferson City, Missouri.

Dear Sir:-

Your letter of April 15th, 1933 directed to the Attorney General in which you make the following inquiry,

> " Please advise whether a privately owned truck, used exclusively for hauling United States mail under contract, is required to have state automobile license."

has been handed to the undersigned for attention.

You are of course familiar with the statutory provisions requiring the payment of a license fee for the operators of motor vehicles upon the highways of the State and of the penalty provided for the failure to procure such license.

The fee required under our statute is not a tax strictly speaking, but is a charge for the privilege of operating an automobile upon the highways. For the purpose of your inquiry, we are assuming that the title to the automobile is in the contractor and not in the Government.

While it is true that a State may not directly tax the property of the Federal Government or the instrumentalities which it uses to discharge any of its constitutional functions, nor may a State by taxation or otherwise materially interfere with the expeditious and orderly procedure of the Government while in the exercise of its constitutional powers, these fundamentals will not protect or exonerate the carrier of mail from a payment of our State license fee.

The immunity of the Government from State taxation is not negotiable to the extent that it can transfer that immunity to every person who contracts with it to do an act for the furtherance of Governmental business.

The license fee here is directly on the owner of the automobile and affects the Government only indirectly and incidentally and does not come within the inhibition hereinabove referred to.

In the case of Commonwealth v. Closson, 118 N. E., p. 653, it was held that one in charge of a vehicle transporting United States mail is not exempt from the operation of state statutes and municipal ordinances regulating traffic on the highways, although by Federal statutes the highways are post roads. In that case Closson was arrested for violating a state statute concerning the conduct and operation of motor vehicles on the public highways. He defended on the ground that, being employed as a mail carrier, using a vehicle for the delivery of mail, he was immune from prosecution and punishment under the statute. The court said:

> "The designated streets or ways are not, however, instrumentalities created by the general government, where 'exemption from state control is essential to the independent sovereign authority of the United States within the sphere of their delegated powers.' . . . Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon the mail carriers to use the ways as they please, or necessarily, or impliedly, do away with the power of supervision, and control inherent in the state."

In the case of Ex parte Marshall, 75 Fla. 97, the defendant Marshall was operating under a contract in the transportation of United States soldiers from the Government camp to the City of Jacksonville. He was arrested for not complying with a certain state law imposing a license tax similar to that involved in this query. He sought a writ of habeas corpus on the ground that he was engaged in the business of the United States government, and was its constituted agent for the purpose of transporting soldiers. The court in denying the writ held that the defendant did not come under the protection of the fundamental law as hereinabove set out.

In the case of Fidelity & Deposit Company of Maryland v. Commonwealth of Pennsylvania, 36 Sup. Ct. Reporter 398; 240 U. S. 319, it is held that a surety company does not by becoming surety on bonds required by United States act as a Federal instrumentality so as to be exempt from a State tax on the premiums received, exacted from corporations for the privilege of doing business within the State.

In the case of State of Washington v. Frederick F. Wiles reported in 199 Pac., p. 749, we find a case involving the identical question which you propound and which in our opinion is controlling of the fundamental law and the ruling of which sustains our opinion. In that case, the defendant prior to his arrest had entered into a written contract with the United States Government whereby for certain considerations he agreed to carry the United States mail in the City of Seattle, Washington, between the various depots, wharves, docks, post office and

substations therein. In carrying out his contract with the Government, he used various motor trucks including the one which he was accused of operating without first having obtained a license. The truck was used by the defendant only in the business of carrying the mail under his contract. It had painted thereon the usual insignia of vehicles used for that purpose including the words "United States Mail". The terms of his contract required him to provide vehicles for the carriage of the mail and to keep them properly equipped and in repair and he was required also to furnish all necessary oil, gasoline, tires, upkeep and drivers. The contract further provided that such trucks should be used only in the business of carrying United States mail. At the time of his arrest the appellant was in the exercise of the duties imposed upon him under his contract.

From a conviction under the above state of facts, the defendant appealed and the judgment of the lower court was affirmed. In substance, the court held that one contracting to transport United States mail was not absolved from the duty of obtaining state licenses for motor trucks used in the business; that such a person was not a direct instrumentality of the Government or a representative or integral part of it, but merely a personal contractor doing certain work for it at a fixed compensation.

It is stated in the course of this opinion that,

> "A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

From what has been said above, we are of the opinion that a privately owned truck used exclusively for hauling United States mail under contract should be required to have a state automobile license before the privilege of using the highways of this state should be extended to him.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:mh

5. BONDS - Voted and unused can still be used if purpose for voted still exists.

May 10, 1933.

FILED
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20

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

Answering your inquiry of April 11, 1933, in regard to the following:

> "In the April School Election in 1931 'U' School District in this county, voted, by two thirds majority, to bond the district for enough money to build a new school building. Then the transportation law in this state became effective and the students graduating from the rural school were transported to another school. At the present the old building is condemned by the county health officer and a new school must be built. Would the bonds that are now issued under the 1931 election be legal? No bonds were ever issued under the 1931 election and the board wants to know if it will be necessary to hold another election. No election has been held since 1931 to vote bonds or a tax sufficient to carry the bonds."

It is our opinion that if no action has been taken to cancel or rescind the action of the school meeting in April election 1931, the bonds could still be issued and would be legal, if the purpose and need for which they were voted in 1931 still exists, and the use and purpose for which they were voted continues.

State ex rel. Muns v. Hackmann, 283 Mo. 469.

Yours very truly,

Geo. B. Strother

GEO B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:WH

COUNTY DEPOSITARIES: County unable to receive bids in county or adjoining counties may at subsequent term select such depositary.

12196-98 R S Mo 1929

May 16, 1933

FILED
25

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

This is to acknowledge your letter of May 3, 1933, which is as follows:

> "We have the following situation in regard to the deposit of county funds of this county by the county court.
>
> There are three banks in this county. One of them, The Bank of Fredericktown, Fredericktown Missouri., is now operating under a restriction of only 5% withdrawal of deposits every six months. The Bank of Marquand, of Marquand, Mo., is not operating under restriction but does not want the county deposit. The Security Bank of Fredericktown, Fredericktown, Mo., has been the county depository for approximately twenty years. (Section 12186 R. S. of Mo. 1929, provide that the depository be selected by the county court on the first day of the May term of each odd year. Then in Section 12187 the law requires a bond be made by the depository bank within ten days after the selection made by the county court.) The County Court of this county on the first day of the May Term 1933, did receive one bid for the depository, that bid was from the Security Bank of Fredericktown and the rate offered for the deposit was one half of one per cent but they will not make a bond as is required under section 12187 because of the unsettled banking conditions. The county court will not receive any additional funds until after August 1933 and we find it is impossible to get a bond from any depository of any adjoining county. Would the county court of this (Madison) county be permitted to wait until August of 1933 before completing their

> selection of a county depository so that the banking situation would be more settled and a bond be secured?
>
> You are no doubt aware that abnormal banking conditions prevail in every county at the present and the county court believes that if allowed to defer this selection until August banking affairs will be more settled and the proper arrangements may be made. Please give me your opinion on this matter immediately."

You state that it is impossible at this time for your county court to select a depositary of county funds due to the refusal of the banks of Madison County or adjoining counties thereto, to execute a bond as required by statute.

You wish to know if the county court may wait until August to make the selection of a depositary.

Section 12184 R. S. Mo. 1929 reads in part as follows:

> "It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals,* * * *"

It will thus be seen the above statute makes it the plain and mandatory duty of the county court to receive proposals as therein set out, and no exception is provided.-

Section 12185 R. S. Mo. 1929, provides a procedure for bidders for the county funds.

Section 12187 R. S. Mo. 1929, provides in part as follows:

> "Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, * * * *"

Section 12189 R. S. Mo. 1929, provides if no proposals are received then the county court has the right to go to adjoining

counties for same, and such depositaries, if accepted, must comply with the requirements of the statutes.

The above statutes provide the manner county funds are to be dealt with and they are mandatory and must be complied with. The county court must ask for proposals, and if none are received, then they may go to adjoining counties, and upon the failure to receive any proposals there, then the county court has done all in its power and has performed its duty under the statute and it may then at any subsequent term as hereinafter provided, select a depositary.

Section 12196 R. S. Mo. 1929, reads as follows:

> "If, for any reason, no selection of a depositary is made at the time fixed by this article, the county court may, at any subsequent term, after twenty days' notice, receive bids and select a depositary or depositaries in the manner herein provided, and the bank or banks so selected shall remain the depositary or depositaries until the next regular term for the selection of a depositary as provided by section 12184 of this article, unless the order selecting it be revoked for the causes specified in this article."

A reading of this statute would seem to cover your difficulty, because no selection of a depositary as you state may be made at this time. However, we call to your attention Section 12198, as to the county treasurer's liability. A portion of same being as follows:

> "* * * *or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, * * *"

There are other matters that should be set out in this opinion, and we are attaching hereto a copy of a previous opinion rendered by this office, dated February 7, 1933, to Honorable O. H. Kamp,

for your information, as we believe it fully answers pertinent questions that may arise.

It is our opinion from the above and foregoing that it is the duty of the county court to ask for proposals and to select a depositary as outlined in the statutes, and if it fails for any reason not within its control, then as provided for in Section 12196, said county court may at any subsequent term select such depositary. However, section 12196 does not mean that the county court may defer asking for proposals or in selecting a depositary as a matter of discretion only, but the failure, if any, to select such depositary being due to the inability to have banks meet the requirements of the statutes.

It must be kept in mind that county money must be handled in the manner prescribed by statute and such statutes are mandatory and must be strictly complied with as the county court is not dealing with private money but with the county's funds.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM
Enc.

SCHOOLS & O[illegible]TION OF BOARD -- (1) Law requiring bo[illegible] be organized wi[illegible]ing four days not compulsory but merely directory.
(2) Newly elected member can qualify after four days.
(3) When assembled two members may elect a president or select a teacher.

162.791.

May 17, 1933.

FILED
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Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

Answering your letter of April 19, 1933, in regard to the election of Mr. G., who lives in a rural school district in your County, owns real estate and is a taxpayer, having paid his taxes for last year. You also state that he was away on election day but was elected school director; that after Mr. G. returned to the district and his home he was notified of his election, was sworn in by the clerk and he, together with another director, after the meeting had been called by the clerk, organized by electing him president, there being only one OTHER member of the board present, and the clerk having previously administered the oath, etc.

From the above history of the facts and your statement further down in your letter that Mr. G. did not qualify within four days, it is our opinion that the fact that he did not qualify within the four days but did qualify later, makes the organization of the board complete and legal. In our opinion the fact that the board did not meet within the four days and promptly organize by electing a president etc., is a mere failure to comply with the statute.

They could meet and organize AFTER, JUST AS WELL AS BEFORE, THE END OF THE FIRST FOUR DAYS as there is no penalty for failing to meet and organize within the four days; the law in this particular is merely DIRECTORY, not MANDATORY.

> "* * * if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. (and not mandatory) * * * * * *."

State ex inf. Bird, 295 Mo. 344 l. c. 351-352.

It is our opinion that Mr. G. was qualified and is a member of the board under the facts given above. It is also our opinion that the meeting was legal. In common school districts where there are three directors, if only two members meet, it is possible to elect one of the two president of the board, especially so where the third member had been notified, even though he was absent, because two members constitute a quorum and if they both vote for the same person that would constitute a majority of the whole board which would make their action legal, everything else being regular, and make the election of the teacher legal, everything else being regular.

"This court has held, *, in construing the intent and purpose of school laws that they were designed as a workable method to be employed by plain, honest and worthy citizens, not especially learned in the law; and that no strict and technical construction should be given to them."

State ex rel. Carnahan v. Jones, 266 Mo. 191;
State ex inf. Simrall v. Clardy, 267, Mo. 371;
State ex inf. v. Bird, 295 Mo. l. c. 352.

Very respectfully,

Geo B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

CONSTRUCTION OF SENATE BILL NO. 50--
Date of making up tax books under this bill not applicable to year 1933.

Sec's 9876-77-Laws 33
SB 50

May 18, 1933.

FILED
25

25

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

This office is in receipt of your letter of recent date with request for an opinion as to the construction of Senate Bill No. 50 approved by the Governor April 1st, 1933, which letter is as follows:

> "The County Clerk of this county has notified me that he has receoved a copy of Senate Bill No. 50, in relation to the use of tax books in the county. The bill provides that the current tax book for 1933 taxes is abolished, according to our interpretation. Is this correct? Section 9876 provides that the assessors book shall be authenicated and shall be used as the tax book for the use of the collector. This would avoid the use of the Current Tax Book, as now made by the County Clerk. Do the provisions of the bill mentioned above apply to the year 1933? I see no emergency clause to the bill and it would consequently go into effect within ninety days. If it does go into effect within ninety days it would seem to abolish the use of the Current Tax Book as now made. Please advise."

The bill referred to in your letter repeals Sections 9876 and 9877, Article VII, Chapter 59, R. S. Mo. 1929, and enacts two new sections to be known as Sections 9876 and 9877, pertaining to the same subject; no emergency clause is attached and consequently goes into effect ninety days after the adjournment of the Legislature, to-wit, July 24, 1933.

The only query in your letter is, "Do the provisions of the bill mentioned above apply to the year 1933?" It is the opinion of this office that this does not affect or apply to the assessor's books and tax books now being copied and extended for the assessments of June 1, 1932, for taxes to be paid in the fall of 1933.

It will be necessary to trace assessments of June 1, 1932, through from the beginning until July 24, 1933, when Senate Bill No. 50 becomes effective, and it will be seen that practically all of the work to be done on the assessor's books and tax books for the collectors will have been completed by the time this act becomes a law and the tax books will, in a great many instances, be in the hands of the respective collectors by that date.

Section 9756, R. S. Mo. 1929, provides among other things,

> "The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, * * * * * * *"

The assessment by the assessor may not be necessarily completed until January 1, 1933; the books are then turned over to the county clerk by the assessor. The county board of equalization, except the City of St. Louis, meets at the office of the county clerk on the first Monday of April in each year, Sec. 9811 R. S. 1929; and the board of appeals meets on the fourth Monday in April thereafter, Sec. 9813 R. S. 1929, except in counties containing a population of more than 70,000 the board of equalization meets the first Monday in March and the board of appeals the fourth Monday in March thereafter.

Section 9871, R. S. Mo. 1929, provides,

> "As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Section 9874, R. S. Mo. 1929, provides that at the May term the county court shall make and levy for county purposes, etc.

Section 9814, R. S. Mo. 1929, provides, among other things, that the county clerk shall keep an accurate record of the proceedings of the board and the assessor shall correct all erroneous assessments, and the clerk shall adjust the tax book according to the orders of the court, etc.

Section 9876, R. S. Mo. 1929, provides,

> "As soon as the assessor's book shall be corrected and adjusted, the clerk of the county court, except in

St. Louis city, shall, within ninety days thereafter, make a fair copy thereof, with the taxes extended therein, authenticated by the seal of the court for the use of the collector. * * * * * *"

Section 9880, R. S. Mo. 1929, provides,

"As soon as may be after the tax book of each year has been corrected and adjusted, and the amount of the county taxes stated therein according to law, the county court shall cause the same to be delivered to the proper collector, * * * * * *"

So, it will be seen that the tax books should be in the hands of the collector by approximately the time the bill becomes a law, So, it would be very impractical and almost impossible to wait until July 24, 1933, to extend the assessor's books to take the place of the tax book as provided by Senate Bill No. 50, and under the injunction of Section 9876, R. S. Mo. 1929, it is the duty of the county clerk, within ninety days after the assessor's books shall be corrected and adjusted, to make a fair copy thereof with the taxes extended thereon, authenticated by the seal of the court for the use of the collector.

From the above and foregoing we take it that it was not the intention of the legislature for Senate Bill No. 50 to make any changes in making and extending the tax books that would affect the assessment of June 1st, 1932, for taxes payable in Fall of 1933.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH;EG

EEKS CONVENTION BILL- Discussion of provisions for mass meetings

May 24, 1933.

FILED
25

Board of Election Commissioners
of the City of St. Louis,
Mr. James A. Waechter, Chairman,
St. Louis, Missouri.

Gentlemen:

We are in receipt of your letter of May 22, 1933, in which you enclosed a letter from the Missouri Branch, Women's Organization for National Prohibition Reform, in which they asked several questions and in order that there be no variance between the rulings of your department and this department, you ask that we submit you an opinion as to the questions asked by said organization.

The questions submitted to you on the Week's Convention Bill are as follows:

"W.O.N.P.R. May 10, 1933.

Questions on the Weeks Convention Bill
on which we should like official rulings.

* *

Under Section 2, the County Court is empowered to appoint two judges and two clerks who favor and two judges and two clerks who oppose the pending amendment.

Although it is not specifically stated, it undoubtedly means the Election Commissioners in St.Louis - does it not?

Our question on this section is, "Would it not be logical for the Women's Organization for National Prohibition Reform and the Crusaders favoring the proposed amendment and the W.C.T.U. and Anti-Saloon League opposing the proposed amendment, to make recommendations for these appointments?"

In this connection would it be possible for our organization to have a list of the judges and clerks, appointed for regular elections, so that we might ascertain which of them favor and which are opposed to the proposed amendment?

The term "each precinct or voting district" - does that actually mean precinct - or would it mean townships in counties and wards in Saint Louis? And who would decide which it means?

When qualified electors meet in said mass conventions, who will organize and conduct the meeting? Will the County Courts and Election Commissioners appoint one chairman for the group favoring and the group opposing, or will the groups divide and organize themselves?

This seems a very vital point to us on which there should be clear and unmistakable rulings to avoid confusion.

Who will be charged with the responsibility of making returns of the proceedings together with names of delegates to the County Courts or Election Commissioners?

Governor fixes date of special election.

Governor fixes date and hour for Mass Conventions throughout the State in "precinct or other voting district".

For County Conventions to be held in County Seat.

For Senatorial District Convention.

For State Conventions to be held in the State Capitol.

The places of meeting - except for County Convention in County seats - and State Convention in Capitol, shall be fixed by County Court or Election Commissioners. Is this correct?

Where there are parts of wards in several Senatorial Districts, would there be a delegate elected to each of the several Senatorial districts represented by that ward?

Example:

Parts of Ward 8 are in the 29th and 30th Senatorial Districts.

Parts of Ward 14 are in the 29th, 30th and 31st Senatorial Districts. Would they elect a delegate for each of the Senatorial District representatives in the Ward?

Section 4.

In counties and cities of less than 350,000, in mass conventions in "precinct or other voting district" wets and drys elect two delegates each to County Conventions. In County Conventions the wets and drys elect four each to Senatorial District Conventions. In Senatorial Districts, wets and drys

In cities of 350,000 or more, wets and drys elect one delegate each from "precinct or other voting district" to Senatorial District Convention.

In Senatorial District Conventions, wets and drys nominate two each and certify names to Secretary of State. Is this correct?"

Due to the numerous questions asked above, we do not in this opinion give the reasons in detail for our answers, but the opinion of this department relative to said questions is as follows:

Under Section 2 of House Bill No. 514 it is the opinion of this department that where the Bill provides that "the County Court is empowered to appoint two judges and two clerks, etc.", such provision is applicable to the Board of Election Commissioners in the City of St. Louis.

It is the opinion of this department that the term "each precinct or voting district" as used in said House Bill has the same meaning as said term is used in the election statutes of the State of Missouri and particularly Sec. 10189 R.S. 1929, and accordingly it means "precincts" and does not refer to townships in counties or wards in St. Louis.

The Bill provides that in counties under 350,000 inhabitants the qualified electors attending each precinct or voting district convention shall divide into two groups, one favoring and one opposing the proposed amendment, and each group shall elect two delegates to said county convention; and further in said Bill pertaining to counties and cities having 350,000 inhabitants or more, it is provided that the qualified electors attending each precinct or voting district convention shall divide into two groups, one favoring and one opposing the proposed amendment, and each group shall elect one delegate to said

senatorial district convention---pertaining to said parts of the Bill you ask "if when qualified electors meet in said Mass conventions, who will organize and conduct the meetings?" In reply to said question, it is the opinion of this department that in view of the fact that House Bill No. 514 fails to make any express provision relative to the matter referred to, the electors meeting in said conventions, at the place designated by either the county court or the Election Commissioners (as the case may be) and at the time designated by the Governor in his Proclamation, shall organize themselves under rules common to parliamentary procedure, that is to say: the entire convention will first organize itself and thereafter the groups within the convention, as referred to in said Bill, will divide and again organize themselves. After each group has designated the number of delegates to which it is entitled to, the convention will then again assemble as a whole and the Chairman of each group will report to the convention as a whole the names of the respective delegates selected by each group as provided for in said Bill.

You next ask: "Who will be charged with the responsibility of making returns of proceedings, together with names of the delegates to the county courts or Election Commissioners?" And it is the opinion of this department that the statute does not provide for making returns to either the county courts or election commissioners of the names of the delegates selected in the precinct convention, but that said names should be certified to by the Chairman and Secretary of the precinct convention and submitted to the delegates elected (as their credentials), such delegates taking their certificates with them to either the county convention or the senatorial convention, as the case may be. Although it is not provided in the statute that a return of the names of the

delegates so selected should be made to the county courts or Election Commissioners, yet it is the opinion of this department that in the interest of orderliness and certainty, and as a matter of precaution, the secretary of each precinct convention should at the time of making out the certificates above mentioned, certify the names of the delegates elected and return the same to the county court or the Election Commissioners.

In answer to your next query, it is the opinion of this department that the county courts or the Election Commissioners (as the case may be) will designate the places for the holding of the precinct conventions and that in cities and counties of over 350,000 inhabitants the Governor will fix the place, date and hour of the senatorial district convention, whereas, in the counties of under 350,000 inhabitants the place of meeting is fixed by the Act as the county seat of the county. The senatorial district convention applicable to counties under 350,000 shall also be held on the date, hour and place fixed by the Governor.

You next ask, "Where there are parts of wards in several senatorial districts, would there by a delegate elected to each of the several senatorial districts represented by that ward?" It is our opinion that this question is merely a moot question, since it has no bearing upon the operations of the conventions mentioned in the Week's Bill, since no precinct (as differentiated from wards) will be found which is partly in one senatorial district and partly in another, and in view of the provision of the Act, the fact that one ward may be partly in one senatorial district and partly in another will occasion no difficulty.

Your next inquiry is as follows:

> "In counties and cities of less than 350,000 in mass conventions in precinct or other voting district, wets and drys elect two delegates each to county conventions. In county conventions the wets and drys elect four each to senatorial district conventions. In senatorial districts wets and drys nominate two each and certify nominations to Secretary of State.
>
> In cities of 350,000 or more wets and drys elect one delegate each from precinct or other voting district to senatorial district convention.
>
> In senatorial district convention wets and drys nominate two each and certify names to Secretary of State.
>
> Is this correct?"

It is our opinion that you are correct in the above statements. Another matter mentioned in the letter referred to us related to whether or not your Board of Election Commissioners would appoint as judges and clerks for the election provided for in Section 2 of the Week's Convention Bill members of various organizations, but as to this question we cannot answer, since that is a matter which must be handled by you in your discretion.

We trust that the above answers in full the interrogatories submitted to us.

Yours very truly,

POWELL B. McHANEY,
Assistant Attorney General.

APPROVED:

Attorney General

ELECTIONS: Special election under House Bill 514. Precinct and not wards to be used as voting places. Judges and clerks to be specially appointed for elections under House Bill number 514.

HB 514 Laws 33
10571 RS Mo 1929

June 15, 1933

FILED
25

Board of Election Commissioners
208 South Twelfth Boulevard
St. Louis, Missouri

Gentlemen:

This Department acknowledges receipt of your letter dated June 13, 1933, with reference to House Bill Number 514.

Section 2 of House Bill number 514, as set out in the letter, for the particular election about which House Bill number 514 refers requires the appointment of two judges and two clerks who are in favor of the proposed amendment and two judges and two clerks who are opposed to the proposed amendment, all of whom being otherwise qualified.

We are of the opinion that it was the intention of the legislators that judges and clerks would be appointed specially for this election and the use of judges and clerks provided for in Section 10571 would not be permissible as it might be that the judges and clerks appointed under Section 10571 would not have all of the qualifications required in Section 2 of House Bill number 514.

We are of the opinion that wherever the machinery provides for carrying out the purposes of House Bill number 514 conflicts with the general election laws of the state, then the provisions of House Bill number 514 would prevail with reference to the election held as provided for in that bill.

The fact that it may be impossible or expensive to comply with the requirements of House Bill number 514 can not change its meanings nor requirements.

If you will again refer to letter of this Department to you dated May 24, 1933, you will see that we held the elections must be held by or in precincts and not by wards. We think the word precincts as used in House Bill number 514 has reference to the election precincts as established and existing at the time of the passage of the bill.

The use of wards in selecting delegates to senatorial meetings would be impractical because in many instances a ward would be in more than one senatorial district, whereas that fact will not be true as to election precincts.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,O

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

IN RE: SENATE BILL NO. 134: INTERPRETATION AS RELATING TO COLLEGE FUNDS.

SB 134 Laws 33

7-4

June 27, 1933.

FILED
25

31

Mr. Roy Ellis, President
State Teachers College
Springfield, Missouri

Dear Sir:

This Department is in receipt of your letter of June 23, in which you request an opinion from this office on the following state of facts:

> "I believe I have a fair understanding as to the disposition of most of the fees taken in by this college under Senate Bill No. 134 which requires certain fees and funds collected by state agencies to be deposited in the state treasury. There are two fees, however, about which I am doubtful.
>
> "The first one is the cafeteria fund. This college operates a cafeteria for the convenience of its students. The cafeteria is operated largely by students and on a non-profit basis. It is in a sense a student activity. The total receipts of the cafeteria for the past biennial period were $23,331.76. ***
>
> "The second fund about which I am doubtful is the bookstore fund. The college operates a store in which we sell and repurchase text books, stationery, school supplies of all sorts. It is operated chiefly by students and the profits such as there are, are used to finance the

> college annual and the college newspaper which are student activities. The publishing staff of each being chosen by the student council. Like the cafeteria fund there is rapid turn over in this account. Under the terms of the bill are you of opinion that this fund would be deposited in the state treasury? I should appreciate your opinion on these two points."

Senate Bill No. 134 provides that fees, funds and moneys received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law be deposited in the state treasury,****; certain exceptions are made, however, as follows:

> "* * * Provided, that in the case of state educational institutions there is excepted herefrom, gifts,or trust funds from whatever source; appropriations, gifts or grants from the Federal Government; private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

The cafeteria fund to which you refer in your letter can, in no way, come within the exceptions provided by Senate Bill No. 134. The cafeteria is owned and operated by the college. The receipts belong to the college. And while it may be "in a sense a student activity", it is in reality a part of the college itself, and can not be said to come within the exception "funds for or from student activities."

In regard to the bookstore fund, this fund would seem to be subject to the same interpretation as the cafeteria fund, since the bookstore is owned and operated

by the college itself. However, the receipts from the bookstore are used to finance the college newspaper and the college annual, both of which are student activities. This fund would therefore come within the exceptions provided by Senate Bill 124, excepting "funds for or from student activities."

Therefore, it is the opinion of this Department that the cafeteria fund comes within the provisions of Senate Bill No. 124 and should be deposited in the State Treasury; the bookstore fund, however, comes within the exceptions provided for by Senate Bill No. 124 and need not be deposited in the State Treasury. This fund, however, must be reported in detail quarterly to the Governor and biennially to the General Assembly.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney-General.

SPECIAL ELECTIONS: House Bill No. 514. Opinion as to supplies needed in special elections.

HB 514 Laws 33

7-12

July 11,1933

FILED
25
32

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

This office acknowledges receipt of your letter of June 23, 1933, wherein you make request for an opinion which is as follows:

> "The county clerk of this county has requested me to secure an opinion from your office in regard to the type of election supplies that will be needed for the special election to be called in August of this year, to vote on repeal of the Eighteenth Amendment of the National Constitution.
>
> I would appreciate an immediate answer to this letter."

The Governor has issued no official proclamation calling for a special election setting up machinery for the ratification of the repeal of the 18th amendment in Missouri.

Section 2 of House Bill No.514, known as the "Weeks Bill", is as follows:

> "For the purpose of electing delegates to any convention to vote upon the ratification of any proposed amendment to the Constitution of the United States, the Governor is hereby authorized by proclamation to call a special election and fix the date of holding thereof, which shall not be held within ninety days of

> the date of any primary or any general election in this state. For each such special election there shall be appointed by the county court two judges and two clerks who are in favor of the proposed amendment and two judges and two clerks who are opposed to the proposed amendment, who shall be qualified electors within their respective precinct. In all other respects, such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, insofar as such laws will apply and the judges and clerks of each such election shall be paid in the manner provided by law of paying the costs of special elections, and shall perform the duties required and be subject to the penalties imposed upon judges and clerks of elections under the election laws of this state."

We infer from this section that the general election laws shall control the special election insofar as there is no direct conflict.

Section 8 of House Bill No.514, sets out the form of ballot to be used, and said section is as follows:

> "The names of any candidates for delegates to any convention held under the provisions of this act shall not be printed on the ballot, but the proposed amendment shall be printed on the ballot, followed by:
>
> (1) For the delegates favoring the pending amendment to the Constitution of the United States.
>
> (2) For the delegates opposing the pending amendment to the Constitution of the United States.
>
> (To vote for the delegates favoring the pending amendment to the Constitution of the United States draw a line through clause 2).

> (To vote for the delegates opposing the pending amendment to the Constitution of the United States draw a line through clause 1.)

Section 13 of said house bill provides the manner of notices as follows:

> "Notice of the proposed amendment and the time and place of electing delegates to any convention called under the provisions of this act to vote upon the ratification thereof, shall be published by the authority and in the manner provided by law for the publications of notices of amendments to the Constitution of the State of Missouri."

You will note that the publications of notices will be the same as provided by law relating to amendments to the Constitution of the State of Missouri.

By referring to Section 10383 R. S. Mo. 1929, which is as follows you will ascertain the mode of procedure on the part of the Secretary of State:

> "Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, and the clerk of each county court shall include the same in the publication provided in section 10349."

The form of ballot will be furnished by the Secretary of State according to Section 10387 R. S. Mo. 1939, which is in part as follows:

> "The secretary of state shall certify to the different county clerks or other proper officers the form of the official constitutional ballot.* * **

As stated above the Governor has not issued any official proclamation but as soon as the same is done each county clerk will no doubt receive definite instructions from the Secretary of State as to the supplies, smaple b llots and method of procedure.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

(ACTING)
Attorney General.

OWN:MM

COUNTY DEPOSITORY: Liability of Bank where no bond furnished as provided by law.

7-22

July 21,1933

FILED
25
33

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

This office acknowledges receipt of your letter of July 24th, 1933, in which you make the following request for an opinion:

> "I am writing you in regard to the construction to be given sections 12,184, 12,185, 12,186, 12,187, 12,192, 12,193, 12,195. Please give me your opinion in regard to the following state of facts of the interpretation of the above mentioned sections R. S. of Missouri 1929.* * *
>
> The county court of this county has continued the selection of the depository of the county funds in May of every odd year since 1925, according to the directions of the law hereinbefore mentioned. However, at no time since 1925 has a new bond been given to secure the deposits of this county, although the said Security Bank mentioned above has been at all times the county depository as required by law. The records of the county court however show that the said Security Bank has been selected every odd year as required by law. The county court on May 6, 1931, made the following order, 'The court makes an order that the Security Bank is to take the deposits of the county funds and pay 1½% interest on daily deposits.' No mention is made in the record of requiring a bond of the said depository as required under section 12,187 R. S. of Missouri, 1929.

The facts of this case will show that since 1925 the Security Bank of Fredericktown, Missouri, has been taking a part of the county funds of this county and placing them on deposit in the Bank of Fredericktown, Fredericktown, Missouri. However there is nothing to show in the records of the Bank of Fredericktown, Fredericktown, Missouri, that there was a deposit by the county through the county treasurer. The records do show that when deposits of this nature were made they were recorded to the Security Bank. There was an understanding between the officials of the said banks that the deposits of the county would be taken care of in that manner, so as to avoid competition and also to avoid paying a higher rate of interest than 1½%. The county court of this county had knowledge of the transactions between the two banks.

Following their usual custom the Security Bank of this county received all deposits for the year 1932, but as was stated before, no bond was given to secure said deposits. After receiving said deposits from the county, the Security Bank placed $13,300 on deposit with the Bank of Fredericktown, Fredericktown, Missouri.* * *The Bank of Fredericktown, Fredericktown, Missouri, is now operating under restrictions of the State Finance Department, alloting only 5% of all deposits to be withdrawn every six months. Under the circumstances and the facts that I have tried to relate to you, would the Security Bank of Fredericktown, Missouri, be responsible for all deposits of this county made to the said Security Bank, including $13,300 now on deposit in the Bank of Fredericktown, Fredericktown, Missouri?

If the above stated cases are correct, would the deposits of Madison County, Missouri, in the Security Bank of Fredericktown, Missouri

become a trust fund by operation of law? What action would you advise as a means of recovering for Madison County in this case?

Section 12187 R. S. Mo. 1929, provides as follows:

"Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety: Provided, that the court may accept in lieu of real estate as security bonds of the United States or of the state of Missouri, which said bonds shall be deposited as the court may direct; the penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court, and said bond shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon said depositary and for the payment upon presentation of all checks drawn upon said depositary by the proper officers of said county or any township whenever any funds shall be in said depositary, and that all interest will be paid promptly, and that all said funds shall be faithfully kept and accounted for according to law; and for a breach of said bond the county or any school district or township of said county or any person injured may maintain an action in the name of the county, to the use of the complainant."

Under the facts as set out in your letter, at no time since 1925 has a new bond been given to secure the deposits of Madison County held in the Security Bank. There is no doubt but that a deposit of public funds without requiring the bond prescribed by statute is in violation of law; and deposits made by officials with a depositary that has failed to execute a bond as the law requires, creates and constitutes the monies so deposited, a trust fund for which a preference will be allowed.

The Missouri Supreme Court has held that a bank does not become a depository merely by deisgnation as such but must qualify by giving security. Consolidated School District v. Citizen's Savings Bank, 21 S. W. (2nd) 781.

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2nd) 751, the Court held:

> ** * *As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. How a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27,1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them. See Harrison v. Smith, 83 Mo. 210, 215, 53 Am. Rep. 571; Midland Nat. Bank v. Brightwell, 148 Mo.

358, 365, 49 S. W. 994, 71 Am. St. Rep. 608; Page County v. Rose, 130 Iowa, 396, 106 N. W. 744, 5 L.R.A. (N.S.) 886, 8 Ann. Cas. 114; Board of Fire & Water Com'rs v. Wilkinson, 119 Mich. 655. 78 N.W. 893, 44 L.R.A. 493; Cherry v. Territory, 17 Okl. 221, 89 P. 192, 8 L.R. A. (N.S.) 1254. See also, Leach v. Exchange Bank, 200 Iowa, 185, 203 N. W. 31,36; and State v. Foster, 5 Wyo. 199, 38 P. 926, 29 L.R.A. 226, 250, 63 Am. St. Rep. 47." " "

In the case of Fidelity & Deposit Company of Maryland v. Peoples Bank, 44 Fed. (2nd) 19, the Court held:

" " "In the instance where the banks received from the county treasurer county funds and placed them on deposit when they were not legal county depositories, they became trustees ex maleficio. Merchants' Nat. Bank v. School Dist. (C.C.A.) 94 F. 705; Bd. of Comm'rs v. Strawn (C.C.A) 157 F. 49, 15 L.R.A.(N.S.) 1110; U.S.F. & G. Co. v. Union Bk. & Tr. Co. (C.C.A) 238 F. 448; American Sur. Co. v. Jackson (C.C.A.) 24 F. (2d) 768; Fiman v. State of South Dakota, 29 F. (2d) 776 (C.C.A.8); Compton v. Farmers' Tr. Co., 220 Mo.App.1081, 279 S. W. 746. As such their absolute liability could be relieved only be restoring the funds to the county. The banks in becoming trustees ex maleficio lost their right to presume that the county treasurer in withdrawing the funds would make proper disposition thereof. Perry on Trusts (7th Ed.) vol. 1, 245; Central Stock & Grain Exchange v. Bendinger (C.C.A.) 109 F. 926, 56 L.R.A. 875; U.S. F. & G. Co. v. People's Bank, 127 Tenn. 720, 157 S. W. 414; Glasgow v. Nicholls, 124 Wash. 281, 214 p. 165, 168, 35 A. L. R. 419.

In the case of Glasgow v. Nicholls, supra, the court said:

> A trustee de son tort does not escape liability to his cestui que trust by showing that he has disposed of the property, the subject of the trust. It may be that such disposition has placed the property in the hands of a bona fide purchaser for value, without notice, and the cestui cannot impress the trust upon the property in the hands of the ultimate holder of it; but, at the same time, the trustee de son tort is personally liable for the value of the property of the cestui which he has had in his possession, for he has converted the trust property, and although the cestui may not be able to follow the specific property and impress a trust upon it, he is nevertheless entitled to a judgment against the wrongdoing trustee."

Therefore, in view of the cases cited above there is no doubt but that the Security Bank of Fredericktown, holds the funds deposited in it by Madison County, as trustee for Madison County. As to the $13,300, deposited in the Bank of Fredericktown, there is no liability on the part of the bank of Fredericktown to Madison County. The Security Bank of Fredericktown is absolutely responsible for this deposit. From the facts as stated in your letter it is apparent that there was an agreement between the bank of Fredericktown and the Security Bank to supress the bidding for county funds and this was known to the county court. This would seem to make the bank of Fredericktown an undisclosed principal and subject that bank to liability to Madison County. However, the county court has no authority to apportion the county funds among two or more banks and therefore two or more banks cannot jointly submit a bid nor can one bank be the undisclosed principal of another presenting a bid. The bank selected as the depositary, in this instance the Security Bank, and its sureties are alone responsible for a failure to accountyfor the funds deposited by the county.

In the case of Henry County v. Citizens Bank of Windsor, 208 Mo. 209, the Court held:

> "There can be no undisclosed principal among the bidders for the county funds. The law requires the names of all bidding banks, together with the bid of each, to be entered upon the records of the court, and that one to be selected which is the highest bidder. And if, by reason of an agreement among all the banks of the county one of them was to be and was the highest bidder, and that agreement further provided that it would turn over to the defendant a designated portion of the county's moneys deposited with it, and that agreement was carried out, defendant was not an undisclosed principal in the agreement entered into between the county and the bank accepted as depositary. There can be no such thing as a joint bid of two or more banks for the county funds; consequently, defendant was neither a disclosed nor an undisclosed principal to the county's agreement." * * *

The Court in the case of Henry County v. Citizen's Bank supra, at page 232 said:

> "* * *Upon the execution, acceptance and approval of the bond of Salmon & Salmon as the depositary of the funds of Henry county, they were entitled to the possession of such funds, and they and their sureties became responsible to the county court for any failure to properly account for such funds; and, there is absolutely no authority by which Salmon & Salmon and the respondent by any arrangement or agreement, could in any way vary the terms of the contract with the county court or render any person other than those embraced and disclosed in the contract liable for any breach of it." * * *

The holdings of the court in the case of Henry County v. Citizens Bank supra, simply mean, insofar as the facts in this case are concerned, that there is no <u>contractual</u> relation

between Madison County and the Bank of Fredericktown regardless of the agreement between the two banks and the knowledge of the county court with respect to these transactions. As the court in the case of Henry County v. Citizens Bank supra expressly states at page 229:

> "* * *We do not mean to be understood as holding that if funds of a county, either legitimately or by some unlawful agreement, find their way into some other banking institution, the county court could not be authorized to pursue such fund and recover it, but we do mean to say that such recovery cannot be sought on the ground that such banking institution having such deposit is an undisclosed principal, or that an action can be maintained at all upon the contract provided for by the statute unless the principal is therein disclosed." * * *"

Section 12198 R. S. Mo. 1929 provides:

> "The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

If the bond accepted by the county court does not fully comply with the statutory regulations, the treasurer is liable on his own bond for the county money.

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (Sup. Ct. Mo) (2nd) 22, the Court said:

> "It could not be made the duty of the treasurer to deposit the funds of the district in the depositary selected by

> the board unless the board had the legal authority to select such depository and had done so in substantial compliance with the authority granted." " "

A depositor makes out a prima facie case when he shows that a deposit has been made and a demand and refusal of the money deposited. The onus is then upon the depositary to exonerate himself from the liability which attached when he assumed the custody of the money. Wiser v. Chesley, 53 Mo. 547. Thompson v. St.Louis & San Francisco Railway Company, 59 Mo. A. 37.

Therefore, in view of the foregoing, it is the opinion of this department that (1) the Security Bank of Fredericktown, Fredericktown, Missouri, is responsible for all deposits of Madison County made to said Security Bank, including $13,300 now on deposit in the Bank of Fredericktown. (2) That the deposit of Madison County, Missouri, in the Security Bank of Fredericktown, Fredericktown, Missouri, constitutes a trust fund by operation of law. (3) That if the bond accepted by the county court does not fully comply with the statutory regulations, the county treasurer is liable on his own bond for the county money. (4) That while the ordinary relationship between the bank and county with respect to funds deposited under the statute is that of debtor and creditor, the facts as presented here constitute the Security Bank of Fredericktown, Fredericktown, Missouri, as trustee for Madison County, and Madison County may sue the Security Bank of Fredericktown for the recovery of this money and may subject all the assets of said bank to the repayment of this trust fund.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:MM

IN RE: APPLICATION TO PAYMENT OF SCHOOL DISTRICT WARRANTS OF RAILROAD TAXES DELINQUENT FOR THE YEAR 1932 AND PAID JUNE 28, 1933.

9233-9312 RS Mo 1929

8-23

August 15, 1933.

FILED
25
39

Honorable Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Mo.

Dear Sir:

Your letter of July 20 reads as follows:

"The county treasurer and the county clerk of this county have made inquiries of this office as to the disposition of delinquent railroad taxes collected on June 28, 1933, for the year 1932. Shall these taxes be (by) applied to the payment of warrants issued by school districts for legitimate school expenses for the school year of 1932-33? Section 9270n R.S. 1929 of Missouri provides that school boards in making their estimates on or before July 1, of each year should estimate the amount of current taxes that will be received from the railroads for the coming school year. This would lead you to believe that railroad taxes should be expended during the same school year that they are collected.

"The state department of education issued a bulletin on January 6, 1933 saying that tax collections of railroads made on or before January 1, 1933 should be spent during the school year of 1932-33. I have been unable to give an accurate answer to this question and would appreciate an immediate reply from your office."

Section 9233 R. S. Mo. 1929 provides as follows:

> "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9357, and no school warrant shall bear interest."

The school year begins the 1st day of July and ends on the 30th day of June.

Section 9313 R. S. Mo. 1929 provides as follows:

> "The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund;' the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;' all money derived from taxation for building purposes, from the sale of school site, school house or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund;' and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall

> be placed to the credit of the 'teachers' fund' of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further: that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided further, that by a majority vote of the school board tuition fees may be used to liquidate indebtedness accrued in the building fund. (R. S. 1919, Sec. 11283.)"

Section 11, Article X of Constitution of Missouri limits the amount of tax the counties in the school districts may impose for school purposes.

Section 12 of Article X of the Constitution provides:

> "No county, * * * * school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose."

In Book v. Earl, 87 Mo. 246, it was held the Constitution of 1875 abolished in county and school districts and municipal governments the credit system and established the cash system by limiting the amount of taxes which might be imposed and limiting the expendi-

tures in any given year to the amount of revenue such tax should bring into the treasury for that year. Under these constitutional provisions, the Supreme Court has held that revenue for current expenses, provided for any one fiscal year, of counties and school districts must first be applied to the payment of ordinary current expenses incurred in county and school district.

State ex rel. v. Allison, 155 Mo. 325;
State ex rel. v. Johnson, 162 Mo. 631.

The constitutional provisions above mentioned require the application of taxes levied for the year to be first applied to the ordinary expenses for the year of a school district or a county.

It is evident from the above provisions of the Constitution that the revenue of school districts for the ordinary expenses of each year must be met by the taxes levied for that year regardless of when said taxes are paid and the Supreme Court of Missouri has so held.

In line with the above statement are the provisions of Section 9233 R. S. Mo. 1929, above set out, providing, no county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with Section 9257.

It is the opinion of this department that, subject to the terms of the Statutes herein set forth and referred to herein, the delinquent railroad taxes for the year 1932 collected on June 28, 1933, received by a school district must first be applied to the payment of warrants issued by such district for ordinary school expenses for the school year beginning July 1, 1932 and ending June 30, 1933, and these warrants should be paid in the order of their presentation and registration, and are not payable pro tanto if there is not sufficient funds to pay off all warrants. The above statement is subject to the

proviso that if there is a surplus in a school district's revenue, after payment of all regular ordinary current expenses for the year beginning July 1, 1933 and ending June 30, 1933, then the railroad taxes received by the school district should be applied to the payment of warrants of previous years in the order of their registration.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney-General

ECC/AJ

HABEAS CORPUS: Convicts may be taken from the penitentiary under a writ of habeas corpus ad prosequendum and tried on another charge.

3615 P.S. Dec 19 29
1749 P.S. Dec 19 29

October 5, 1933

10-7

FILED
25
49

Honorable Melvin Englehart
Prosecuting Attorney
Fredericktown, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of September 29, relating to certain convicts which you have confined in your county at the present time. Your letter is herewith quoted:

"Please give me an immediate reply to the following inquiry.

In the March Term of Circuit Court of Madison County, Missouri, Sam Thomas, Pete Grego, Angelo Strazzo and Joe Moda, were charged with bank robbery, of the Security Bank of Fredericktown, Mo., May 25, 1932 and entered pleas of guilty. They were each sentenced to ten years in the state penitentiary and were incarcerated there as per the sentence. These same men were returned to Fredericktown, Mo., Sept. 23, 1933, as witnesses for the state in the prosecution of their accomplice in the above mentioned bank robbery. While on this trial was in process of being tried, the state has discovered that the four men mentioned above committed another robbery on the above mentioned date. These four men are now in the custody of the sheriff of Madison County, and will remain there until the quarantine that is now in force at the state penitentiary, is lifted. Does the state have the authority to try these men in the Circuit Court of this county at the present Sept., Term., when they were released to the sheriff of this county on Writs of Habeas Corpus Ad

Testificandum as witnesses in the case of State of Missouri vs. Clarence O.Simmons? Will it be necessary for the prosecuting attorney of this county to secure a permit from the Warden of the State Penitentiary to try these men for that purpose at the present term?

Please advise me at once, and if by telephone if possible. Also, as Prosecuting Attorney of this County, I hereby request the Office of the Attorney General of the State of Missouri, to furnish Assisting counsel to the Prosecuting Attorney in this Case. I remain."

The four convicts were brought to your county under Section 3618, Revised Statutes Missouri 1929, same being as follows:

"Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf;and whenever any convict, confined in the penitentiary, shall be considered an important witness in behalf of the state, upon any criminal prosecution against any other convict, by the attorney-general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney-general or prosecuting attorney, a writ of habeas corpus, for the purpose of bringing such person before the proper court to testify upon such prosecution; such convict may be examined, and shall be considered a competent witness against any fellow convict for any offense actually committed whilst in prison, and whilst the witness shall have been confined in the penitentiary."

Under Section 1749 R. S. Mo. 1929, which is as follows:

"A prisoner who shall be brought before any court, public body or officer, upon a writ of habeas corpus, to testify, shall be remanded, after having testified, to the prison from which he was taken."

the convicts or prisoners are to be remanded to the penitentiary, but you state the convicts are remaining in your county jail awaiting the lifting of the quarantine at the penitentiary. You therefore still have the prisoners or convicts within the jurisdiction of Madison County.

In the case of State ex rel. Billings, Prosecuting Attorney v. Rudolph, Warden of State Penitentiary, 17 S. W. (2nd series) 933, wherein a situation arose similar to the one you present which in our opinion is determinative of the question. This case overrules a number of other cases and we are herewith quoting the pertinent parts:

> "After the decision in State ex rel. Meininger v. Breuer, supra, Meininger was tried and convicted while under bond pending on appeal from a prior judgment and sentence to the penitentiary. State v. Meininger (Mo. Sup.) 280 S.W.1007. There is no constitutional or statutory provision prohibiting the trial of a defendant during the time of his incarceration in the penitentiary, and the guarantee by the Constitution of a speedy trial makes no exception of a defendant so incarcerated. Section 22, art. 2, Const. If Meininger could be tried after sentence and while under bond, there is no reason why the defendant Stocks, cannot be tried after sentence and during the service of time in the penitentiary. On principle, there is no difference. Those interested will find this conclusion sustained by all the cases cited and reviewed in State ex rel. Meininger v. Breuer, supra, 304 Mo. loc. cit. 406-414, 264 S. W. 8. In the cases there reviewed, all the courts hold that a convict may be taken by the state from the penitentiary and tried for an offense committed prior to his incarceration. To hold otherwise would make of the penitentiary a shelter for criminals.
>
> In Commonwealth v. Ramunno, 219 Pa. 209, 68 A. loc. cit. 185, 14 L. R. A. (N.S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818, the Supreme Court of Pennsylvania said:
>
> 'On the prisoner's other contention not much ought to be said, for nothing can be said in support of it. At all times he was within the commonwealth. By its process he had been committed to one of its penal institutions for a violation of one of its laws. It

not only did not object to his being brought into the jurisdiction of one of its courts to answer a more serious charge than the one upon which he had been committed, but asked, at the instance of a district attorney representing it in his district, that his body should be produced, to be subjected to punishment upon a charge which he was called to answer, different and distinct from that for which he had formerly been convicted. The warden of the penitentiary having him in custody made no question as to the commonwealth's right to take him away; and, under the circumstances, when he reached the jurisdiction in which he was to be tried for the most serious offense known to the law, it was none of its concern how he got there. A prison is not a place of refuge for a criminal. It is for his punishment, to which he is involuntarily committed, and the same power that commits him can take him from it when in the interest of justice he should be transferred elsewhere to answer for his misdeeds.'

In Rigor v. State, 101 Md. 465, 471, 61 A. 631, loc.cit.634, the Supreme Court of Maryland said:

'The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.'

In Ponzi v. Fessenden, 258 U. S. 254, loc.cit. 260, 42 S. Ct. 309, 310, (66 L.ed. 607, 22 A. L.R. 879,) it is said:

' One accused of crime, of course, cannot be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense' - citing cases. 'If that is accorded him, he cannot complaint. The fact that he may have committed two crimes gives him no immunity from prosecution of either.'

In Flagg v. State, 11 Ga.App. loc.cit.40, 74 S.E. 563, the court said:

> 'When a convict is serving a penal sentence he is in the custody of the state or its authorities. In a sense he is the property of the state; his labor belongs to the state. Having forfeited his right to freedom, he is completely under the dominion and control of the state, with no rights save those which the law in its humanity may accord him. It would indeed be remarkable if the state, which has full power to reach out and bring into court one of its citizens while in the full enjoyment of his liberty, could not find a process by which one of its convicts could be brought into court for any purpose for which his presence could lawfully be required. We have not the slightest doubt of the full and complete power of the courts to adopt appropriate measures to obtain a convict's presence in any proper case.'
>
> Being in the custody of the state, no constitutional or statutory right of the defendant, Stocks, is violated by the state changing its place of custody from the penitentiary to the circuit court room of Dunklin county. While absent from the penitentiary for trial, he is in custody under the sentence."

It is also held in the case supra, that the circuit courts have the power to issue a habeas corpus ad prosequendum, the same being the writ which would be necessary in the instant case. The court in passing upon the question said:

> "While not ruling the question, some observations on the authority of circuit courts to issue writs of habeas corpus ad prosequendum will not be amiss. If a circuit court issued such a writ, no question of conflicting or territorial jurisdiction would be involved. The writ is equivalent to a warrant for an arrest. It should be executed as warrants are executed. Sections 3909,3911, and 3814, R. S. 1919. Our courts have power to issue all warrants which may be necessary in the exercise of their respective jurisdictions. Section 2341, R. S. 1919.
>
> In Ex parte Marmaduke, 91 Mo. 228, loc. cit. 251, 4 S. W. 91, 99 (60 Am. Rep. 250), it is said:

'Independent of any such statute (Rev.St. 1919, sec.2341),courts, having been created for the purpose of administering public justice, have, in consequence of their being courts, the inherent right to effectuate their jurisdiction by all process necessary for that purpose. * * * The rule being, that, whenever power of jurisdiction is conferred, everything necessary to make either effectual is implied. 1 Kent. Com. 463, and cas. cit.'

In re Edward Talbot, 8 Ohio Dec. 744, loc. cit. 747, it is said:

'A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court, once having by its process acquired the right to adjudicate upon a person or thing, it has what is called jurisdiction. This power of jurisdiction* * * * is the object of process.'

In Commonwealth v. Ross, 13 Pa. Dist. R. 493, it is held that a district court has authority to issue such a writ to cause a defendant who is confined in the penitentiary outside of the territorial jurisdiction of the court to be brought before it for trial on an indictment for felony.

In Ex parte Marmaduke, supra, the St. Louis criminal court issued a writ of habeas corpus ad testificandum, which was served in Cole county on the warden of the penitentiary. The authority of that court to issue the writ was not questioned."

We suggest, as you have the convicts now in your local jail, that if you desire, you could proceed to file preliminary complaints and hold preliminary hearings if the convicts remain in your county, and, if you so desire, you could secure a writ of habeas corpus ad prosequendum and proceed to have the same served on the warden and this would forestall the convicts being returned to the penitentiary. You state that if they are to be

tried in the present term of your circuit court, trial must be had immediately, otherwise it will be six months before the probability of a trial. We suggest that in the event that you are unable to obtain a trial this term of court that the convicts be returned to the penitentiary and later you could have them returned to your county by the writ mentioned above.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General,

OWN:LC

Sheriffs - Fees & mileage - Sec 11789
Summons standing jury.

Sec 11789 RSMO 1929

Op 2/11

February 7, 1933

FILED
26

Hon. John A. Eversole,
Prosecuting Attorney,
Washington County,
Potosi, Missouri.

Dear Sir:

Your request directed to the Legal Department under date of February 2nd, 1933, for an opinion has been handed to the undersigned for attention. You ask an opinion of this department upon the following subject:

> "Section 11792, R. S. Mo. 1929 declares that a sheriff is allowed ten cents per mile for serving all writs, summonses, order of court or any venire in a criminal case when served more than five miles from the place where court is held, etc.
>
> Section 11789 R. S. Mo. 1929, declares that a sheriff shall receive $8.40 for summonsing a standing jury. The question is this--is the sheriff allowed mileage in addition to the $8.40 allowed by section 11789."

Section 11789 relating to the fees which shall be allowed a sheriff for his services, provides, among other things, that for the summoning of a standing jury he shall receive $8.40. Section 8755, R. S. 1929, provides the manner in which the petit jury shall be drawn and the number of jurors and alternate jurors to be chosen for service at the next term of the circuit court of said county. This section in the later portion thereof refers to the petit jury as the 'standing' jury. Section 11789 supra in addition to providing for the fees for summoning a standing jury, also contains among other provisions, the following :

> "For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip, 10¢".

Under the provisions of this section as we construe it, the Legislative intent was to allows the sheriff $8.40 for summoning the petit jury and their alternates, and in addition to that allowance, when required to travel in excess of five miles from the place where court is held, he should be paid mileage as provided in said section.

The mileage of sheriffs, county marshalls and other officers in certain cases as provided for in section 11792 does not refer to, and has no connection with the standing jury provided for in section 11789, but refers to special juris which may be called in criminal cases, proceedings for contempt or attachment.

Very truly yours,

Carl C. Abington,
Assistant Attorney-General

CCA/N

Approved:

Roy McKittrick,
Attorney-General

IN RE; Power of County Court to accept warranty or quit claim deed in satisfaction of school fund mortgage and bond or should they foreclose.

9 2 56 R S Mo 1929.

March 7, 1933

FILED
26

Hon. J. Dorr Ewing,
Prosecuting Attorney
Grant City, Missouri.

Dear Sir:-

Your letter of February 28th,1933 noted, wherein you would like the opinion of this department as to whether the County Court has power to accept Warranty or Quit Claim Deed in satisfaction of School Fund mortgage and bond, without sale to the highest bidder.

The County Courts of the State get their authority largely from Section 36, Article VI of the State Constitution and from the following Sections of the Statutes (which statute I am setting out pretty fully.)

> "SEC. 9243--COUNTY SCHOOL FUNDS--"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion require personal security in addition thereto, * * * belonging to the County School funds; * * *"

> "SEC.9245--COUNTY COURT TO HAVE JURISDICTION OF COUNTY SCHOOL FUND--Whenever any county in this state may have, separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds."

Then to the same effect they have power to manage the several township funds in their counties.

> "SEC.9248--MANAGEMENT OF SCHOOL FUNDS--The County courts, respectively shall have the care and management of the school funds of the several townships within their respective jurisdictions, * * *."

The county courts have power to require additional security.

"SEC.9253--COUNTY COURT MAY REQUIRE ADDITIONAL SECURITY--The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. * * *"

"SEC.9252--FORM OF MORTGAGE--NOTICE OF SALE--FEES,HOW PAID--Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, * * *."

The County Courts have power to sell, but should make order first.

"SEC. 9254--COUNTY COURT MAY MAKE ORDER OF SALE, WHEN--Whenever the principal and interest, or any part thereof secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

May become the owners when and how.

"SEC.9256--AUTHORITY TO REPOSSESS PROPERTY BY PURCHASE--Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school

fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools: * * *."

You will note;

"The statutes provide that when money belonging to the school fund shall be loaned, the county court shall cause the same to be secured by mortgage in fee on real estate situated within the county, * * * and of the value of double the amount of the loan, and also with a bond and personal security. * * * No authority is anywhere conferred upon the county courts to dispense with the real estate security required to be taken.* * *"

Lafayette County v. Hixon, 69 Mo.,581.

"The county courts of Missouri are creatures solely of statutory origin and have no common law or equitable jurisdiction."

State ex rel.vs. Johnson, 138 Mo. Ap. 306, l. c. 314.

"In relation to these funds the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference

> in this respect between the principal and the interest of these funds, If they can give away the one, they can give away the other. * * * The welfare of the State is concerned in the education of the children. She has provided and is providing means for that purpose, not only for those now in existence, but for those who may come after the. The fund, as has been said, is a permanent one, and, if every man, woman and child in a township should petition the county court to give away, that which is by law entrusted to it, for the education of its children, it should without hesitation reject their prayer. " "
>
> Montgomery County v. Auchley, 103 Mo. 492, l. c. 503.
> Veal v. County Court 15 Mo. 412, l. c. 414.

We are therefore, of the opinion that while in this instance, it might seem to be expedient and less expensive as you say, to the county to accept a deed instead of foreclosing the mortgage, yet it would be unwise, (on account of the bad precedent) and I think unconstitutional and without authority of law to do otherwise than to foreclose the mortgage as provided in the statutes above quoted.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney General

GBS/mh

APPROVED:

ROY McKITTRICK
Attorney General

to assessment

TAXATION: Property subject ^Baryties, lumber. and ties.

9742-9756 RS Mo 1929

June 7th, 1933

FILED
26

Hon. John A. Eversole,
Prosecuting Attorney,
Washington, County
Potosi, Mo.

My dear Mr. Eversole:

Acknowledgment is hereby made of your request of June 5th, for an opinion of this office which request reads as follows:

> "There are thousands of tons of Barytes, a certain mineral mined in this county, stacked up waiting for higher prices. The county assessor wants to know if this mineral is taxable. Also whether ties and lumber stacked in the woods, on the Rail Road Right of way and on mill yards is taxable.
>
> I wish you would give me your opinion on this matter as the assessor has asked me. I do not believe that things of this kind have been assessed here in the past, especially the Barytes."

In considering this question, it is well to have before us the sections of the statutes pertitent thereto.

> "Section 9742 Property taxable for state purposes. For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

The exceptions as stated in the next section, clearly are not such as would include the subjects of your inquiry. The section pertaining to the assessment of the taxes reads as follows:

> "Section 9756, Time for making assessment-what lists shall contain. The assessor

TAXATION: Property subject to assessment Baryties, lumber and ties.

> * * * shall, between the first days of June and January * * * proceed to take a list of the taxable personal property * * *. Such lists shall contain; * * * eleventh, all other property not above numerated* * *, under this head shall be included all pleasure carriages of all kind; * * * and every other species of property not exempt by law from taxation."

It is apparent from your inquiry that the Baryties, ties and lumber have all been severed from the soil and therefore lost their character as real property and become personalty. Being personal property, the immediate question for our consideration is whether or not provisions has been made for the taxation of this particular personalty. As stated by the Supreme Court in State ex rel: v. Lesser, 237 Mo. l. c. 318.

> "The sovereign power of the state to require its citizens to pay taxes on all their personal property * * * may * * be conceded. But conceeding that the state has the power to tax such interests, it does not follow that such interests are taxed unless the law so declares".

After reading the full text of Section 9756, it is clear that the subjects of your inquiry, to be assessable, must fall within the provisions of clause eleven, as hereinbefore set out. Our Supreme Court in the case of State ex rel Globe-Democrat Publishing Company v. Gehner, reported in 294 S. W. 1017, held clause eleven to be sufficiently comprehensive to include every class of personal property. The question in this case was whether or not the accounts receiveable of the Globe-Democrat Publishing Company were subject to assessment as personal property. The court held that they should be assessed under clause eleven of Section 9756, (Section 12766 R. S. Mo. 1919) as the rule of ejusdem generis did not apply. The court stated as follows on page 1018:

> "If it appears that the Legislature intended, in the use of general words, to go beyond the particular ones, the rule is not applicable. In this case it may without violating the rules of construction, be held that the particular words to be used in the return made by the taxpayer exhausted the classes there enumerated and thus authorized the use of general words to include other classes of property for the

> purpose of taxation, * * * We are therefore, of the opinion that the rule of ejusdem generis cannot be invoked in this case to relieve accounts receivable from the burden of taxation. To conclude otherwise would be, despite the comprehensive purpose of the statutes of this character, to hold that the general words in section 12766, as ammended, and the statement required to be made in the taxpayers oath as to the return of this class of property, are meaningless."

It is therefore the opinion of this office that the Barytes, ties and lumber are proper subjects of taxation, due regard being given to section 9745, 9763, and 9764 in determining the proper authority to make the assessment.

Respectively Submitted,

HARRY G. WALTHER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney-General.

HGW/lm

The necessity of a permit when selling beer at picnic or fair grounds.

7-21

July 7, 1933

FILED
25
32

Mr. Ben Elmore
Salisbury, Missouri

Dear Mr. Elmore:

Your letter of July 1st, requesting an opinion from this office is as follows:

> "We are being asked if it is permissable for a customer, who has a permit to sell beer, to sell beer at a stand at these fairs or any place outside of his place of business. Will you please inform us on this question and if it can be done, how should he proceed?"

It is our opinion that under the recent beer law a permit to sell beer authorized under that act cannot be used as a roving permit authorizing the holder to sell at any other place of business than the place designated at the time the permit was taken out. One wishing to sell beer at a Park or Fair Grounds should apply for a permit to sell at that location.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED_____
Attorney General.

WOS:MM

GAME AND FISH DEPARTMENT:

Who required to have license to fish.

Sec 8248-54 RSMo 1929

7-11

FILED
26

32

July 11, 1933

Honorable John A. Eversole
Prosecuting Attorney
Potosi, Missouri

Dear Mr. Eversole:

We acknowledge receipt of your letter dated July 3, 1933, as follows:

> "The local game warden has arrested two boys, 15 years of age and life long residents of St. Francois County, Missouri, for fishing in Washington County, Missouri without a fishing license to do so.
>
> I am attempting to prosecute them under section 8254 Revised statutes of Missouri, for the year 1929. The more I read and study this section the more conflicting it seems to me and the more I doubt whether they have violated any law.
>
> The case is set for trial July 22nd before a justice of the peace in this county. I wish you would give me your opinion on this matter before that time."

Section 8248 Revised Statutes Missouri 1929, provides as follows:

> "It shall be unlawful for any person after the passage of this article to hunt or fish in this state without first obtaining a license permitting him or her to do so; such license shall be dated when issued and shall

> authorize the person named therein to hunt and fish during the calendar year of issue, and then subject only to the regulations and restrictions as provided by law: Provided, no license shall be required to fish in privately owned lakes or ponds where a fee is charged for the privilege of fishing."

The above section was section 5598 Revised Statutes 1919, the latter being an amendment of Section 6574 Revised Statutes Missouri for 1909, the latter section being amended by the Laws of 1919 at page 346 so as to make it necessary to have a license to fish as well as to hunt.

Section 8254 Revised Statutes Missouri 1929, as amended by the Laws of 1925 at page 223, reads as follows:

> "Resident licenses shall be issued as county resident licenses and state resident licenses. A county resident license shall entitle the holder to hunt and fish in the county wherein such license is issued and any adjoining county. A state resident license shall entitle the holder to hunt and fish in all counties in the State of Missouri. Any person who has been a bona fide resident of this state for six months last past may secure a license for himself or herself by filing his or her affidavit with any county clerk or the license collector of the city of St. Louis, stating his or her name, age, place of residence, post office address, the color of his or her hair and eyes, and the fact whether he or she can or cannot sign his or her own name, and paying to said clerk the sum of one dollar for license to hunt and fish in the county where he or she resides and any county adjoining same, or two and fifty one-hundredths dollars ($2.50) for a state license: Provided, that this section shall not apply to owners and tenants of farm lands, used exclusively for agricultural purposes and members of their

> families under the age of twenty-one years, who may hunt and fish on their own or leased lands, without obtaining a license: Provided, that no female nor minor who are resident citizens of this state shall be required to take out a fishing license; and provided further, that no person shall be required to take out a fishing license to fish in the waters within the boundaries of the county in which he resides; but nothing herein shall be so construed as to permit a person to fish in any county other than that in which he resides without first taking out a fishing license as provided in this article".

There is an apparent conflict between the two sections just quoted but since Section 8254 follows Section 8248 and particularly since Section 8254 was amended in its present form in 1925, we are of the opinion that Section 8254 was intended to qualify the provisions of Section 8248.

By virtue of the provisions of and exceptions in Section 8254 the owner or owners of and tenant or tenants on farm lands where such farm lands are used exclusively for agricultural purposes, are not required to secure licenses to hunt or fish on such lands and neither are the members of the respective families of such owner or owners or tenant or tenants, required to procure a license to hunt or fish on such land.

Under Section 8254 no female resident citizen of this state nor any minor whether male or female who is a resident citizen of this state, is required to procure or have a license to fish under any circumstances in this state.

Construing all of the parts and provisions of Section 8254 together we are of the opinion that no person, regardless of age or sex, is required to take out or procure a license to fish in the waters within the boundaries of the county in which such person resides.

We are therefore of the opinion that the prosecution mentioned in your letter can not be maintained

for the reason that the defendants are minors and this applies regardless of the county of their residence or the county in which the fishing was done.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

Acting Attorney General.

GL:LC

COUNTY DEPOSITORY:

Procedure in selection of County Depository: Liability of County Treasurer on official bond in event no depository is selected by County Court.

September 26, 1933.

FILED 26

Hon. John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Eversole:

We have your letter of September 9th, 1933, with request for an opinion, which letter we are incorporating in our opinion.

> "I am writing you this letter at the request of my Friend Wilson Bell who is county treasurer of Washington County.
>
> Each and every bank in this county have refused to give Mr. Bell the necessary bond required of a county depository. Mr. Bell has made every possible effort to secure this bond, in fact has even gone out side of the county in his attempt to secure a bond after the banks in this county had all refused.
>
> We wish your advice as to what should next be done and in the meantime do you consider Mr. Bell and his bondsmen liable in case of a bank failure. Would certainly appreciate a reply at your very earliest convenience. Mr. Bell and I intend to be in Jefferson City in the near future to discuss this and other matters with you but would like your advice in the meantime."

While you definitely do not state in your letter, we assume that your county court has complied with all of the provisions of the statute relative to the selection of the county depository, that is, that the county court has proceeded under the provisions of Section 12184 R. S. 1929, by advertising for bids for the county funds and no bids were received by the county court from the banking corporations, associations, or individual bankers in the county and all of the banking institutions in your county have failed to proceed under Sections 12184, 12185, 12186 and 12187 R. S. 1929, in submitting bids for the county funds and in the giving of a bond or bonds for the county depository.

In case the county court has complied with the statutes and no bids have been submitted, all as provided in Sections 12184, 12185, 12186 and 12187, supra, then, in that event, the county court may go to Section 12189, R. S. 1929, for the selection of the county depository, which section is as follows:

> "DUTY OF COUNTY COURT IN CASE NO BIDS ARE RECEIVED.--If for any reason the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositaries as provided in section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, in such sums or amounts, and for such period of time, as the court may deem advisable, at such rate of interest, not less than one and one-half per centum, as may be agreed upon by the court and the banker or banking concern receiving the deposit; said interest to be computed upon the daily balances due the county, as provided in section 12186, and any bank or banking concern agreeing to accept deposits under the provisions of this section shall execute a bond in manner and form as prescribed in section 12187, with all the conditions therein mentioned, the penalty of such bond or bonds to be not less than the total amount of the county funds to be deposited with such bank or banking concern."

The duty under the statutes of selecting the county depository devolves on the county court and it should first proceed under the first four sections of Article IX, Chapter 89, R. S. 1929, viz, 12184, 12185, 12186 and 12187, supra, and then if there are no bids submitted by the banks the county court should then go to Section 12189, supra, for guidance and under said section the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties etc., who are willing to comply with this section by paying the required interest, not less than one and one-half per cent, to be computed upon daily balances, and executing a bond in manner and form as prescribed in Section 12187.

Coming now to the question as to the liability of the county treasurer of your county on his official bond, in event of a bank failure and consequent loss of the county funds in the county depository:

Section 12198 R. S. 1929, provides as follows:

> "COUNTY TREASURER EXEMPT FROM LIABILITY, WHEN.--The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

In the case of Glaze v. Shumard, 54 S. W. (2d) 726 l. c. 728, it is said:

> "It is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise."

As was said by the Supreme Court in the case of City of Fayette v. Silvey, 290 S. W. 1019, l. c. 1021:

> "* * * The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public

> money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.
>
> In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22 l. c. 24, 66 A. L. R. 1053, the Missouri Supreme Court in this leading case said:

> "The ruling in the University City Case was made in recognition of the rule followed in this State, and generally followed that the liability of the treasurer of a public corporation for its funds coming into his hands is absolute. State ex rel. v. Powell, 67 Mo. 395; 29 Am. Rep. 512; State ex rel. v. Moore 74 Mo. 413; 41 Am. Rep. 322; County of Mecklenburg v. Beales, 111 Va. 691, 69 S. E. 1032, L. R. A., (N. S.) 285. The rule is one founded upon considerations of public policy."

In the case of Everton Special Road District v. Bank of Everton, 55 S. W. 335, l. c. 336, the Supreme Court stated:

> "In selecting a county depository the steps may be all regular up to the execution of a

> bond by the depository and then if the bond given does not substantially comply with the requirements of the statute, the depository selected is not the legal depository."

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751, l. c. 754, the Supreme Court said:

> "As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them."

The Springfield Court of Appeals followed the Huntsville Trust Company case in the case of Consolidated School District v. Citizens Savings Bank, 21 S. W. (2d), l. c. 788, and the Huntsville case is cited with approval in the case of White, County Treasurer, v. Greenlee, 49 S. W. (2d) 132.

Also, in the case of Boone County v. Cantley, Commissioner, 51 S. W. (2d) 56, l. c. 58, the Supreme Court further said:

> "A bank which has given a bond that does not comply with the provisions of Section 12187 R. S. 1929, regardless of the action taken by the county court with respect to it, is

> not a county depositary either in law or in fact. And upon the receipt of county funds by such a bank, under color of being a county depositary, a trust as to funds so deposited arises in favor of the county. Huntsville Trust Co., v. Noel, 321 Mo. 749, l. c. 757; 12 S. W. (2d) 751."

In the case of State ex rel. Cravens, to Use of Consolidated School District No. 2, v. Thompson, 22 S. W. (2d) l. c. 198, the court made the following statement which is appropriate to the question here involved:

> "It is plaintiff's position, as reflected in the first assignment of error, that the recital in the said minute, 'Bond of D. W. Thompson as treasurer approved. Money to be kept in Farmers Trust Co.,' was not sufficient in law to designate a depository for the moneys of the district and to authorize Thompson to place the money there, because not in conformity with the provisions of sections 9582-9586, Rev. St. 1919, governing procedure in respect to county funds; and that, when the power of an inferior body to do a thing depends upon a condition precedent prescribed by statute, all the world must take notice of that limitation of its power and authority, and determine at their own peril whether or not the condition has been complied with and the authority granted; and that the act of the board of education in directing by minute entry only that the funds of said district be kept in the Farmers' Trust Company of Grant City, without first advertising for bids, and without requiring a bond of the depository selected, was void and of no effect, and not binding on the district; and that it was the duty of the treasurer before depositing the funds with the Farmers' Trust Company to see and know that said depository had been properly and legally selected and designated, and that a bond of said trust company had been properly approved and filed, and his failure to do so renders him and his sureties liable."

It will be seen from the above cases that where the county depository has not been selected in the manner designated by the statute and no depository bond has been given as required by the statutes that the bank or trust company does not become a lawful county depository and, in that event, under the decisions the county treasurer is liable under his official bond in case of a bank failure and consequent loss to the county of its funds.

We hope that this fully answers your questions, but should there be any further question on this matter we shall gladly give you our opinion.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

ROADS AND BRIDGES:

Refunds under Sections 8127 and 8128, R.S. Mo. 1929, discussed.

10-14

October 11, 1933.

FILED
26

Mr. W. Evans,
2006 Grand Avenue,
Kansas City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am advised that a refund of $30,000.00 is being made to the Parkville Special Benefit Assessment Road District.

There seems to be some question as to whether this money must be returned in cash to the property owners who were taxed or whether it shall be used for building more roads. I understand that the Attorney General has rendered an opinion that this money can not be returned in cash to the property owners.

Will you please advise me if such an opinion was rendered? Also, I would like to know if this money cannot be returned in cash, if it can be used to build other roads in this particular road district."

Section 8127, R. S. Mo. 1929, provides as follows:

"Counties or other civil subdivisions shall be reimbursed for work done in constructing such part of a road or roads including bridges, except bridges over the Missouri, Mississippi and the navigable portions of the Osage and Gasconade rivers, which may become a part of the state highway system to the extent of the value to the state at the time taken over, due consideration being given to the type of road the state would have constructed had such road not already been constructed, provided that all reimbursements to the amount of six thousand dollars per mile shall be deducted from the apportionment made to each county, and all reimbursements in excess of $6,000 per mile shall be made out of the one-third of the state road funds set apart and available for the construction of a higher typed road than properly bound gravel road. Any portion or all of such reimbursement shall be made either in the form of additional roads, or in cash, at the election

of the authorities of the county or civil subdivision to which reimbursement may be due. If the authorities of the county or civil subdivision elect to have such reimbursement made in the form of additional roads, such roads shall be constructed in such county or within such civil subdivision connecting with the state highway system and constructed under state supervision; or, all or part of said sum may be used to construct a higher type road than that proposed by the commission as part of the state highway. If the authorities of the county or civil subdivision elect to have all or any part of such reimbursement made in cash, all or any portion of such reimbursement made in cash may be used for the purchase of rights-of-way for state highways within such county or civil subdivision. Where money has been raised or set apart for the construction of roads which are designated as state highways and contracts have been entered into requiring expenditure of said funds, and in all cases where said roads are under construction at the time this article shall take effect, the same may be completed; and the counties or civil subdivisions wherein said roads are constructed or to be constructed, shall have all the benefits of this section. Where two or more counties or minor subdivisions or minor subdivisions in two or more counties have constructed a road which is taken over as a part of the state highway system and reimbursement is to be made under the provisions of this section, reimbursement shall be made to each county or minor subdivision in proportion to the funds contributed by each in the construction of the roads taken over, and those constructed therewith in each county or in the territory of the minor subdivision of each county. Providing that the county or other subdivision thereof shall not receive as refund under this article a greater sum than has been expended on said section of road so taken over by the state, by the said county or subdivision thereof."

Section 8128, R. S. Mo. 1929, provides as follows:

"Any county or other civil subdivision having funds of its own arising from a road tax or bond issue may expend said funds in the building of the state road system within said county or other civil subdivision as designated in this article; provided the construction of said roads is under the supervision and according to the plans of the highway department as provided for in this article, and all money so expended by any county or other civil subdivision shall, to the extent of the apportionment of such county or other civil subdivision herein provided for, be repaid to such county or other civil subdivision, as soon as funds arising from the state road fund are available for that purpose. Requisition therefor shall be made by the county court and shall be honored

by the proper officer of the state highway department."

Section 8127 specifically provides that any portion or all of such reimbursement shall be made either in the form of additional roads or in cash, at the election of the county or civil subdivision to which reimbursement may be due. Section 8128 provides that all moneys expended by any county or civil subdivision, according to the plans of the highway department, shall be repaid to such county or civil subdivision. Under Section 8127, if the authorities elect to have reimbursement made in cash, subh reimbursement may be used for the purpose of rights-of-way for state highways within such county or civil subdivision. Section 8127 deals with roads that were in existence or had been built and were afterwards taken over by the highway department, while Section 8128 deals with roads which have been built under the Centennial Road Law under the supervision and according to the plans of the highway department. In the first section it is optional as to whether the refunds shall be made in roads or in cash, while under the last section there is no option and funds expended under Section 8128 must be repaid in cash. It is therefore the opinion of this department that if roads had been constructed prior to the passage of the Centennial Road Law, which is the name of the Act under which the highway department now functions, and such roads were taken into the highway system that it is optional with the political subdivision wherein the roads lay whether they shall be reimbursed in the form of additional roads or in cash. However, if the roads were actually constructed after the passage of the Centennial Road Law, under the supervision and according to the plans of the highway department, then the refund will be made in cash.

You do not state in your letter how the money of this District was raised, whether by a bond issue or whether as a result of taxes in the Road District. If the money which was expendéd on the roads which afterwards entered into the highway system, was raised by taxation, then we believe that the money refunded under either Section should go into the treasury of the district and could be used for the purpose of building additional roads, or it may be used under Section 8127 for the purchase of rights-of-way for state highways within such district. If the refund is being made under Section 8128 and the money arose from taxation, we believe that such funds should go into the treasury of the district and may be used for the purposeof building roads in the district.

We find no authority in the law which would permit the returning of this refunded money to the taxpayers, whether the money was originally raised by general taxation for road purposes in the district or whether it was the proceeds of a bond issue floated by the district. However, if the money expended

on the roads which went into the highway systemwas the proceeds of a bond issue for that purpose,we think a difficult situation arises. Section 20 of Article X of the Constitution of Missouri provides as follows:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

Under the foregoing constitutional provision money raised by a bond issue shall be expended for the purposes for which the bonds were voted and for the repayment of the bonds and not otherwise. If the money which went into the roads which became a part of the highway system was raised by a bond issue and such bond issue covering these roads has not been paid off, then we believe that the $30,000.00 which is to be refunded, if in cash, should go first, to discharge the bonds voted for by the District which built the roads. If the bond issue which built the roads that went into the system has been paid off, or if there is an excess after the retirement of the unpaid bonds, then we believe that the balance remaining becomes the property of the road district and may be used for the purpose of building additional roads therein.

It is therefore our opinion that the law provides no method by which the money refunded by the highway department can be directly returned to the taxpayers. If the refund is made under Section 8127, the reimbursement may take the form of additional roads or cash, according to the election of the authorities of the district. If made under Section 8128, the refund shall be in the form of cash, as there is no option under that Section to refund in additional roads. Where cash is refunded under Section 8127, it may be used for the purpose of purchasing rights-of-way for state highways within the district, or it may be returned to the treasury of the district to be used for the purpose of improving or constructing roads in the district. If the refund is made under Section 8128, the cash should go into the treasury of the district and may be used for the purpose of building roads therein. In the event, however, that the money which built the original roads which went into the highway system came not from taxes but from a bond issue for that purpose, then the refund, under Section 20 of Article X of the Constitution, must first be applied to retire the bonds outstanding which paid for the roads that went into the highway system. If there are no such outstanding bonds, then even though the money came from a bond issue, we believe it should be returned to the treasury of the district and used for the purpose of improving, repairing and building other roads.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

FWH:S
APPROVED:

Attorney General

CRIMES AND PUNISHMENT: Child abandonment means that necessities of life are not provided for child.

12-27

December 22, 1933.

FILED
26

64

Hon. John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Eversole:

This is to acknowledge your letter which reads as follows:

"I have been urged to prosecute a case against a young father for his failure to support his minor child. The parents were divorced and the mdher given the care and custody of the child which is three years of age. The father was adjudged by the court to pay for the support of said child the sum of ten dolla rs per month. He could do this if he wanted to I think but seemingly hasn't wanted to. At least he hasn't done so.

The mother and child are living with her parents and the child's grandfather is of course keeping them supplied with all necessities of life. The grandfather and mother however want me to prosecute the husband for his failure to pay for the support of said child as adjudged by the court.

I have looked up the law quite carefully I believe. The leading case seems to be State vs. Thornton reported in 232 Missouri at page 306L. C. which holds that if some one else is furnishing the necessary support for the child the father cannot be convicted.

> Several later cases have been decided and all seem to follow this case, however the grandfather is not entirely satisfied with my opinion that under the circumstances he cannot make a case out of this. For that reason I would very much appreciate your opinion as to whether I am right or not."

It is our opinion that your opinion concerning the above matter is correct. The case you referred to, State v. Thornton, 232 Mo. 298, l. c. 305 and 306, holds:

> "The statute penalizes the refusal of the father to supply necessary food, etc. Under the law pertaining to necessaries, a necessary article is one which the party actually needs. It is not enough to show that the article is per se classed as necessary, such as food and clothing. It must also be actually needed at the time."

And further,

> "The Legislature did not enact this law for the purpose of punishing parents for failure to do their duty as such. Such a purpose would smack too strongly of paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the State, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution.
>
> It follows from the foregoing that if infant children are receiving necessary food, clothing and lodging from any source, there is no occasion for the State to interfere by penal law or otherwise."

The facts in this case are similar to those you stated. This case has never been overruled by the Supreme Court although it was sought to be distinguished in State v. Beims, 212 Mo. App.

231 (St. Louis Court of Appeals). However, in State v. Winterbauer, 318 Mo. 693, the Supreme Court of Missouri again affirmed the Thornton case, supra, and quoted therefrom, having this to say in regard to State v. Beims (l. c. 696):

> "The Springfield Court of Appeals in its opinion adopted the construction given the statute in the Thornton case, holding that as it appeared the child was provided with necessary food, clothing and lodging by its grandfather, the conviction could not be sustained and it accordingly reversed the judgment and discharged the defendant.
>
> In State v. Beims, 212 Mo. App. 231, 253 S. W. 420, the St. Louis Court of Appeals said:
>
> '. . . and the mere fact alone that the child was being supported and cared for by friends, relatives, or by charitable institutions, would not excuse any man or woman from discharging the duty imposed upon them by law.'
>
> We think this ruling is opposed to the opinion in the Thornton case."

The above case is the last expression of the Supreme Court that we are able to find.

Section 4026 R. S. Mo., 1929, provides in part pertinent as follows:

> "* * * * or if any man or woman shall, without good cause, abandon or desert or shall, without good cause, fail, neglect or refuse to provide the necessary food, clothing or lodging for his or her child or children born in or out of wedlock, under the age of

> sixteen years etc., he or she shall upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. Etc."

As stated above, we concur in your interpretation and opinion of the law as applied to the facts in your case.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

NEPOTISM - Right of Sheriff to appoint nephew

January 10, 1933.

FILED
27

Hon. Eugene A. Farris,
Prosecuting Attorney Ray Co.,
Richmond, Missouri.

Dear Mr. Farris:

This office is in receipt of your letter dated January 6, 1933 in which you make the following inquiry:

> "May a sheriff appoint his nephew as his deputy and not violate the law against nepotism.
>
> You understand the sheriff is on a fee basis and the deputy would only receive a salary from the sheriff. He would not collect or receive any money from the state or county."

Sec. 13 of Art. 14 of the Constitution of the State of Missouri provides as follows:

> Nepotism, by any officer or employe, forbidden - forfeits office.
>
> Any public officer or employe of this state or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment. (Adopted Feb. 26, 1924.)

The above provision of the Constitution has been construed by the Supreme Court in State ex inf. Norman vs. Ellis, Circuit Clerk, 28 S.W. 2d, 363.

You do not say in your letter whether the person desired to be appointed is a nephew by affinity or consanguinity, but it would not matter, as the sheriff is prohibited from appointing his nephew to the office

(Hon. Eugene A. Farris)

of deputy sheriff in any event, and would subject himself to forfeiture of his office in so doing.

You will observe that the constitutional provision above quoted does not make the same applicable only where fees are to be received, but that would make no difference, as the Constitution evidently intends to prohibit the appointment to office of a relative in the degree therein specified.

Very truly yours,

GILBERT LAMB,
Ass't. Attorney General

APPROVED:

Attorney General

GL:AH

When surety bond for school fund loan is released.

5

February 9,1933

FILED
27

Mr. R oth H. Faubion,
Prosecuting Attorney
Lamar, Missouri.

Dear Sir:

Beg to acknowledge receipt of your letter with copy of bond therein. Assuming all blanks in form of bond sent by you properly filled out and that loan was made under Section 9243 R. S. Mo. 1929, I suggest it will be necessary to have exact knowledge of what occurred in the way of extension of time without consent of surety before it can be determined whether surety is liable or has been released by extension of time of payment.

In Harburg v. Kumpf, 151, Mo. l. c. 20, Supreme Court said:

> "It has been uniformly held in this State that if a creditor for a valuable consideration makes an agreement with the principal debtor which suspends the right to sue on the demand for a definite period of time without the consent of the surety, it operates to discharge the surety."

And same volume and page, the court further said:

> "And in that case (referring to 69 Mo. l.c. 542) it is also held that payment of interest in advance is a sufficient consideration to support the contract for extension."

And in West vs. Brison 99, Mo. l. c. 693, it is said:

> "Where the surety claims to have been discharged by reason of an agreement between the creditor and the principal debtor, extending the time of payment, it must appear that the agreement was upon a

> valuable consideration and that the extension was for a definite period of time."

And in Petty vs. Douglas, 76, Mo. 70, it was held:

> "That payment of interest then due on a matured note and part payment of the principal was no valid consideration for an agreement to extend time and the surety was not thereby discharged."

And in Owings vs. McKenzie, 133 Mo. 323, it was held:

> "That an agreement to extend for which there was no consideration, except the legal consequences of accruing interest, according to the tenor of the note, was not valid."

The principal underlying the cases is that mere agreement by principal to do what tenor of note or bond calls on him to do will not constitute sufficient consideration for contract to extend without consent of surety and will not release surety but contra a contract to pay interest in advance which tenor of note or bond does not require is a good and valuable consideration moving to the creditor and will if made without consent of surety discharge surety.

On account of above rule of commercial law the Supreme Court said in Harburg vs. Kumpf, 151, Mo. l.c. 32:

> "We hold therefore that the promise of a holder to extend a note after maturity for a definite period, based on no other consideration than the promise of the maker to keep the money during that period and pay interest thereon according to the legal tenor and effect of the note is not based on a valid consideration, the promise to extend is not binding and if there is a surety on the note he is not discharged although the attempted agreement for extension was made without his knowledge or consent."

And in Investment Co. vs. Scales, 277, Mo. p.366 the court

division one said:

> "The payment of interest by the maker, in advance or after due, although it tolls the Statute of Limitations, does not release indorsers."

And in 278, Mo. l.c. 518, in Baade v. Cramer, the court said:

> "Although the maker of a negotiable note did not indorse or authorize the indorsement thereon of a memorandum extending the time of payment, yet if it was made at his solicitation and in accordance with his agreement with the payee, in good faith and based on a sufficient consideration, and stated the conditions of the extension, the agreement constituted a valid and subsisting contract."

And in same case on same page the court said:

> "Extension of a negotiable note, absent a memorandum indorsed thereon, can be established by parol testiiony; and an agreement to extend the time of payment may be made verbally, and independently of the deed of trust given to secure the note."

And in 83, Mo. p. 21 the court said:

> "And extension of the time of payment of a promissory note, for a definite period, by agreement between the payee and maker, will, if based upon a sufficient consideration discharge the surety, if made without the latter's knowledge and consent. The payment of interest in advance in pursuance of such agreement is a good and valuable consideration."

And in the case of Jobe, Admx, v. Buck and Mosely, 224, M.A. 622, the court held:

> standing alone, is insufficient to show extension of time so as to release surety."

And so if the right to sue is not suspended by agreement between the payee and principal debtor the payment of interest in advance or payment as it becomes due and after maturity note is allowed to continue unpaid with such payments of interest, without consent of surety he is not discharged.

And so in last above cited case, 224, M. A. l.c.629--Wherein court held the surety was not released although she had no knowledge of payments of interest, and giving its reason for such holding the court said:

> "There is nothing in the facts to show that plaintiff ever divested itself of the power to sue at any time. There never was a time, during the long period of indulgence disclosed by this record, that the appellant as surety could not have paid off the amount due on the note, and then pursued her remedy against the principal debtor for the amount so paid."

The underlying principle that is the basis of release of the sureties on account of extension given principal without surety's consent is that to effect a release the extension must in some way materially affect the surety in his right of recourse against the principal.

From the forgoing citations of authorities you will I think agree that you should as far as you can do so write the Attorney General what facts exist and can be proven by surety to show a definite extension of time to principal for a fixed period, of time and just what consideration if any was paid by way of interest or otherwise by principal to payee and whether or not interest paid before maturity of obligation for extensionor after maturity, and whether or not interest was paid in advance as a consideration for extension and whether agreement for extension was oral or in writing, or by way of a memorandum on the obligation or on some other piece of paper. Also, what proof if any, surety can produce to show he did not consent to the extension.

In short, write the Attorney General all the facts you can obtain bearing on the extension. When all the facts you can

unearth are submitted to this office, it will promptly give you its opinion based on the facts submitted .

In your letter of January 24th you say:

> "I would be pleased to have an opinion from you on the following facts; to wit: whether or not in the school fund bond enclosed is the security liable in case the loan is continued or extended without the notification or consent of the security. The county court is beset with such a circumstance. A party who was security on a school fund bond is balking in the payment of a deficiency after the sale of a property on the ground that he is not liable because said loan was extended without his consent."

The foregoing authorities disclose a simple extension unless based on a legal consideration as outlined in above authorities would not release surety. For release must be based on extension agreement oral or written, definitely proven, and on a valid consideration, and extension must be for a fixed definite period of time. and without consent of surety.

The attorney General will be pleased to render you all the assistance within his power in this matter.

Very respectfully

Edward C. Crow.

APPROVED_____
ROY McKITTRICK
Attorney General.

ECC:MM

COUNTY COURT: May maintain action against surety on school bond without foreclosure of mortgage.

February 11, 1933

FILED
27

Honorable Roth H. Faubion
Prosecuting Attorney
Lamar, Missouri

Dear Mr. Faubion:

We acknowledge receipt of your letter dated February 6, 1933, which letter is as follows:

"In 1926, A and B, husband and wife, borrowed $1900.00 from the common schoolfund of Barton County and executed to the county their school fund bond with C and D as sureties on this bond.

They also undertook to secure the same by a school fund mortgage on a piece of property in Golden City, Mo., but the scrivener in drawing this mortgage, by mistake located the property in Lamar,Mo,which of course,failed to convey the legal title to the property.

Default has been made in the payment of this loan and it now becomes necessary to either feform this mortgage, sell the property and then sue on the bond for a deficit as the property will not sell for enough to satisfy the loan.

The courts seem to hold that if default be made in the payment of a school fund loan it becomes the duty of the sureties to pay this debt and then look to their principle and the property mortgaged for their satisfaction 70 Mo. 645, 61 Mo. 332, 52 A,351,and 13 A. 99.

It would require one term of court to correct the mortgage, another to sell the property and a third to sue on the bond. This would occasion considerable delay and expense. I am unable to see any reason why the county cannot sue directly on the bond. This would facilitate matters a great deal. I mean a direct suit without foreclosing the mortgage.

I would like your opinion on this question. I hate to ask haste, but we must have this for our April Term of Circuit Court, so if possible please do this quickly".

The law governing the situation presented by your letter has been determined by the Supreme Court of this state in Johnson County v. Gilkeson, 70 Mo. 645, the court saying:

> "This was a suit against Gilkeson and Brammer, securities for one Swan on a bond given the county for the use of school township number 44, Range 28, in 1866. The defense on the part of Brammer was, that he gave notice to the plaintiff to sue or to foreclose a mortgage on Swan's property, and by reason of the neglect of the county to do either within the thirty days after the notice, the debt was lost so far as the principal was concerned by his insolvency after the notice. Another defense was, that the name of Eads, another security on the bond when it was signed, had been erased. In regard to this last defense the court found, as a matter of fact, that it was not true, and the evidence authorized the finding. And the only question here is as to the first defense. As this court has already decided this question in two cases, (Cedar Co.v Johnson, 50 Mo. 225, and Jasper Co.v.Shanks, 61 Mo.332.) it is useless to look into the long list of authorities elsewhere cited by the counsel for appellant. Whether this right claimed here is under our statute or at common law, the result is the same, since the court has declared that "one who becomes a surety on such public bonds must hold himself ready to pay it, if the principal fails; and if he fears his insolvency, he should pay the obligation and collect it, if he can, of his principal; but he will not be discharged on account of the neglect of public officers. Judgment affirmed". (cases cited)

There is no legal obstacle to the county maintaining an independent action on the bond, however, the court could as properly maintain an action to correct the mutual mistake made in the drawing of the mortgage if it was a mutual mistake, and in the same action ask for a foreclosure of the county mortgage and get a deficiency judgment against the sureties, having made the sureties a party to the action, the sureties would doubtless be subrogated to the rights of the county so far as the correction and foreclosure of the mortgage is concerned. See State ex rel v.Davidson, 315 Mo. 549.

Very truly yours,

GILBERT LAMB,
Assistant Attorney General.

APPROVED:

Attorney General.

GAME & FISH; Pet deer required by Section 8247 R. S. Mo. 1929 to be licensed under Section 8299 R. S. Mo. 1929.

FILED
27

March 17th,1933

Hon. Roth H. Faubion,
Prosecuting Attorney of Barton County,
Lamar, Missouri.

Dear Sir:-

I acknowledge receipt of your inquiry of February 23rd, 1933 requesting an opinion on certain facts, which request reads as follows:

> " About the 15th of December, 1932 Mr. John Gray of this city bought a 7 months old buck deer from Dolan Park in Springfield, Missouri.
>
> He bought said deer for a pet and for no other purpose. The deer seems to be very gentle and docile as a dog. It is not to be used for scientific or propagating purposes.
>
> The Game and Fish Department has ordered the deputy game warden to either force the owner to buy a permit or for said game warden to confiscate the deer and to arrest the said owner, using sections 8298 and 8299 R. S. Mo. 1929.
>
> Mr. Gray is a responsible man and wants to do the right thing in this matter. However he cannot find anything in the law that applies to his case. I am at a loss to know just how to act. The department wants me to act, but it seems to me that the action will not stand up.
>
> Could your office please render me your opinion as to the status of said owner etc., and as to whether he is liable under said sections to buy a permit or not?"

The section having particular bearing on this situation is Section 8247, R. S. of Mo. 1929 and appropriate parts of which read as follows:

> "SEC. 8247.POSSESSION OF GAME IN CLOSED SEASON--PENALTY. Any person who shall have in his possession * * * any * * *game * * *during the closed season prescribed by law therefor, * * *except when such possession * * * is permitted thereunder, shall be guilty of a misdemeanor and the game warden * * *hereby * * *authorized to * * * confiscate any * * *game * * *from any person who may be holding the same, in violation of this article."

This act is a valid exercise of our police power of the State,as all game belongs to all the people in their collective sovereignty, and its possession and use is subject to the regulations of the State. The Supreme Court has stated this in the following language:

Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238.

"* * *the common ownership of game, which otherwise would remain in the body of the people, is lodged in the State to be exercised like all other governmental powers in the State in its sovereign capacity, to be exercised in trust for the benefit of the people and subject, of course, to such regulations and restrictions as the sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the State."

Greer v. Connecticut 161 U. S. 519, l. c. 522.

"From the earliest traditions the right to reduce animals FERAE NATURAE to possession has been subject to the control of the law-giving power."

So far as the acts for the preservation of fish and game are concerned they operate on and affect all game, whether raised in captivity or not, and deer are included in the term "game".

State v. Weber, 205 Mo. l. c. 44

"The term 'game animals' as used in the title of the act includes all kinds of deer within this State, whether wild or reduced to captivity.

No owner of deer raised in captivity has a better title thereto than has the hunter at common law to the deer captured or killed by him, * * *"

Now, therefore, such possession of deer being unlawful under Section 8247 it would seem that the only manner in which Mr. Gray can continue in possession of this deer is to bring himself within the provisions of the article which will allow him to retain possession of the deer.

Sections 8298 and 8299 R. S. of Mo. 1929 require certain conditions be met before the restrictions of Section 8247 can be lifted. Section 8298 provides for permit or license for the transportation, taking, capturing,killing or importation of deer. Section 8299 provides for the permitting of raising and propagation of deer. Possession is permissible under the latter, but not under the former, except insofar as is permissible to accomplish the transportation, taking, capturing, killing or importing.

Section 8299 provides,

> "The issuance of such licenses shall be discretionary with the state game and fish commission, * * *".

If in his discretion, the commission will issue Mr. Gray a permit under Section 8299, Mr. Gray may lawfully and legally retain possession of his 7 months old buck. If not, Mr. Gray is subject to the penalties provided for in Section 8347.

Very truly yours,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

HGW/mh

APPROVED:

ROY McKITTRICK
Attorney General

IN RE: Refund money for roads taken over by State, may be used to purchase farm to market right-of-ways; special road district has no authority to borrow money from county.

8127 — 8047 R.S. Mo. 1929

April 5th, 1933

FILED
27

Hon. E. A. Farris,
Prosecuting Attorney,
Ray County,
Richmond, Missouri.

Dear Sir:-

Your request for an opinion has been received pertaining to the following questions:-

" 1. Has the County Court the right to use refund money obtained from the State in the purchase of right-of-way of Farm to Market Roads.

2. Can the County Court and special Road Districts make agreement by which the County Court advances money for the purchase of right-of-ways to be repaid by Special Road District.

3. Money advanced toward the purchase of right-of-way will be money in the excess of the amount necessary to pay off the bonds of the County."

Paragraphs 1 and 3 in your request are so correlated that they will be treated together.

(1) The farm to market roads were authorized by the Constitutional amendment creating the State Highway system; Section 44a Article IV of the Missouri Constitution.

Section 8127 R. S. Mo. 1929 relating to the reimbursement of counties in cash provides:

"* * *all or any portion of such reimbursement made in cash may be used for the purchase of right-of-ways for State highways within such county or civil subdivision."

A farm to market road is a State highway within the definition laid down in Section 8093 R. S. Mo. 1929.

It is the opinion of this office that the county court has the authority to use refund money obtained from the State, which is in excess of the amount necessary to pay off the bonds of the county, in the purchase of right-of-ways for farm to market roads.

(2) While your request for an opinion does not state under what

special road district law your road districts are organized, we are assuming for the purpose of this opinion that they are organized under Article 9, Chapter 42, R. S. Mo. 1929. The powers and duties of the special road district board are set out in Section 8033, R. S. Mo. 1929;

" * * * to construct, improve and repair * * highways."

Section 8047, R. S. Mo. 1929 provides that the district road fund shall be disbursed only,

"* * * for working, repairing and improving public roads of such districts * **, and for no other purpose; and no part thereof shall be used for paying damages and costs for opening new roads."

The authority of the special road district to obtain money in advance of its revenues is limited to the methods set out in Section 8053 R. S. Mo. 1929; namely, (1) issuing anticipation warrants to the extent of one year's income, and (2) by a bond issue. A special road district may issue bonds. Harris v. Bond Co. 244 Mo. 664,l.c.692. We are therefore of the opinion that the special road district has no authority to borrow money from the county court. There is no statute authorizing the county court to loan money to the road district.

Section 8127 R. S. Mo. 1929, provides that the reimbursement shall be made to counties or other 'civil subdivisions'. The term "civil subdivisions" includes a road district. Section 8132 R. S. Mo. 1929. It appears therefore that if any of the reimbursement funds are for roads taken over by the State that originally belonged to a special road district, that the refund covering this road in the special road district belongs to the special road district funds.

It is therefore the opinion of this department that (1)the refund money in excess of the amount necessary to pay off the bonds, may be used for the purchase of right-of-ways for farm to market roads; (2) that the county court has no authority to advance money to a special road district and the special road district has no authority to borrow money from the county, for the purchase of right-of-ways for farm to market roads.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER/mh

PROSECUTING ATTORNEYS - Duty of County to furnish office, stationery, etc.

Filed: #27

May 25, 1933

FILED
27

Honorable Charles Farrar
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Mr. Farrar:

We have your letter of April 24, 1933, in which you request an opinion from this department on the question of whether or not the county court of your county is required to furnish you an office, stationery, etc., which letter is as follows:

> "I am the prosecuting attorney of Dallas County, Missouri, and on account of lack of office room in the court house I am forced to rent an office elsewhere. Is the county required to furnish me an office, stationary, postage, telephone, fuel, etc.?
>
> Please give me an opinion on the above."

At the outset, we wish to state that the courts of this State in regard to furnishing offices, janitor service, stationery, postage and equipment for the county officers have adopted a liberal policy.

The first case on this question so far as we are able to find is the case of County of Boone v. Todd, 3 Mo. 140, in which the court held that where the county had not provided an office for its circuit clerk the court said:

> "The county has no right to throw this burden on the clerk."

And further that the county was required to furnish him an office. Also, to the same effect is the case of St. Louis Co. Court v. Ruland, 5 Mo. 268, in which the court held that the county courts are bound to allow their clerks their expenses for fuel.

In the case of Saylor v. Nodaway County, 159 Mo. 520, under a statute providing that the necessary expenses incurred by the probate court "for books, stationery, furniture, fuel and other necessaries shall be paid by the county", the court held that the county court was compelled to pay the probate judge for postage stamps used in the discharge of his official duties.

In the case of Ewing v. Vernon County, 216 Mo. 681, l. c. 692, involving what the recorder may have for equipment and expenses, the court said:

> "There is not a word in the chapter relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it but when we read other provisions of the general statutes relating to building a court house and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish."

In the companion case of Ewing v. Vernon County, 216 Mo. 696, the court held that the sheriff's office is entitled to janitor service at the expense of the county and it is the duty of the county court to reimburse the sheriff for reasonable outlays for such services.

In Buchanan v. Ralls County, 283 Mo. 10; 222 S. W. 1002, the Supreme Court held that it was the duty of the county to furnish the county treasurer with suitable office space, heat, lights and janitor service under the statute, Section 12136, R. S. 1929, which provides that,

> "The county court shall provide said county treasurer with suitable rooms, and secure a vault in the court house or other buildings occupied by county officers * * * * * *."

In 46 C. J., p. 1018, it is said,

> "The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication, and the officer cannot recover compensation additional to the compensation fixed by statute for such expenses. But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make

> the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done."

In many instances there are no statutory provisions for certain county and state officers in what they shall have for expenses and office equipment, but we find that it has been the attitude of the Supreme Court that where there is an express grant of power it carries with it such implied powers as are necessary to carry out the purposes of the authority granted.

It is an established rule of construction that a long continued interpretation of statutes by public officers charged with their execution, while not controlling upon the courts, is entitled to special consideration. In Ewing v. Vernon County, 216 Mo. supra, l. c. 689, the court said:

> "Show me, said a great judge, what has been done under a deed and I will show you what the deed means. By the same doctrine, show me what by the concensus of what public official interpretation has been done under a statute, and I will show you what it probably means. Citing, Scanlon v. Childs, 33 Wisc. 663; Packard v. Richardson, 17 Mass. 144; Donaldson v. Allen, 213 Mo. l. c. 299 and 300."

In all of these cases the statutes have not been explicit on what should be furnished each county official, yet the courts have adopted a liberal view in the interest of efficiency of the offices and the officers in the performance of their duties.

It is our opinion that where the county court has not provided an office in the court house for a prosecuting attorney, he should not be required to furnish an office, stationery, fuel and postage out of his salary.

The Supreme Court said in Ewing v. Vernon County, 216 Mo., supra, l. c. 695:

> "Fees are the <u>income</u> of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo. * * * * * *
>
> It must not be expected that this court will throw down statutory safeguards for the protection of the

treasuries of the counties of this State, or in any way countenance looseness in their business affairs. But on the other hand we shall not construe our statutes so as to produce a harsh or ridiculous result and one not within the fair meaning of our laws.

The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

In 15 C. J., p. 505, it is said:

"In most jurisdictions it is held that a proper interpretation of the statutes authorizes the payment of necessary incidental expenses of the county officials, such as postage, stationery, mileage, and kindred expenditures from the county funds."

It is the opinion of this office that if the Prosecuting Attorney is not furnished an office in the court house or in some other building at the county seat by the county court where he might transact his official business, then he has a right to provide an office and fuel for same, and it is the duty of the county court to pay for same within reasonable limits.

It is our further opinion that stationery, postage and the telephone should be furnished by the county for his use in the transaction of the official duties of his office, and paid for out of county funds.

Yours very truly,

COVELL R. HEWITT,
Assistant Attorney-General.

Approved_____
Roy McKittrick
Attorney-General.

IN RE: Sale of beer by one person under permit issued to another.

May 20th, 1933

FILED
27
25

Hon. Roth H. Faubion,
Prosecuting Attorney,
Barton County,
Lamar, Missouri.

Dear Sir:

I have your letter of May 10th, 1933 requesting an opinion upon the following state of facts:

> " 'A', a resident of Kansas comes to Missouri, obtains a Beer license in the name of a resident of Missouri, who has not been near the establishment since it opened and who could not have been interested in the business because he is indigent and more or less of a tramp.
>
> Is this lawful under the new law?"

In this connection we call your attention to Section 13139-C which reads in part as follows:

> "It shall be unlawful for any person in this State * * * to sell any non-intoxicating beer without first having applied for, and secured, a permit from the food and drug commissioner authorizing * * * such * * * sale."

Section 13139-D makes this unlawful act a misdemeanor. Section 13139-Y provides that any person convicted of the violation of this act who shall be a holder of any permit, that his permit shall from and after such date of conviction be void and the holder thereof shall not for a period of one year after date of such conviction be entitled to any permit for any purpose authorized in this Act.

It is therefore the opinion of this office that the sale of non-intoxicating beer by a party having no permit to do so, under the facts and circumstances stated in your letter, is a violation of House Bill No. 23, commonly known as the Beer Act.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney-General

FER/mh

APPROVED:

ROY McKITTRICK
Attorney-General

ANTI-NEPOTISM: Commission of the township collectors.

7-26

July 12,1933

FILED
27
34.

Hon. Roth H. Faubion
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

Your letter of June 28th,1933, addressed to this office has been handed me for reply. You ask for an opinion in your letter which is as follows:

> "I have two opinions that I wish your office would render me.
>
> One is whether in the opinion of your office does the Anti-Nepotism law apply to a rural school district so that a director may not hire any of his close relatives as a teacher in said district.
>
> The other is as follows. The law states that collectors shall receive a certain per cent on moneys received and disbursed. In the case of a township collector does this mean that when he turns the money over to a successor that the act of turning over said money is a disbursement so that said collector would be entitled to his fee for making a disbursement?"

Our records show that you were written a letter on July 6th explaining the situation with reference to the first paragraph of your letter relating to the Anti-Nepotism law. There is a case pending in the Supreme Court at this time

directly in point which will decide the matter of a near relative to a director teaching in a school district.

Regarding the second paragraph of your letter, Section 12284 R. S. Mo. 1929, deals with books, papers and moneys of a retiring township officer. This section is as follows:

> "Whenever the term of office of any township officer shall expire, and others are elected or appointed and qualified as their successors, such successors shall, immediately after entering upon the duties of their office, demand and receive from his or their predecessors, or their legal representatives, all the books, papers and money under his or their control belonging to such office, and such books, papers and other property shall be delivered upon oath that the same are all the moneys, books, papers and other property under his control belonging to such township; duplicate receipts shall be given the outgoing officer for the same, who shall retain one copy and deliver the other to the township clerk, who shall charge the incoming officer with the value thereof."

In the first place we are at a loss to understand how a township collector could have on hand at the termination of his duties as township collector any money in view of the fact that he must make annual statements on the first Monday of March of each year. Also, under Section 12337 R. S. Mo. 1929, he is compelled to pay after deducting his commission all State and county taxes collected by him during the preceding month. Said section being as follows:

> "The township collector shall on or before the fifth day of each month, make out and file in the office of the clerk of the county court a statement, in writing, showing the amount of taxes collected by him for state, county, school, road, township and all other purposes during the preceding month, which statement shall be sworn to by such township collector before the county clerk or some other officer authorized to

administer oaths. On or before the tenth day in each month the township collector shall, after deducting his commissions, pay over to the county treasurer and ex officio collector all state and county taxes collected by him during the preceding month, as shown by the sworn statement required by this section, and take duplicate receipts therefor, one of which he shall retain and the other he shall file with the county clerk; and the county clerk shall charge the treasurer with the amounts so receipted for, to be accounted for at the annual settlement; and the township collector shall, in like manner, on or before the 20th day ofeach month, pay over to the township trustee an ex officio treasurer after deducting his commission all township taxes and funds of every kind belonging to said township, collected by him during the previous month, and take duplicate receipts therefor, one of which he shall retain and the other he shall deposit with the township clerk, and the township clerk shall charge the township trustee and ex officio treasurer with the amount so receipted for; and the township collector shall likewise make annual settlements with the township board on or before the twentieth day of March in each year. He shall receive a commission of two and one-half per cent. on the first forty thousand dollars collected; one per cent. on the next forty thousand dollars collected; and three-fourths per cent. on the remainder of all moneys collected by him. If any township collector shall fair or refuse to file the statement required by this section, or, having filed such statement, shall neglect or refuse to pay over to the county treasurer and ex officio collector the state and county taxes collected by him during the previous month, as shown by said statement, the county clerk shall, immediately

> after such default, and not later than the fifteenth day of the month in which such statement was or should have been made, certify such fact to the state auditor and the prosecuting attorney shall proceed against such defaulting township collector in the same manner as is provided by section 9928 for proceeding against defaulting county collectors and the said township collector shall forfeit his commission on all moneys collected and wrongfully withheld, and otherwise be liable to all the penalties imposed by said section 9928." * * * * *

From the foregoing section it would appear that if any township collector, if he were going out of office could readily settle and pay over any moneys which he might have on hand and deduct his commission therefrom, and therefore he would not have any money on hand to turn over to his successor; If he fails to do so the section sets out the procedure to compel him and he loses his commissions.

Lastly, Section 12316 R. S. Mo. 1929 reads as follows:

> "The county treasurer in counties adopting township organization shall be allowed a salary by the county court as at present provided by law, the county collector for collecting and paying over the same shall be allowed a commission of two per cent. on all corporation taxes, back taxes, licenses merchants' tax and tax on railroads, and five per cent. on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: Provided, he shall receive nothing for paying over money to his successor in office."

This section deals with the funds on hand by county collectors in counties having adopted township organization. It is the opinion of this department that this section would also be applicable to a township collector.

It is the further opinion of this office that the township collector would not be entitled to any commission for any moneys he might turn over to his successor, that the same is not a disbursement within the meaning of the law.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

(ACTING)
Attorney General.

OWN:MM

FEES: Under Senate Bill No. 124 funds collected prior to Bill going into effect not required to be transmitted to State Treasury. At stated intervals means with reasonable promptitude. Certain exceptions in the Bill.

Sec 1 SB 124 Laws 1933

7-26

FILED
27
34

July 13, 1933

Honorable Eugene Fair
President State Teachers College
Kirksville, Missouri

Dear Mr. Fair:

This Department acknowledges receipt of your letter dated July 11, 1933, as follows:

> "I have been asked as secretary of the Teachers College group of presidents, to write you and ask whether we should need to turn in the fees from the various State Teachers Colleges which we have collected previous to the going into effect of the "Fee Bill" July 24; also to ask you when we should begin to turn in the moneys which we collect after July 24.
>
> One of our number is also taking the matter up with Treasurer Nacy and State Auditor, Smith, but we thought that you were the proper authority to consult about when we should begin complying with the new law. We have every desire to comply with the law, but hardly know when to begin to do so.
>
> I will thank you for an opinion on this matter, and I will relay your opinion on to the other presidents".

We assume your letter refers to Senate Bill No. 124 which provides as follows:

"Sec. 1. All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly".

We are of the opinion that Senate Bill No. 124 applies to and effects fees, funds and moneys received after and if and when such Bill goes into effect, otherwise the Bill would be retrospective in its operation.

The official authorized to receive the moneys affected by the above Bill is required at stated intervals to place such money in the state treasury. As to what is meant by the words "at stated intervals" or as to who shall say what is to be considered stated intervals, the Bill is silent. We think the words "at stated intervals" should be construed as meaning with reasonable promptitude and as to what would be reasonable promptitude might depend somewhat on the amount of the collections of the department or institution of the state required to remit same. However, the State Treasurer being in charge of the State finances, is the one best qualified to apply this term to the particular institution involved.

You will note that from the operation of Senate Bill No. 124 are certain exceptions, for instance if your college receives moneys from gifts, trust funds, appropriations or funds from student activities, farm or housing activities, when such activities are in connection with your school, you would not be required to place such money in the state treasury.

Yours very truly

GILBERT LAMB
Assistant Attorney General,

APPROVED;

_____
Acting Attorney General

GL:LC

STATE TEACHERS COLLEGE SWIMMING POOL: Can be promoted by who, and under what circumstances?

FILED
27

7-29

July 28, 1933

Honorable Eugene Fair, President
Northeast Missouri State Teachers College
Kirksville, Missouri

Dear Mr. Fair:

Your request for an opinion from this office dated July 5, 1933, is in words and figures as follows:

> "We are contemplating somewhat, building an indoor swimming pool on the campus of this college. Of course, we have no appropriations to do it with. However, the students who collect each quarter a student activity fee, have decided that they would like to devote a part of this each quarter to the payment for a swimming pool. I want to ask your advice about a number of matters in this connection.
>
> Am I right in assuming that as a State Teachers College through our Board of Regents, we would not be allowed to borrow any money to float this project even though we had ascertainable means to do it. I am assuming that that is right. This raises then, the question as to how the students might go ahead and do it themselves. Would we be permitted, providing we were able to get some help from the United States government, to build this pool on our campus here, or would there be a necessity for deeding the ground on which it is built, to the Student Council, with a promise from them that as soon as the pool is paid for they would deed it to the state?
>
> Then I should like to submit to you too, the further following questions:
> 1. If the Student Council, as a corporate body, holds title to the building and grounds, will they have to pay a general property tax to local and state authorities?

2. If the students sell season tickets or other swimming privileges to outsiders in order to defray part or all of the cost of maintenance, will the project be classed as an amusement and be subject to an amusement tax, as such?
3. If it is classed as a privately owned amusement would the amusement tax be assessed
   (a) against the project as a whole,
   (b) against all student and outsider's fees which are applied to the pool
   (c) only against the fees charged outsiders

Bearing in mind the spirit of the project, I can see no sensible reason for any kind of a tax with one possible exception -- 3¢ --a percentage of fees charged outsiders for pool privileges."

You are right in your assumption stated in paragraph two of your letter. The Board of Regents of your institution has only such powers as are specifically set out in the statutes. Article 18, of Chapter 57, R. S. Mo. 1929 consists of several sections of law creating the State Teachers Colleges of this State, and providing for the administration and management of the same. Upon a careful reading of said article we have failed to discover any authority for the Board of Regents to borrow money, or pledge the real estate of the college for the purpose of building a swimming pool. It follows then that the Board cannot deed the property to the Student Council for such a purpose with an understanding that it is to be deeded back. This would be indirectly pledging the real estate to satisfy labor and material liens. The Board of Regents cannot do indirectly, that which they are not authorized to do directly.

Answering the third paragraph of your request, of course the Student Council could purchase land in their own right, separate from the school property. They could incorporate if they prefer. Should said property be operated exclusively for educational purposes they would not have to pay a general property tax on the same. Whether or not a swimming pool owned by the Student Council can be said to be owned and operated exclusively for educational purposes, thereby coming within the constitutional tax exemptions, depends altogether on the facts. The property may, or may not be exempt. Our

answer would be a mere guess and speculative, the courts only could establish the answer in the final analysis. The whole issue would be to determine what the phrase "educational purposes" includes.

This State has no amusement tax. We are not familiar with the provisions of the Federal Tax Laws. If you present your question to the Collector of Internal Revenue on this point, they will be in a position to answer your questions.

The Student Council, upon authority from the Board of Regents, could build a swimming pool on the campus, out of the student activity fees, but the real estate would not be subject to any construction liens, and the title to the pool would vest in the State of Missouri free and clear of all the imcumbrances. One loaning money on the project could choose to look to the Student Council for the satisfaction of the indebtedness, but not to the property.

If we have not answered your query you may call upon us further.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

SECURITIES DEPARTMENT: Sale of the whole interest in a mining lease is not a certificate of interest under Sec. 7724, R.S. Mo. 1929.

October 17, 1933.

10-23

FILED
27
52

Hon. Eugene A. Farris,
Prosecuting Attorney,
Ray County,
Richmond, Missouri.

Dear Sir:

This department is in receipt of your letter of October 2, 1933, in which you request an opinion from this office as to the following state of facts:

> '"I desire to submit hereby a question for your official opinion. The question submitted for your opinion is as follows:
>
> Would the sale of the whole interest to a mining, gas or oil lease be determined, under subdivision (c) of Section 7724, Chapter 40, R.S. Missouri 1929 to be a 'certificate of interest' in such lease so as to be a 'security'? Or, reversing the proposition, would not an undivided interest in such a lease instead of the whole lease be the sole and only right in such a lease to be denominated a 'security', under said subdivision of said section.
>
> I have been asked for my official opinion upon the matter, and it is my opinion that where the whole of such a lease would be sold it would not come under the provision of said subdivision of said question so as to be determined to be a 'security'. Am I right or wrong?'"

Section 7725, R.S. Mo. 1929 provides as follows:

> "No person, either acting personally or through an agent, or as agent of another, shall on and after the date when this chapter goes into effect sell any security to any person in the State of Missouri contrary to the provisions of this chapter."

Section 7724, R.S. Mo. 1929, subsection (c), defines the word "security" as follows:

> "'The term 'security' or 'securities' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, interim certificate or receipts, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate or any transferable share, investment contract, or beneficial interest in or title to property or profits, pre-organization certificate or receipts, or any other instrument commonly known as a security.'"

A certificate is defined in Webster's International Dictionary as "a certified statement; a written testimony to the truth of any fact." The word "interest" is defined as being "a right, title, share or participation in a thing; specif., participation in advantage, profit and responsibility."

A certificate of interest, therefore, is a written testimony to the truth of a right, title, share or participation in a thing.

It was the intention of the Legislature in providing for the Securities Department under Chap. 40, R.S. Mo. 1929 to regulate the sale of securities. That is, interests in projects as distinguished from an isolated sale of the whole. This intention is made apparent from a consideration of Sec. 7727, R.S. Mo. 1929, providing for transactions exempt from this chapter. Sub-section (c) of Sec. 7727, R.S. Mo. 1929 provides as follows:

> "In an isolated transaction in which any security is sold, offered for sale, or delivery, by the owner thereof, or by his representative for the owner's account, such sale or offer for sale or delivery not being made in the course of repeated and successive transaction of a like character by such owner, or on his account by such representative, and such owner or representative not being the underwriter of such security."

In view of the foregoing, it is the opinion of this department that under the facts as stated in your letter, the sale of the whole interest to a mining, gas or oil lease is not such a "certificate of interest" in such lease as to be within the provisions of Sec. 7724, R.S. Mo. 1929, sub-section (c).

In connection herewith, we wish to say that the Securities Department of the State of Missouri concurs in this conclusion.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

COUNTY FUNDS: FEDERAL HOME OWNERS' LOAN BONDS AS LAWFUL INVESTMENTS FOR FUNDS OF COUNTY ACCUMULATED TO MEET FUNDED INDEBTEDNESS.

12118-12123 RS Mo 1929

12-20

December the Fifteenth

1933

FILED
27

Honorable Eugene A. Farris,
Prosecuting Attorney Ray County,
Richmond, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of September 8, 1933, such request being in the following terms:

> "Our County has a first mortgage on some real estate here. The owner can secure a loan from the Home Loan Dept. of the Government for the amount of his indebtedness, if he can use the Gov't bonds to pay off the County?
>
> May our County Court accept as payment of their loan, these gov't securities instead of cash. They are willing, if this is legal. I don't just know the character of paper the Gov't would issue. There are several in this County would like to do likewise."

According to the Revised Statutes of Missouri of 1929 funds accumulated by counties in Missouri for the repayment of county indebtedness may be invested in either of two ways, the first being in real estate mortgages under R. S. Mo. 1929, Sec. 12117-12122, and the second being by investment in certain bonds under Sec. 12123.

The first of these methods for present purposes can probably be sufficiently described by the language of Section 12118, which provides as follows:

> "When any such money shall be loaned by the county court, they shall cause the same to be secured by a mortgage in fee on real estate, free from all liens and encumbrances, within the county, of the value of double the amount of the loan, with a bond and personal security in addition thereto; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed in property in an amount equal to that loaned in addition to all debts for which he is otherwise liable, and property exempt from execution."

The second method is provided for in Section 12123, as follows:

> "In case the county court of any county, having such money as is referred to in the foregoing sections of this article, shall

deem it best, such court, instead of loaning such money in the manner hereinbefore provided for, may invest the same either in purchasing, on the best terms obtainable, bonds of the United States or of the state of Missouri, said bonds to be held in trust for the fund or funds to which the money applied to their purchase belonged, and shall be so expressed in the public records of the county."

The single issue, therefore, is whether or not bonds issued by the Home Owners' Loan Corporation would come within one or the other of the above statutory qualifications.

The Home Owners' Loan Corporation was created by the Home Owners' Loan Act of 1933, approved June 13, 1933. Briefly summarized the corporation created by such act is to function in the following manner, the figures and letters given in such description being the sections and subdivisions of the act. The corporation is governed by the Federal Home Loan Bank Board which is authorized to issue capital stock in the amount of $200,000,000.00 which is to be subscribed for and paid for by the Secretary of the Treasury of the United States, the money for such payment to be advanced to the Secretary of the Treasury by the Reconstruction Finance Corporation. (Section 4 (b)). The corporation is authorized to issue bonds which are the bonds in question in your request in an amount not to exceed $2,000,000,000.00, such bonds to be paid for either by cash or by first mortgages on real estate, such bonds being guaranteed as to interest only by the United States (Section 4 (c)). The bonds issued for real estate mortgages may be in amounts up to 80% of the value of the property secured by such mortgages, and also the corporation is authorized to make advances in cash to pay taxes and assessments on the real estate secured by such mortgage to meet the incidental expenses of the transaction, and to pay as much as $50.00 in cash on each mortgage to the holder thereof (Section 4 (d)), and the corporation is authorized to employ and pay as part of its expenses various agents, employees, officers and attorneys (Section 4 (j)). The bonds issued by the corporation have a maximum eighteen year maturity. (Section 4 (c)).

The above description of the general structure, organization and authorized operations of the Home Owners' Loan Corporation has been given to show that bonds issued by it could not be considered to fall within the first possible class of investments for county funds, i. e., real estate mortgages. In the first place, even assuming that a bondholder would have a direct interest in all of the real estate mortgages held by the corporation, such real estate mortgages could be in amounts up to 80% of the total value of real estate secured thereby whereas Revised Statutes of Missouri 1929 Section 12118 provides that real estate mortgages cannot exceed 50% of the value of the property secured thereby if they are to be available as investments for county funds. Furthermore, the requirements of Section 12118 as to the land secured by such mortgage and the person whose personal security is engaged being within the county could not be complied with by the bonds in question here because the mortgages held by the Home Owners' Loan Corporation will be secured by land all over the United States and the persons whose personal security is behind the mortgages will be likewise widely distributed beyond the confines of the county. Furthermore, although this would not necessarily be a difficulty

Section 12117 contains the following proviso "Provided, that no loan shall, in case of loan of sinking fund, extend beyond the maturity of the indebtedness said sinking fund is provided for and intended to pay" and it might be very likely that the eighteen year maturity of the bonds would extend considerably beyond the maturity of sinking fund indebtedness of the county. For these various reasons it seems plain that although the Home Owners' Loan bonds are in a sense real estate mortgages in that the assets behind them are entirely cash and real estate mortgages, nevertheless they are not real estate mortgages in the sense that they could qualify as an investment of county funds in real estate mortgages under Revised Statutes of Missouri 1929, Section 12117-12122.

The second and remaining consideration is whether or not the Home Owners' Loan bonds are "bonds of the United States" within the meaning of Section 12123. These bonds are obligations of the Home Owners' Loan Corporation by which they are issued, and the United States is not liable for the principal thereof, but in Section 4 (c) of the act it is provided that the bonds "shall be fully and unconditionally guaranteed as to interest only by the United States." Thus, as far as interest is concerned, these bonds are bonds of the United States in the sense that the United States undertakes to pay such interest, but there is no undertaking anywhere in the act by the United States to pay the principal and, therefore, such bonds cannot be considered as bonds of the United States in the sense that Liberty Bonds and treasury certificates are bonds of the United States.

The bonds in question have some features in common with treasury certificates and other direct obligations of the United States. Thus they are exempt both as to principal and interest from all state and federal taxation (Section 4 (c)), but bonds of many other government created corporations have been declared to be federal instrumentalities and exempt from taxation without ever being regarded as bonds of the United States so that being exempt as a federal instrumentality from taxation would hardly seem to make an obligation a bond of the United States which would not otherwise be such (see Act of Congress of July 17, 1916, c. 245, Section 26, 39 Stat. 380, 12 U. S. C. A. Section 931, providing as follows:

> "Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section 761 and section 781 of this chapter. First mortgages executed to Federal land banks, or to joint-stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation."

Other similarities between these bonds and treasury certificates or

Liberty Bonds are their acceptability at par as collateral security against deposits of public moneys with depositaries by the Treasury Department of the United States under Treasury Department circulars Nos. 92 and 176. Likewise, the Reconstruction Finance Corporation will accept such bonds at 80% of par as collateral security for loans, Jesse H. Jones, chairman of the Reconstruction Finance Corporation stating in a letter under date of July 22, 1933 to the chairman of the Home Owners' Loan Corporation that "it is needless to add that the determination to make loans of so great a percentage against these bonds has been reached only upon the conclusion that your bonds should be treated as prime collateral." Likewise, the trustees of the Postal Savings System have determined to accept as security for deposit of postal savings funds these bonds at their market value, and the Comptroller of the Currency has ruled that these bonds may be acquired and carried on the books at their actual value by national banks (see Preliminary Proof No. 1 of Home Owners' Loan Corporation, Department) of Commerce Building, Washington, D. C.) Presumably, the above rulings by various departments of the federal government treating the Home Owners' Loan Corporation's bonds as being the same class of security as United States bonds is somewhat persuasive toward regarding the Home Owners' Loan Corporation's bonds as bonds of the United States for investment and security purposes, and if this opinion were being rendered to a department of the federal government it might possibly be necessary to reach a contrary conclusion from that which has been reached by us. However, the Missouri statutes use the words "bonds of the United States", and a bond the principal of which is not in any sense an obligation of the United States cannot by any reasonable construction of language be regarded as a bond of the United States within a statute which is prescribing strict requirements for investments of public funds.

For the foregoing reasons it is our conclusion that bonds of the Home Owners' Loan Corporation issued under the act of Congress approved June 13, 1933, known as the Home Owners' Land Act of 1933 would not be a proper legal investment for money in the hands of a county collected for the purpose of constituting a fund for the repayment of county indebtedness.

Yours very truly,

EDWARD H. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

Bank Moratorium - Waiver of Deposits. ✓ 6

February 10, 1933

FILED
28

Hon. O. H. Moberly,
Commissioner of Finance,
Jefferson City, Missouri.

Dear Mr. Moberly:

As far as moratoriums in Missouri are concerned, at the present time their status is either that of a voluntary agreement or an arbitrary ruling without legal authority.

In the event such agreement is made by a part of the depositors of the bank, the remainder of the depositors are not bound, and upon the opening of the bank, the depositors who did not sign a waiver or otherwise become parties to the agreement for a moratorium are not bound and would be entitled to demand and be paid the full amount of his or her deposit upon demand.

Very truly yours,

Gilbert Lamb
Assistant Attorney-General

GL/N

Approved:

Roy McKittrick
Attorney-General

Right of non-consenting depositors to draw his funds if bank restricts payment of checks.

February 15, 1933.

FILED
28

Hon. O.H. Moberly,
Commissioner of Finance,
Jefferson City, Mo.

Dear Sir:

You state in your letter of February 9 as follows:

"A complaint has reached this Department from a depositor of a bank to the effect that the bank has placed a restriction on the withdrawal of deposits and has refused to honor his checks on the bank, when the amount of the check exceeds the amount he is permitted to withdraw under the restriction.

The depositor insists that this Department force the bank to pay the full amount of his deposit and I will appreciate an opinion from your Department as to the action this Department is to take in the matter."

Your question is what action your department shall take. If check is drawn and signed by depositor, made payable to himself and not stale and depositor personally presents the check and at the time of presentation he has sufficient funds to his credit with the bank to pay same in full and bank makes no objection to payment of check other than that it has placed a restriction on withdrawal of deposits, and check is presented during business hours and depositor offering check has not consented to bank's restriction on withdrawal of deposits, it is the legal duty of the bank to pay the full amount of the check at once to the depositor.

And assuming conditions all exist as set forth in the preceding paragraph hereof it is my opinion you should immediately notify the bank it must at once pay the depositor's check in full when presented, and you should without delay notify the depositor you have written bank it must pay his check immediately.

You should also ask both bank and depositor to immediately notify you whether or not the bank acquiesces in or refuses to comply with your direction herein.

Very Respectfully yours,

APPROVED:

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COMMISSIONER OF FINANCE: Expenses of Department chargeable to closed institutions

5301-7-24 RSMo 1929

March 10, 1933

FILED
28

Honorable O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

We acknowledge receipt of your letter dated March 10, 1933, as follows:

"The enclosed copy of my letter of March 2nd, addressed to Mr. W. F. Keyser, Secretary of the Missouri Bankers Association, his reply thereto and the opinion of the Attorneys for the Association are largely explanatory.

The last paragraph of my letter to Mr. Keyser I am sure explains why I asked for an opinion from the Attorneys for the Association prior to seeking an opinion from you. The fact is that, before taking any action whatever in this matter, I wanted to be sure of the cooperation of the Missouri Bankers Association. I make this statement in the form of an explanation as well as an apology for my action in seeking the opinion herein referred to prior to requesting an opinion from you.

The only source of revenue of any consequence for the benefit of the office expenses of this Department has heretofore been the fees derived from bank examinations. Under present conditions and the conditions that have existed for some time past the attention of practically our entire force of Examiners is required in matters of bank liquidation. It seems only proper that such institutions should bear their proportionate part of the expenses of the office and, having the approval of the Missouri Bankers Association and the opinion of its Attorneys, I hope I may also receive the approval of your Department to this action, which seems necessary if the Department of Finance is to properly function in the future.

Your immediate attention to this matter will be greatly appreciated".

Section 5301, Revised Statutes Missouri, 1929, requiring the examination of banks and trust companies in this state by the Commissioner of Finance, provides that the Commissioner shall at least once in each and every year, in person or by deputy or by examiners appointed by him, examine every bank and trust company organized and doing business in this state, as well as every private banker who is required to report to the Commissioner and every other corporation required to report to you; also, the Commissioner through his deputies or examiners, has the power to examine banks, savings and deposit institutions, trust companies, private bankers and other corporations, whenever, in the judgment of the Commissioner it may be deemed necessary or expedient so to do. The above section further empowers the Commissioner to make such special investigations as he may deem necessary to determine whether any individual or corporation has violated any of the provisions of Chapter 34. Section 5301 further providing:

> "Such examination may be made and such inquiry instituted or continued in the discretion of the commissioner after he has taken possession of the property and business of any such corporation or banker, until it shall resume business or its affairs shall be finally liquidated in accordance with the provisions of this article. The expense of every annual or special examination shall be paid by the bank, private banker, savings and safe deposit institution, trust company or such other corporation examined in such amount as the commissioner shall certify to be just and reasonable, and for the purpose of this section such institutions are hereby denominated banks".

The above quoted part of Section 5301 clearly authorizes the commissioner to continue the examination of the affairs of any institution entitled to be examined by him, after he has taken possession of the property and business of such institution and which examination may continue until such institution shall resume business or until its affairs are finally liquidated, which expressly authorizes the commissioner to remain in charge of a closed bank and continue his investigation and examination until the liquidation thereof has been completed. The authority above referred to precedes the provisions in Section 5301 for the payment to the commissioner of his expenses and fees. It is further provided in Section 5301:

"The aggregate sum collected from the banks, private bankers, savings and safe deposit institutions, trust companies and other corporations shall be reckoned upon a basis sufficient to cover the entire expenses of the department of banking, including salaries of officers and employees, traveling expenses of the commissioner, his deputy and examiners, and the preparation of the reports and all other expenses made necessary by this chapter. Any special expenses incurred and services performed on account of any such corporation or banker, or on account of any foreign corporation or its agency to which this chapter is applicable, outside of the expense of any annual or special examination shall be charged to and paid by the corporation or banker for whom they were incurred or performed".

We think the last quoted part of Section 5301, taken in connection with the first quoted part thereof, authorizes the Commissioner of Finance to charge against and collect from a bank in liquidation the charges provided for in the last quoted part of Section 5301.

Section 5323 Revised Statutes 1929, authorizes the commissioner to appoint one or more special deputy commissioners as agent or agents to assist him in liquidating the business and affairs of closed banks or trust companies and that the commissioner may delegate such special deputy commissioners to perform such duties connected with such liquidation as the commissioner may deem proper and the commissioner may employ such expert assistants and counsel as he may deem necessary in the liquidation and distribution of the assets of the closed institutions. No reference is made in Section 5301 to special deputies, the evident purpose in authorizing the commissioner to appoint a special deputy was to enable the commissioner to delegate to some other person such duties as it was not practical for the commissioner or his regular office force to perform in connection with the liquidation of a closed bank or trust company.

Section 5324 authorizes the commissioner to pay out of the funds of a closed bank or trust company being liquidated by him the expenses of liquidation. There is no reason to say or believe that this expense would be limited to the expense of the special deputy or such force as he might necessarily employ in the bank, because it is further provided in Section 5323 that the Commissioner shall fix and pay the compensation of special deputy commissioners, assistants and counsel and other employees appointed to assist him in such liquidation, which

doubtless refers to the appointments entitled to be made under Section 5323, and further, the provision for the payment of such special deputies, assistants and counsel is in addition to the expenses of liquidation theretofore provided for in Section 5324.

We are of the opinion you have the authority to pay out of the assets of a closed institution, being liquidated by you, its fair proportion of the expense of your office and appointees made necessary by the liquidation of such institution.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General

GL:LC

NEPOTISM ... Right of State Finance Commissioner to appoint cousin as deputy commissioner.

FILED
28

March 20, 1933

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter dated March 18, 1933, in which you state and inquire as follows:

> "Confirming our conversation in the corridor this morning, in the case of the Bank of Lucerne, Lucerne, Missouri, which bank voluntarily closed a month or more ago, the only applicant for the position of Special Deputy Commissioner to liquidate the institution is an own cousin of mine, who presented with his application a petition signed by a number of the depositors of the bank.
>
> The question is whether I can make this appointment without violating the provisions of the Nepotism Act. Since the salary of Special Deputy Commissioner is paid by the bank and not by the State, it may be that this appointment would not come under the Act referred to.
>
> I shall be pleased to have your written opinion on this matter at your earliest opportunity, as we desire to place a liquidator in charge of this bank immediately."

Section 5282, R.S.Mo.1929, creates the State Department of Finance in which it is provided the same shall be under the management and control of a chief officer who shall be called the "Commissioner of Finance". You have qualified for and are now acting in the capacity of Commissioner of Finance of the State of Missouri.

Section 5323, R.S.Mo.1929, among other things provides:

> "The Commissioner may, by certificate, under his hand and official seal, appoint one or more special deputy commissioners as agent or agents to assist him (the Commissioner) in liquidating the business and affairs of any corporation or private banker in his possession",

and further in the same section:

"He (the Commissioner) may, from time to time delegate such special deputy commissioner to perform such duties connected with such liquidation as he may deem proper."

Section 13 of Article 14 of the Constitution of Missouri provides:

"Nepotism, by any officer or employe, forbidden--forfeits office. Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Undoubtedly, you are a public officer of the State and since the special deputy commissioner you are entitled to appoint is to assist you in carrying out the duties and obligations of your office, one of which is to liquidate insolvent banks, then the service which the special deputy commissioner would render would be a service to the State in the same manner and sense as you serve the State in the discharge of your duties.

While it is true that the special deputy commissioner would be paid out of the assets of the closed institution, yet that makes no difference because the prohibition of the Constitution is against the appointment of a relative within the prohibited degree of blood or consanguinity.

You do not say whether the applicant for special deputy commissioner is related to you by blood or marriage, but that would make no difference as the appointment is prohibited by the Constitution and you would subject yourself to having your office forfeited should you make the appointment.

Yours very truly,

GILBERT LAMB,
Assistant Attorney General

APPROVED:

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Attorney-General

GL...iac

COUNTY COURTS: Effect of closed banking institutions on payment of funds appropriated by County Court.

Dec 9874 - 1585 RS Mo 1929

April 5, 1933

FILED
28

Honorable Robert C. Fields
Prosecuting Attorney
Lebanon, Missouri

Dear Mr. Fields:

We acknowledge receipt of your letter dated March 25, 1933, as follows:

"I have been asked by the County Court of this county to obtain an opinion from your office relative to the following statement of facts:

In January of 1930, the Bank of Conway failed. In this bank the county had approximately $35,000.00, this bank having been a county depository for some time. The current fund, the court house bond fund, the numerous school funds, etc. had balances on the Treasurer's books at this time and while it was all carried in the one account it belonged to the various funds. The Treasurer at that time did not charge up as a loss any part of the amounts that the Treasurer's books showed that each fund had therein. Another depository had been opened about two years prior to the failure of the bank as this bank at Conway did not receive a contract as a depository for all the county's money during the period of two years before the crash. The books of the Treasurer's office were left as they were before the bank failed and this practice was followed. If a school district had $200.00 on the Treasurer's books when the bank failed, he permitted the district to write warrants and the money to pay these warrants was taken out of the new depository. The same practice was followed as to all accounts except the current fund. With the current fund he would call warrants up to within $35,000.00 of the amount that the Treasurer's books showed that was credited to the current fund and as a result of this practice, the current fund was made to stand the entire loss occasioned by the bank's failure.

The Court desires to know the procedure that they should take to remedy this situation. They desire to know if they should under the law charge up to each fund the proportionate amount that that fund should have borne of the loss?"

Section 9874 Revised Statutes Missouri, 1929, commands the County Court to appropriate, apportion and subdivide the county revenue collected and to be collected, for the purposes set out in Subdivisions 1, 2, 3, 4 and 5 of that Section.

This action is mandatory on the County Court.

State ex rel v. Lee, 262 S. W. 344, 345.

Section 9985 in the first part thereof is a re-statement in substance of Section 9874, Section 9985 further providing that the money so appropriated, apportioned and subdivided by the County Court should be held to be a sacred fund for the respective purposes for which it has been subdivided and the County Court shall have no power to divert the sums appropriated from the purposes for which they were appropriated, nor permit the funds thus set apart to be drawn from the Treasurer of the county except by warrants issued by order of the court on the respective funds.

Section 9986 directs the County Treasurer to separate and subdivide the revenues of the county in his hands and as they come to his hands, in compliance with the order of the court provided for in Section 9874 and the provisions of Chapter 59, the Treasurer being authorized to pay out such revenues only on warrants issued by order of the County Court on the respective funds so set apart and subdivided and not otherwise, and the Treasurer shall keep a separate account with the County Court of each fund, which fund shall be known and designated by the Treasurer by the names which the funds are referred to in Section 9874.

Section 9986 makes it a misdemeanor for the Treasurer to fail or refuse to perform the duties required of him by the provisions of Chapter 59.

Sections 12139, 12169 and 12170 make further provision that the Treasurer shall pay county revenue only on warrants issued by the County Court and Section 12139 provides that the warrant shall state on what fund the same is drawn and that the warrant should be paid out of that fund.

Neither of the separate funds referred to in Section 9874 has preference or is entitled to priority as to the receipt of county funds over any other of the funds mentioned in Section 9874.

State ex rel v. Appleby, 136 Mo. 408, 413.

State ex rel v. Henderson, 160 Mo. 190.

In the event there is a surplus in one fund after its purposes have been exhausted, such surplus may be transferred to some of the other funds for which appropriation was made by the court.

Andrew County ex rel v. Schell, 135 Mo., 317.

Obviously, it was the duty of the County Court in your county to make the appropriations and apportions as provided for in Section 9874; likewise it was the duty of the County Treasurer to carry the names of such funds on his books with the respective amounts appropriated therefor by the court. If there was not sufficient revenue collected to satisfy the appropriation and apportionment made for all of the funds, then the amount collected should have been pro rated among the different funds in the amount that the respective sums appropriated bore to the whole amount collected. The Treasurer was only entitled to pay the money in his hands out on the warrants of the County Court and the warrants should have designated on what funds they were drawn, and as issued and drawn by the County Court the Treasurer should have charged the same to the respective funds on which such warrants were drawn and charged to that fund only. If one of the designated funds became exhausted it could only be replenished by further collections of revenue or by the transfer of a surplus from one of the other funds to the exhausted fund.

The foregoing would apply whether any money of the county was tied up in a closed banking institution or whether it was not.

As we understand your letter we think the foregoing answers your inquiry.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

Banks, preferred claims, Senate Bill # 293. Laws 33: √

April 22,1933

FILED
28

Mr. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of April 19, 1933, which reads as follows:

> "We are having many demands for release of funds in banks operating on a restricted basis, which funds would probably be classified as preferred claims in case the bank were being liquidated.
>
> Heretofore we have refused to consider any preferences and I am wondering whether or not we are within our legal rights. I am enclosing herewith a letter that will give you some idea of the several demands made upon this department in this connection.
>
> An early reply will oblige."

The enclosures show that a letter on April 7th was written to you telling the status of a deposit in the Sikeston Trust Company and that at the March term 1933, the Court ordered this sum paid to the receiver.

You answered this letter on April 11th telling him th t the bank was on a restricted basis and that you could make no exception in this case.

Your letter was answered on April 15th wherein the writer, Ray B. Lucas, Attorney, disagreed with your position and filed a motion in the Circuit Court asking that said fund be turned over as the court previously ordered. The question presented being whether or not preferred claims or this claim, if it may so be classed, may be restricted by you.

Senate Bill 293 provides among other things the following:

> * * * and to authorize, direct and regulate the payment of any portion of the deposits in demand accounts as may be deemed necessary and expedient; * * * *

Senate Bill No. 293 gives you with the approval of the Governor, broad powers and it is a matter of discretion with you just so long as your discretion exercised is not unreasonable.

It is our opinion that you are within your legal rights to refuse to consider any preferences if you adopt that policy. Of course, if the court finds in this case that even though this bank is on a restricted basis that said fund should be paid, of course you will have to comply with its order, as said order would be authority for its payment.

We are returning enclosures forwarded in your letter.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

J H:HH

Banks, Newspaper Notices discussed, Section 5333 R. S. Mo. 192[illegible]

April 22, 1933

FILED
28

Mr. O. N. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

Your letter of April 19th enclosing letter from Judge William T. Jones addressed to you received. You request an opinion concerning the questions asked therein. The letter referred to in your letter reads as follows:

"This question has arisen in connection with the liquidation of two of the banks which I am handling here:

The Deputy in charge started the publication of his notice to creditors more than 90 days before the last date fixed in the notice for presenting proofs of claims, as required in Section 5333 R. S. Mo. 1929. He arranged for the insertion of these notices in three different newspapers, (St. Louis Globe-Democrat, St. Louis Post-Dispatch, St. Louis Star and Times), using them alternately, and proceeded on that basis to this date, when I have been advised of this arrangement.

I had interpreted the provisions of Section 5333 as contemplating that this notice would be inserted in one newspaper continuously over the period provided for in this section. The question is, will the insertion of this notice in different newspapers once each week for three consecutive months, the first insertion being published more than 90 days before the last date fixed in the notice, for presenting of claims, be a compliance with the requirements of this statute?

I felt that I had better submit this to you and have you get an opinion from the Attorney General's office on the question.

If you concur in this view I will thank you to submit the question to the Attorney General's office and let me have his ruling as soon as possible."

The facts as we gather from the above being that the insertions of the notice were alternated each week between three newspapers. In other words, one week said notice would appear in one newspaper and the second week in another newspaper and the third week in another newspaper and the fourth week would revert back to the first newspaper etc. The notice did not continue in one newspaper weekly during the entire period of three consecutive months. The question asked being whether or not said insertions of notice as aforesaid, meet the requirements of Section 5333.

Section 5333 R. S. Mo. 1929 reads in part as follows:

> "* * * He shall also cause said notice to be inserted weekly in such newspaper as he may direct for three consecutive months the first insertion thereof to be published more than ninety days before the last day fixed in said notice for presenting proof of claims." * * *"

In the case of Woods v. Gainsville Bank et al. 11 S. W. (2) 58, the Kansas City Court of Appeals held that the publication of the notice as required by this section must be strictly complied with. In this case, a notice was published in a newspaper for the full time as required by said section with the exception of one week, and the court held that the missing of the publication from that newspaper for that week did not meet the statutory requirement of weekly for three consecutive months.

This case was cited and discussed in the case of State vs. Schroetter, 30 S. W. (2) l.c. 833, wherein the court said:

> "Section 11716, Rev. St. 1919, (Section 5333 R.S. Mo. 1929), providing that the commissioner should notify all persons to present claims within four months, is a special statute of limitation, and in order for the statute to run, the requirements as to giving notice must be followed strictly. Mann v. Bank of Greenfield (Mo. Sup.) 20 S. W. (2) 502,508. So strictly must the law be complied with that the Kansas City Court of Appeals in the case of Woods v. Gainsville Bank et al., 222 Mo. App. 957, 11 S. W. (2) 56, in construing the above section of the statute, held that the law was not complied with in the publication of notice when the published notice

> was omitted from the paper one week of the time it was to run, and the court so held although the claimant had actual knowledge that the bank had closed.

The case of State ex rel. Hennesmeyer v. Reid et al. 134 Mo. App. 582, concerns a notice wherein the statute provided that same should be published for four consecutive weeks, and with the added provision for such other notice as may be directed by the county court. The county court ordered that said notice be published in three newspapers for four consecutive weeks. Two of the newspapers published said notice for four consecutive weeks and one of the newspapers published it for three consecutive weeks. The court held that although it was necessary to only have the notice published in one of the newspapers yet by the county court ordering the publication in three newspapers the fact that one of the newspapers did not carry the insertion as required, namely, four weeks instead of three, that said notice was invalid, although two of the three notices were published as required.

We call your attention to Section 13775 Laws of Mo. 1931, p. 303, relative to public notices which has this provision.

> 'Provided that when a public notice required by law to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week.'

We are of the opinion, from the foregoing, that said notice, when directed to be inserted in a newspaper by the commissioner must be published continuously in the same newspaper weekly for three consecutive months, the first insertion being published more than 90 days before the last date fixed in the notice for presenting of claims.

We are of the further opinion that the notices inserted in three newspapers alternately does not meet the requirements of Section 5333, and said notice is invalid.

We are returning Judge Jones' letter as you requested.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

J.H:MM

BUS AND TRUCK LAW: Trucks not for hire nor common carriers do not have to have license to deliver from Iowa into Missouri.

September 12, 1933.

9/12

FILED
25
43.

Hon. W.R. Fimmen,
County Attorney,
Davis County,
Bloomfield, Iowa.

Dear Sir:

The office of the Attorney General of the State of Missouri acknowledges receipt of your letter of August 12, 1933, which is as follows:

> "I have had considerable complaint in regard to Missouri Officials picking up Iowa trucks for various violations, and I am now writing you in regard to a client of mine who is the owner of an Ice and Bottling Company. They are selling their products in Missouri and are delivering them in their own trucks. I am writing to inquire whether this company must have a Missouri license or a Missouri permit."

For your information, under the Bus and Truck Law of Missouri we have what we term the "motor carrier". A party engaging in that type of business is required to obtain a Certificate of Convenience and Necessity and pay certain license fees. The definition of "motor carrier" is as follows:

> "'The term 'motor carrier', when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier. Provided, however, this act shall not be so construed as to apply to motor vehicles used in the transportation

> of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation!"

The term "contract hauler" refers to one who receives on proper application and hearing a permit, the definition of "contract hauler" being as follows:

> "'The term 'contract hauler', when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined.'"

We note in your letter that your client conducts and ice and bottling business and does the delivering in the company's own trucks. The Public Service Commission, whose duty it is to carry out the terms of the Bus and Truck Law of Missouri, has no jurisdiction over persons who are hauling their own property on their own trucks. The Public Service Commission of Missouri made the following ruling in their bulletin of June 3, 1933:

> "There is no reciprocity agreement between Missouri and any other state, insofar as the operations of a truck or bus for hire is concerned, nor is there any law authorizing such agreement."

As the trucks in question are not "for hire", and are not common carriers, it is the opinion of this department that it is

not necessary for them to have a license to deliver their products in Missouri.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

X BLIND PENSION:-Fact that person upon one examination may refuse to submit to an operation as ordered by the Commission will not deprive applicant of pension if, according to facts as found by Commission upon a subsequent examination, she is entitled to pension.

V

8898 RS Mo 1929

11-13

November 7, 1933.

FILED 28 58

Miss Marie M. Finan, Pension Secretary,
3858 Westminister Place,
St. Louis, Missouri.

Dear Miss Finan:

We are acknowledging receipt of your letter in which you inquire as follows:

"Section 8898 of the Revised Statutes of the State of Missouri, 1929, Volume II, Chapter 51, page 2467, covering pensions to deserving blind, provides in part as follows:

'No person shall be entitled to the benefits of this article who shall refuse to submit to treatment or operation to effect a cure when recommended by the examining oculist and approved by the commission; but upon submission to such treatment or operation the pension of applicant, otherwise entitled thereto, shall be paid as in other cases; Provided further, that no applicant who is more than seventy-five years of age, shall be required to submit to an operation to restore his or her vision in order to come under the provisions of this article, but may voluntary submit to operation.'

There is a difference in opinion as to whether or not the refusal of an applicant at any time to submit to an operation or treatment recommended by the examining oculist makes them ineligible for the pension for all time.

For instance, we have a case in Butler County. The applicant was examined September 2, 1933, and found ineligible for the pension. However, an operation was recommended by the examining oculist which the applicant refused, signing a refusal slip reading as follows:

'I, the undersigned, applicant for the blind pension do hereby indicate my refusal to submit to such treatment or operation in an effort to effect a cure as may be recommended by the examining oculist, and approved by the Missouri Commission for the Blind.'

> This party has again been re-examined, and this time patient denies even light perception in either eye, and if we are unable to disprove her claimed loss of vision, will she be eligible for the pension regardless of the refusal slip which she signed, refusing to have the operation recommended at the time of the last examination."

You inquire whether the fact that a blind person has refused to submit to an operation, as required under certain circumstances under the statute, does by that act forever forfeit her right to receive a pension under the Blind Pension Act.

Section 8898, R. S. Mo. 1929, among other things, provides as follows:

> "* * *No person shall be entitled to the benefits of this article who shall refuse to submit to treatment or operation to effect a cure when recommended by the examining oculist and approved by the commission; but upon submission to such treatment or operation the pension of applicant, otherwise entitled thereto, shall be paid as in other cases: Provided further, that no applicant who is more than seventy-five yeams of age, shall be required to submit to an operation to restore his or her vision in order to come under the provisions of this article, but may voluntarily submit to operation."

It appears from your inquiry that a certain applicant was examined on September 9, 1932, and found ineligible for pension. Operation was recommended by the examining oculist but the applicant refused to submit and signed a refusal slip. The party has now been re-examined and apparently is entitled to the benefits of the Act, unless her refusal to have an operation in 1932 shall now bar her from the provisions of the Act.

Under the above section, if a person comes up for an examination for the purpose of receiving the pension upon recommendation by the examining oculist, the Commission may require that the applicant submit to an operation. If the applicant fails to submit to the operation, then she is denied a pension. We believe, however, that the proper construction of the Act is that she is to be denied the pension based upon the results of that particular examination, at which time the order directing the operation was made. The penalty for refusing the operation is that the applicant shall not be entitled to the pension. We do not believe that it was the intention of the Legislature that such applicant would not be entitled to re-examination, and, if so, that upon re-examination the applicant would be barred from pension by a refusal to submit to an operation when required at a previous examination. A person may not be entitled to a pension upon one examination and because of changing conditions of the eyes may upon a subsequent examination be entitled to the

benefits of the Act. We believe that each examination and each application shall be treated upon its own merits changed as of the time the examination is made, without being prejudiced by what it might have transpired at the time of a previous examination.

Unquestionably it was the intention of the Legislature that the applicant should not receive a pension where she refused to submit to an operation upon the first examination. The applicant in this particular case has paid the penalty for her refusal to submit to the operation and no pension has been received by her up to this time because of her refusal to submit to the operation. When she is again examined the Board may again require that she submit to an operation and upon her failure so to do she would again be denied the benefits of the pension law. If, however, upon the re-examination, her condition is changed to such an extent that the Board no longer requires submission to an operation, then we do not believe that she is to be denied the right of a pension because of the refusal for which she has already paid the penalty. We believe that each application for an examination should be treated upon its own individual merits. The statute does not prohibit a subsequent examination, nor does it expressly or impliedly indicate that the Commission's finding on one examination would be finally decisive of the case to the extent that the individual might not file a new application where a change of conditions would warrant it. Each new examination, therefore, must stand alone, unprejudiced by previous examinations, and the applicant's right to a pension must be determined according to her condition at the time of the examination.

It is therefore the opinion of this Department that though the applicant was examined in September, 1932, and at that time was required to submit to an operation which she refused, yet, if upon a subsequent examination her condition is such as to warrant the awarding of a certificate according to the facts as they are found at that time, we do not believe that her refusal to submit to an operation at some date in the past would deprive her of the benefits of the Act. She paid the penalty of her refusal by not being awarded the pension during the period between the two examinations. We do not believe that the refusal to submit to an operation on one examination shall forever forfeit her right to receive the pension under different conditions at a later time.

Very truly yours,

Leonard Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

Pensions to Blind:

1. An income of $600.00 over any consecutive twelve months makes a person ineligible for a blind pension and said twelve months need not compose the actual calendar year.

8893 RSMo 1929

12-11

December 2nd, 1933.

FILED
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62

Miss Marie M. Finan,
Pension Secretary,
Missouri Commission for the Blind,
2832 Washington Avenue,
St. Louis, Missouri.

Dear Miss Finan:-

We have your letter of October 18, 1933, in which was contained a request for an opinion as follows:

> "The above pensioner resides in St. Louis and is employed by the Charter Oak Stove and Range Company. Her salary for the first seven months of 1933 was $36.50 per month. On August 1, 1933 she was increased to $60.00 per month because of the N.R.A. If she works continuously for the balance of the year she will receive a total of $555.50 for her services which will still be within the limits of $600.00 set by the pension law.
>
> The question which has arisen at this time is, when this party will have to be stricken from the roll. If she continues at the present rate of $60.00 per month, on March 31, 1934 she will have earned during the past twelve previous months, a total of $626.00.
>
> Do we interpret the law correctly when we understand that an income of $600.00 over any twelve months makes a person ineligible, or is it necessary to have an income of $600.00 during a calendar year."

Section 8893, Revised Statutes of Missouri, 1929, Chapter 51, Article 1 provides as follows:

> "Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident

> of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand dollars ($5,000.00) or more, or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever or has property or an interest in property to the value of five thousand ($5,000.00) dollars or more, or who has a parent or parents, resident in this state who upon the investigation of the commission may be found to be able to provide for the reasonable support of such applicant; and provided, further, that blind persons who are maintained in either public, private, or endowed institutions, or by private persons who would otherwise be entitled to a pension under this article, shall not be entitled to the benefits of this article; and provided further, that no blind person shall be entitled to the benefits of this article while confined in any jail or penitentiary under conviction of any offense or while publicly soliciting alms in any manner or through any artifice in any part of this state or while confined in any insane asylum at the expense of the state or any county or municipality thereof."

The section above quoted is the section that must be construed in the rendering of an opinion on your question, and since there are no decisions on such point we shall interpret the matter according to the general law and our conception of the meaning intended by the legislature.

The title to the article in which the above section appears is "Pensions to Deserving Blind".

In Sutherland's "Statutory Construction", 2nd Edition, Sec. 339 it is stated:

> "If the meaning is doubtful the title, if expressive may have the effect to resolve the doubts by extansion of the purview, or by restraining it, or to correct an obvious error, for, in ascertaining the intention, nothing is to be rejected from which aid can be derived; therefore, the title of an act may claim a degree of notice, and is entitled to its share of consideration."

Similar language was used in State ex rel. Bixby vs. St. Louis (1912) 241 Mo. 231, 145 S. W. 801; Straughan v. Meyers (1915) 268 Mo. 580, 187 S. W. 1159; Dahlin v. Missouri Commission (1924) 262 S. W. 420.

In the Dahlin case last referred to the court in construing the statute in question, stated at page 424:-

> "Where certain terms of a statute are ambiguous, resort may be had to its title as a clue or a guide to its meaning."

Applying this principle to our own situation, we conclude that the statute is intended to provide relief only to "Deserving Blind". The statute then sets out $600.00 per annum as the amount of income that will take a person out of this class. The $600.00 per annum is merely a yardstick to measure the need of a person, and whether the amount is received for an actual calendar year or is received for a space of time consecutively aggregating a year is of no importance. It is a well settled rule of law in this state and elsewhere that, where possible, effect should be given to the legislative intent express or implied, and since in this matter the intent seems to us to be clear we do not hesitate to give effect to it in this opinion.

Further illuminating language is to be found in the Dahlin case above cited at page 424 as follows:

> "The blind pension law is remedial, and should therefore be liberally construed; <u>also it should be construed with the object in view that was sought to be accomplished.</u> Straughan v. Meyers, 268 Mo. 580, 187 S. W. 1159; Lusk v. Public Service Com., 277 Mo. 264, 210 S. W. 72."

Since in our case the object seems to be to provide for deserving blind people and the person in question has already a sufficient living wage, we are of the opinion that she should be stricken from the pension rolls when she shall have received her present working wage for twelve months, i.e., according to your letter, on March 31, 1934.

Very truly yours,

Approved:

Assistant Attorney General.
Chas. M. Hazell Jr.

Attorney General.

CMHJr:LC

NEPOTISM - Right of Collector to employ brother-in-law's wife as a deputy.

Jan. 18, 1933.

Mr. Elbert L. Ford,
Prosecuting Attorney,
Kennett, Missouri.

FILED
29

Dear Mr. Ford:

We acknowledge receipt of your letter dated January 16, 1933 in which you state:

> "The newly elected Treasurer and ex-officio Collector (we have township organization) wants to get an opinion from you relative to Article 14, Section 13, Constitution of Missouri, in regards to employment of relatives.
>
> He is desirous of employing his brother-in-law's wife as a deputy in his office as Collector. The salary she receives will be paid by him personally and individually and the State or County does not pay him or allow him any money for help."

We assume from your letter that the person desired to be employed as a deputy in the office of the Collector is the wife of a brother of the Collector's wife.

Section 13 of Article 14 of the Constitution of the State of Missouri provides as follows:

> "Nepotism, by any officer or employe, forbidden - forfeits office.
>
> Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment. (Adopted Feb. 26, 1924.)"

(Mr. Elbert L. Ford)

You will note that the prohibition is against the naming or appointing of any relative within the fourth degree, either by affinity or consanguinity, and the matter of who pays the salary or whether any salary is paid, is of no consequence.

Relationship by affinity does not extend to the relatives of the other spouse by affinity only. In other words, relationship by affinity is confined to the blood relatives of the other spouse.

State ex rel v. Hall & Ellis, 325 Mo. 154-162
28 S.W. 2d. 363

Accordingly, the constitutional provision referred to does not prohibit the appointment inquired about in your letter.

Yours very truly,

GILBERT LAMB,
Assistant Attorney General

APPROVED:

Attorney General

COUNTY COURTS. Pro-rating funds when amount collected is less than that appropriated under Section 9874, R.S. Mo. 1929

See Supplementary Opinion attached

January 23,
1 9 3 3 .

FILED
29

Hon. Elbert L. Ford,
Prosecuting Attorney,
Kennett, Missouri.

Dear Mr. Ford:

This office acknowledges receipt of your letter dated January 16, 1933 in which you state and inquire as follows:

"I am herewith enclosing to you copy of an order, which the County Court made last year with reference to the apportioning and subdividing the County revenue under Section 9874 and Section 9985, Revised Statutes of Missouri for the year 1919. The total amount of this budget was $62,800.00, or the anticipated revenue of this County for the year 1932. The actual revenue collected will be approximately $40,000.00 or about $22,000.00 short of taking care of this budget.

The Treasurer of this County has on hands at this time approximately $20,000.00 in cash and is unable to decide how to disburse this money.

Please advise me on the following questions:

First - Should the money received for 1932 be pro-rated to the different funds as the fund itself relates to the whole amount of the budget?

Second - Should the warrants be paid in the manner which they have been issued, presented and protested to the Treasurer, not with-standing the budget?

Third - Should the money be placed in the different funds to take care of that particular fund first, in other words, should the $12,000.00 be paid first to the care of paupers and insane persons of said County and after this is taken care of and then the next money be paid to the second class, which includes payment of County officers and after that, then the next money be placed into the third class

Hon. Elbert L. Ford.

Section 9874, Revised Statutes of Missouri, 1929, provides in substance as follows:

> " The county courts of the several counties in the state are authorized and empowered at a time fixed each year to appropriate, apportion and subdivide the county revenue collected, and to be collected, money received,and to be received, for county purposes in the following order:
>
> I. A sum sufficient for the payment of all necessary expenses in the care of paupers and insane persons;
>
> II. A sum sufficient for the payment of building of bridges and repairing of roads, including the pay of road overseers;
>
> III. A sum sufficient for the payment of salaries of county officers when payable out of the ordinary revenues;
>
> IV. A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of election, and fees of witnesses before grand juries;
>
> V. A sum sufficient for the payment of the other ordinary current expenses of the county.

Section 9874, R.S. Mo. 1929, authorizing and empowering county courts to appropriate, apportion and subdivide county funds in the order named is mandatory on such county officers. The principle of law applicable in that respect is stated in Chase v. U. S., 261 Fed. 833-837, in the following language:

> "An examination of the legislation of Congress shows that in many of the acts of Congress the word 'authorized' is fequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word 'authorized', the other words 'in his discretion' are added. As was said by the Supreme Court of the United States in Mason et al. v. Fearson, 9 How. 258, 13 L. Ed. 125:
>
> 'Whenever it is provided that a corporation or officer 'may' act in a certain way, or it

> 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons. * * *. Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the Legislature, which is the test in these cases, seems under such circumstances to have been 'to impose a positive and absolute duty'. Mayor of New York v. Furze, 3 Hill (N.Y) 612; Minor et al v. Merchants' Bank of Alexandria, 1 Pet. 46,64, 7 L. Ed. 47, and note; Livingston v. Tanner, 14 N. Y. 64; Ralston v. Crittenden (C.C.) 13 Fed. 508; Supervisors Rock Island County vs. U. S. 4 Wall. 435, 18 L. Ed.419".

The Supreme Court of this state in State ex rel v. Lee, 262 S. W. 344-345, has followed the same reasoning, as is shown by quotation from the opinion in the last named case, as follows:

> "Preliminary. The power given by section 1181 to the state superintendent of public schools is couched in words vesting him with 'authority' to correct certain errors in apportionment. With respect to such errors as fall within the section words of that character in a statute like this are to be construed as mandatory, since 'public interests and rights are concerned'. Newburgh Turnpike v. Miller, 5 Johns.Ch. (N.Y.)101, 9 Am. Dec.274; 25 R. C. L. p 770."

Therefore, whatever duties are required of the county court by the provisions of Section 9874 are absolute and not a discretionary matter with that body.

Section 9985, Revised Statutes of Missouri, 1929, in the first part thereof is a re-statement in substance, of Section 9874, and it being further provided in Section 9985 that the money so set apart appropriated, apportioned, and subdivided, shall be held to be a sacred fund for the purpose for which it has been designated, and the county court shall have no power to divert the same, or to permit the funds thus set apart to be drawn from the treasury of such county, except by warrants issued by order of the court on the respective funds. Section 9986 directs the county treasurer shall separate and subdivide the revenues of the county in his hands,

and as they come into his hands, in compliance with such order of the court and the provisions of Chapter 59. It being further provided that the treasurer shall pay out the revenues thus subdivided on warrants issued by order of the court, on the respective funds so set apart and subdivided and not otherwise, and the treasurer shall keep a separate account with the county court of each fund, which funds shall be known and designated respectively as the pauper fund, road and bridge fund, fund for the payment of the salaries of the county officers, fund for the payment of fees of grand and petit jurors, judges and clerks of election, witnesses before a grand jury, and contingent fund, and no warrant shall be paid out of any other fund other than that upon which it has been drawn by order of the court. Section 9986 makes it a misdemeanor for the treasurer to fail or refuse to perform the duties required of him under the provisions of Chapter 59.

Sections 12139, 12169 and 12170, Revised Statutes of Missouri, 1929, make further provision that the treasurer shall pay county revenue only on warrants issued by the county court, and Section 12139 provides that the warrants shall state on what fund the same is drawn and that the warrant should be paid out of that fund.

In the case of State ex rel Norfolk Beet-Sugar Co. v. Moore, Auditor, 69 N. W. 373, concerning the right of the State Auditor to draw a warrant on a certain fund, is found an interesting outline of the history of the necessity for appropriation by legislatures into specific funds and for specific purposes, and in the opinion is a definition of the words 'appropriate' or 'appropriation'. In that case it is sought to compel a warrant to be drawn on the fund for purposes other than for which the fund was appropriated, but the usual definition of the word 'appropriate' is not unbending in the case under consideration, because if there is a surplus in any fund appropriated by the county court after all of the liabilities of such fund have been met, that surplus may be transferred by the county count to other funds, and used for purposes other than those for which it was appropriated. Andrew County ex rel v. Schell, 135 Mo. 31.

We do not find in the Missouri cases where the courts of this state have directly passed on the question here involved, so that the question must be solved by applying general principles of statutory construction, and also by considering the conditions that are now matters of common knowledge and which may have been in the minds of the legislators when the revenue acts referred to were enacted. In Ex Parte Marmaduke, 91 Mo. 228 - 254, on the rule of construction of statute the Supreme Court of this state said:

> "* * * * * * *the letter of a statute may be enlarged or restrained, according to the true intent of the framers of the law. Whitney v. Whitney, 14 Mass.92; State ex rel v. Emerson, 39 Mo. 80; State ex rel v. King, 44 Mo. 283; Riddick v. Walsh,

> 15 Mo. 519. In such cases, the reason of the law prevails over its letter, and general terms are so limited in their application as not to lead to injustice, oppression, or an absurd consequence, the presumption being indulged that the legislature intended no such anomalous results. 7 Wall. 482; 68 Ill. 38; 67 Mo. 256."

The Supreme Court of Missouri in the case of State ex rel. v. Appleby, 136 Mo. 408, had under consideration mandamus proceedings brought to compel the judges of the county court to issue warrants in payment of criminal costs. The action was to compel the transfer from a fund where there was a surplus to the contingent fund. The court in discussing the purpose and intent of what is now Section 9874, at page 413 of the opinion said:

> "By the statute it could only have been intended that the county court should, in the first instance, apportion the funds approximately to the purpose mentioned, and that warrant should be drawn upon and paid out of the proper fund until it should be exhausted, or until all the liabilities for which the particular fund was apportioned should have been paid. The object of the legislature was to prevent as far as possible, discriminations against any class of liabilities or expenses of the county".

This is the only case in Missouri we find that undertakes to put a construction on Section 9874, on the question here involved. Apparently the framers of the Constitution of 1875 and legislatures subsequent thereto, under took to restrict and restrain county courts and other county officials from indiscriminate expenditure of county funds and to establish a budget system on a cash basis of operating the county government. Section 9874 was one of the sections of the law intending to carry those purposes into effect. It is true that Section 9874 commands the county court to appropriate its revenues in the order named in the statute, and the treasurer to keep his books and pay out the money accordingly. While, of course, insane persons and paupers are helpless and entitled to have their care and keep provided for and carefully guarded, it is hard to conceive that the legislature intended that no moneys could be expended, for instance, for the payment of salaries of county officials, or the fees of grand or petit jurors; judges and clerks of election, and witnesses before a grand jury, after the appropriations were made and where all revenue collected was not sufficient to pay the liabilities of all the funds until all the bridges had been built, and roads repaired that were taken in consideration by the court at the time of making its budget and appropriating the county revenue. To do so would probably result in the resignation of county officials; a partial failure to enforce criminal laws; the rights of taxpayers not be adjudicated in civil cases nor

would there be sufficient money in the contingent fund for the ordinary and necessary expenses of the county, such as repairs on a court house or jail or the procuring of insurance policies for the protection of the county against fire or windstorm. It may have been thought the classification provided for in Section 9874 should be made to prevent county officials from discriminating in favor of themselves, in the appropriation of revenues. If the taxes collected are pro-rated as it is herein held they should be, then there would be no discrimination on the part of the county court under the Appleby case. It is a matter of common knowledge that there is a vast amount of uncollected revenue or back taxes due in the various counties in the State of Missouri. This condition may continue indefinitely and if it should occur that all of the revenue collected in the county in one year could only be credited to say the first two subdivisions of Section 9874, and little or none in the last three subdivisions, chaos will reign in every county where that condition exists. We can not conclude that the legislators had in mind to bring about such a situation in the passing of Section 9874, and it should not be held to bring about that condition unless its very terms compels such a holding.

We think the legislature had in mind, as we have said, the establishment of a budget or cash basis system, and that Section 9874 provides the order of importance in which the county court should consider the various needs for moneys in fixing its estimate of the amount of revenue to be set apart. Having the whole situation in mind Section 9874 should be construed as meaning that if there be not sufficient revenue on hand or collected to take care of the entire appropriation of the county court for the necessary funds, that the amount of revenue so collected should be distributed pro rata among the funds, and in this case should be distributed as the percentage of any one fund bears to the whole fund to be distributed.

Section 12139 provides that the county treasurer shall make a record of warrants as they are presented to him and the warrants presented shall be paid out of the funds mentioned in the warrants, and in the order in which the warrants are presented for payment; that is, warrants drawn on the particular appropriated fund are first payable, and in the order of time in which the warrants are presented to the treasurer on that particular fund. If there be a surplus in the fund when the liabilities for the year in which it was appropriated have been discharged, then warrants drawn in other years according to the time of their presentment may be paid out of that surplus.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:_____
Attorney General.

GL:LC

COUNTY COURTS: Pro-rating funds when amount collected is less than that appropriated under Section 9874 R.S.Mo.1929

February 4, 1933

Honorable Elbert L. Ford
Prosecuting Attorney
Kennett, Missouri

Dear Mr. Ford:

On January 23, 1933, this office answered your inquiry dated January 16, 1933, with reference to apportionment of collected revenues in your county to the various funds as apportioned and appropriated by the county court.

In addition to what was said in that letter we call your attention to Section 43, of Article 4, of the Constitution of the State of Missouri, and to the case of State ex rel v.Henderson, 160 Mo. 190, construing the above section of the Constitution, and which we think confirms our former opinion to you. We call your attention particularly to pages 211, 212, as follows:

> "We can not agree with the learned counsel that the entire income of the State is mortgaged in favor of the various items named in section 43, article 4, of the Constitution,and that the full amount of the appropriation for each purpose must first be collected and set apart before any part of the next in order can be paid. No such construction has ever been given the Constitution or the laws appropriating taxes for various state and county purposes.
>
> The Constitution does not say that the first money received into the Treasury shall be applied to meet the first items mentioned in said section 43, that no money shall be disbursed on account of a subsequent appropriation until a sufficient amount is accumulated in the Treasury to meet all prior appropriations.
>
> Such a claim is inconsistent with our whole scheme of taxation. The moneys for the various institutions and the support of the civil list are never in the Treasury when the Legislature makes the appropriations.

A large part of the funds will not reach the Treasury for nearly two years after the appropriations are made. If the contention of the relators should be sustained, the mileage and per diem of the members of the Legislature, and of the various State officials would be postponed until two years after their passage".

No such interpretation has ever been put upon this section, but the practical construction has been that no such lien or priority was created thereby".

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

_____
Attorney General.

GL:LC

Chiropractic Board: Date Governor appointed members, when confirmed by senate relates back to date of appointment-- Expenses incurred while in discharge of duties payable out of Chiropractic Appropriation fund.

May 22, 1933

FILED
29
23

Dr. Jerome F. Fontana, Secretary
State Board of Chiropractic Examiners
2605 Chippewa Avenue
St.Louis, Missouri

Dear Doctor Fontana:

This is to acknowledge your letter of May 5, 1933, which is as follows:

> "It is the wish of the members of the State Board of Chiropractic Examiners, that an opinion be rendered on the following case:
>
> The members of this Board received their commission on April 19th and on the 21st a meeting was held in Jefferson City. At that time, we members believed that we had been confirmed, but shortly after our meeting we were informed that we did not have the power to act. However, the members of this Board have since been confirmed by the Senate; now the question is, can we, the members of the Board, be paid for our expense from the appropriation of our fund for that meeting?
>
> Thanking you in advance, I am, "

We obtained from the office of the Secretary of State information, that on April 18, 1933, four members were appointed to your board by Governor Park to take the places of the four members of the retiring board. Two members of the retiring board were never confirmed by the Senate, and the commissions of the other two members expired January 1, 1933.

To answer your inquiry, two questions present themselves.

First; On what date did the appointment of the incoming members become effective? Second; Was the meeting that was held on April 21st, for the purpose of discharging the actual duties of the board.

It will be seen that the second question must fail unless the present board members were at that time (April 21st) duly appointed and members of said board.

The act creating the Board of Chiropractic Examiners and regulating the practice of Chiropractors was approved March 14, 1927, and was passed by the fifty fourth General Assembly which adjourned on April 4, 1927. This act is now found in Chapter 105 R. S. Mo. 1929.

We now proceed to determine the date the appointments became effective, and we look to the statutes creating same.

Section 13547 R. S. Mo. 1929, in the parts pertinent to the present inquiry reads as follows:

> "A State Board of Chiropractic Examiners is hereby created, consisting of five persons, etc." " "

And further:

> " " "to be appointed by the governor, with the advice and consent of the senate in the following manner, to-wit: Within thirty days after the passage of this law, the governor shall appoint five persons as aforesaid etc." " "

And further:

> " " "They shall constitute the first board of chiropractic examiners, their term of office shall expire one in one year, two in two years, and two in three years, from the date of appointment. At the expiration of the term of office of any member of said board the Governor shall appoint a member for a term of three years. All vacancies shall be filled by the governor in like manner, and the person appointed to fill such vacancy shall serve for the unexpired term only."

In Reading this section it will be seen that the Legislature intended that some of the appointments should be made when the Senate was not in session.

In the case of State ex inf. Elliott W. Major, Attorney-General, ex rel. Jesse W. Sikes, v. W. W. Williams, 332 Mo. 268, the court in its opinion said: (l.c. 283)

> "* * *It is fundamental that in the construction of statutes the courts should so interpret them as to conform with the intent of the law-making power that enacted them.* * *"

And further at page 284:

> "* * *Laws must be given a reasonable construction, keeping in view the purposes of as well as the circumstances surrounding their enactment.* * *In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character.****"

At page 1012, vol. 17, American and English Annotated Cases, is found the following:

> "* * *In Dyer v. Bayne, 54 Md. 87, it appeared that the governor nominated the plaintiff as successor to the defendant in the office of tobacco inspector, and sent his name to the senate for the advice and consent of that body. The senate did not act upon his nomination for several weeks, but it was finally confirmed. Upon the question as to when the term of the plaintiff commenced, it was held that the confirmation of the senate related back to the act of the governor in making the nomination, and, hence, that the plaintiff's term began on the day of his nomination.* * *"

The above case, (Dyer v. Bayne, 54 Md. 87) was cited and quoted from in the case of Little v. Schul, 118 Md. 462.

The terms of two members of the old board expired on January 1, 1933, and the other two had not been confirmed, and these persons constituted the board until April 18th, when they were relieved of their duty by the appointment of the present members.

Section 5, Article 14, of the Constitution of Missouri provides:

> "In the absence of any contrary provision all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

The law does not contemplate a vacancy in any office and for that reason incumbents which in this case were the former board members would hold office until their successors, the present board members were appointed.

In the case of State ex rel v.Seay, 64 Mo 89, the court said:

> "* * * *The law abhors vacancies in public offices, and great precautions are taken to guard against their occurrence. The policy of the law is to have some one always in place to discharge the duties of public offices, and in a doubtful case the construction of a law fixing the tenure of an office would be greatly influenced by that consideration.* * *"

We therefore hold that on April 18th, the term of office ceased for the old board and the term began for the present board by virtue of the Governors appointment. Of course, after the present board was appointed by the Governor, the names of such members were presented to the Senate, while it was in session, and the Senate acted, as you state, favorably upon the appointments. It may then be said that these appointments were made by the Governor with the advice and consent of the senate.

We now proceed to answer the second question in your inquiry, same being, whether or not expense accounts for attending the meeting on April 21st should be paid out of the appropriations from your fund.

Section 13548 R. S. Mo. 1929, provides in part the following:

> "The board shall meet and organize by electing a president, secretary and treasurer, each to serve for a period of one year." * * *

And further:

> * * * Four members shall constitute a quorum. The members of the board shall meet and organize in Jefferson City, Missouri, within thirty days following their appointment." * * *

And further:

> * * * Each member of the board, except the secretary, shall receive compensation for his or her services, the sum of $10.00 per day while discharging the adtual duties of the board, and each member shall receive traveling expenses while actually employed in the discharge of his or her duties as members of said board." * * *

You did not state the purpose of the meeting or if it was to discharge the duties of the board. We assume it was for such and particularly for the purpose of organization. If such be the facts, it is our opinion that the members should be paid for their expenses from the appropriation out of your fund.

Trusting this answers your inquiry, we are,

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

PROHIBITION: Fees of enforcement officers for executing search warrants.

4514 RS Mo 1929.

September 7, 1933

9/9

FILED

29

42

Honorable Elbert L. Ford
Prosecuting Attorney
Kennett, Missouri

Dear Mr. Ford:

This Department acknowledges receipt of your letter of August 1, along with two other inquiries which have been answered. The subject of the present inquiry is as follows:

> "Please advise me at your earliest convenience if a Sheriff or Constable is entitled, under Section 4514, Revised Statutes 1929, to mileage and fees for serving liquor search warrants where they do not find any whiskey or other intoxicating liquors and the return shows that they have made the search but failed to find anything.
>
> Some of the peace officers in this County have in the past few years been making applications before a Justice of Peace and have been obtaining warrants and searching premises and the County Court has been refusing to pay them mileage or fees on the same because they do not feel it their responsibility."

The section to which you refer, 4514, R. S. Mo. 1929, is as follows:

> "All officers whose duty it is to issue or execute search warrants as provided for herein, shall be entitled to the same fees and mileage as such officers are now or may

hereafter be entitled to for similar services in the issuance and execution of criminal processes, the same to be taxed and collected as other criminal costs are taxed and collected."

In Section 4511 R. S. Mo. 1929, the part to which we wish to refer later is as follows:

"The attorney-general of the State of Missouri, or the prosecuting attorney of any county, or any prohibition enforcement officer, is hereby empowered to file in the circuit court, criminal court, court of criminal correction, or any other court having criminal jurisdiction in the county, or before the judge thereof in vacation, or justice of the peace, an application for a search warrant, which application shall be by petition setting forth substantially the facts upon which the same is based, describing the place to be searched and the thing or things to be seized as nearly as may be, which petition shall be verified by the oath of the officer filing the same. If it shall appear to the satisfaction of the court in which said petition is filed, or the judge thereof in vacation, or justice of the peace before whom said petition shall be filed, either from the facts set forth in said petition or from evidence heard thereon, that there is probable cause to believe that intoxicating liquor is being unlawfully manufactured, sold, stored or kept in any building, structure, or at any place described in said petition, within said county or transported, as in this chapter defined, contrary to the provisions of this chapter, or that thereat or therein is being used or kept any still, doubler, worm, worm tub, mash, mash tub, fermenting tub, vessel, fixture or equipment, or any part or parts thereof used or fit for use

> in the unlawful manufacture or production of intoxicating liquor, it shall be the duty of such court or such officer before which or whom said petition was filed, to issue or cause to be issued a search warrant thereon, which search warrant shall substantially recite the facts set forth in said petition****."

Under the above section the Justice of the Peace enters on his docket the filing of the petition and his judicial finding. The other pertinent portion of the statute relating to the duties of the officer in making his return on a search warrant is as follows:

> "****Provided further, that any officer executing a search warrant as herein provided shall forthwith make his return thereon to the court or officer issuing said search warrant of the manner and date of his execution thereof, showing what, if anything, was seized and held or seized and destroyed by said search, together with the name of the owner or owners, if known, of the things seized, and if not known, then the name or names of the person or persons appearing to be in charge or control thereof, and shall attach to said return as a part thereof an accurate list or inventory of the article and things so seized; and in case of the seizure of any such articles, things, or equipment, or intoxicating liquor which said officer may have found in use or fit for use without the aid of a search warrant as hereinbefore provided, he shall immediately file a list of the things so seized with the prosecuting attorney of the county in which the same were found, and shall hold the things so seized for disposition in accordance with the provisions of this chapter*****."

You state that the costs are sought only in cases in which under the search warrant no evidence was taken or found, hence, we assume that when no evidence was taken or found that the same was not followed by prosecution and the matter was automatically dropped.

Corpus Juris, Volume 56, page 1209, paragraph 109, states:

> "****that the issuance of a search warrant is a judicial action, function and proceeding, although it is said not to require more judicial power than does the issuance of criminal warrants generally."

It is the opinion of this Department that under Section 4514, supra, that it was the intention of the Legislature for the prohibition officers to receive fees for executing search warrants in prohibition cases and that the officers should receive the fees in the amounts as set forth in Sections 11791 and 11792 R. S. Mo. 1929.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

CONSTITUTION OF MO: Sec. 12, Art. IV. Appointment of State representative to Federal position

September 18, 1933.

9-20

FILED
29

Hon. Lester J. Fordyce,
Powersville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 11, 1933, requesting an opinion in regard to the following subject matter:

> **"I am writing you for information covering the following subject:**
>
> **I served in the last General Assembly from Putnam County and now have a possibility of appointment as Deputy-Collector in the Internal Revenue Department, Western District for Missouri; I am in doubt as to whether such an appointment can be accepted by me since my term as Representative is not yet completed.**
>
> **I remember receiving your opinion concerning Members of the General Assembly accepting appointments in the State Department but, since this will come as a Federal appointment I do not believe the same statutes will govern this particular appointment.**
>
> **May I impose upon your time and good will by asking that you please furnish me with a letter covering the Constitutionality of the above?"**

The Constitution of Missouri, Section 12, Article IV, provides as follows:

> **"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace**

> and notaries public excepted) shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

Under the plain wording of the first portion of Sec. 12 of Art. IV, supra, if you were contemplating accepting the appointment to an office within this state or any municipality thereof, you would be precluded from accepting the same by this section of the Constitution. But you now hold the office of Representative of Putnam County and desire to accept a Federal position. We must, therefore, look to the last portion of the section, the pertinent part being as follows:

> "and no ****person holding any lucrative office under the United States, or this State **** shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

The question arises as to whether or not you would be accepting an office and thereby becoming a public officer within the definition of a public officer. A definition of "public office" and "public officer" is set out in 22 Ruling Case Law, p. 380, Sec. 12, as follows:

> "'It is sometimes said that an office is a public charge or employment, but it frequently becomes necessary to distinguish between a public office and a public employment. The term 'Employment' is the more comprehensive, and while an office is an employment, it does not follow that an employment is an office. **** Even where the appointment is in the nature of an employment, the appointee may be a public officer if the necessary elements of an office are present. But on the whole an officer is distinguished from the employee in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the more enduring tenure, and in the fact that the duties of the position are prescribed by law. ****While an employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.'"

And again, in Hastings v. Jasper County, 314 Mo. 144, 149, the following definition is given:

> "'A public office is defined to be 'the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be by him exercised for the benefit of the public.' (Mechem, Public Officers, 1; State ex rel Walker v. Bus, 135 Mo. 325). **** The authorities all agree, substantially, that if an officer receives his authority from the law and discharges some of the functions of government, he will be a public officer.'"

In the case of State ex rel Zevely v. Hackmann, 300 Mo. 59, "public officer" is defined as follows:

> "A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given him by law, and who exercises the functions pertaining to the office assigned to him by law."

You state that you desire to become a Deputy-Collector in the Internal Revenue Department, Western District of Missouri. Under the above definition you would be accepting a public office, with a designated title, and would carry out duties which would be assigned to you by law. You would not be an employee, but you would be holding a public office. If you accept the office of Deputy Internal Revenue Collector, then you can no longer represent your county in the Legislature. You may either resign, or your acceptance of this office will operate ipso facto as a resignation of same. As was said in the case of State ex rel v. Bus, 135 Mo. 325, l.c. 330:

> "The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first."

It is therefore the opinion of this department that you may accept the contemplated position of Deputy Internal Revenue Collector, but you will automatically vacate your present office as Representative of Putnam County.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

INQUEST COSTS - To be paid by county.
WITNESS FEES - No witness fees payable to witness detained in jail for refusal to give recognizance.

December 8th, 1933.

FILED
29
63

Hon. Elbert L. Ford
Prosecuting Attorney
Kennett, Missouri

Dear Sir:

We have your request of November 14th, 1933 for an opinion upon the following state of facts:

> "I would appreciate it if you would render me an opinion in the above case relative to costs. This County and State Auditor is having some controversy relative to payment of inquest fees. It is the contention of the County Court that under Section 3855 Revised Statutes Missouri, 1929, that the State is liable for cost and expenses of inquest when such inquest shows that the deceased came to his or her death by a felony.
>
> Second - The Court under an order held three material witnesses in jail for several months in the above matter and according to the supplemental cost bill filed in this case there is due said witnesses the sum of $450.00 for witness fees for each day they were held in jail pending this trial.
>
> The question is where witnesses are held in jail as material witnesses by the Court and for the State whether they are entitled to witness fees for the time they were held in jail or "for attending any Court of Record?"
>
> I would appreciate it if would give me an opinion concerning this and I am doing this at the request of the State Auditor who asked me to get this opinion."

#2 - Elbert L. Ford

I.

WITNESS FEES IN INQUEST CASES ARE TO BE PAID BY THE COUNTY.

Section 3855 R. S. Mo. 1929 cited in your letter merely classifies fees accruing in any inquest as criminal costs, but does not fix the responsibility for paying same. Section 3855 is as follows:

> "CERTAIN FEES DEEMED CRIMINAL COSTS. --All fees due witnesses before the grand jury, and all fees due jurors in any criminal case, and all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and shall be paid in like manner and shall be subject to all the offsets herein provided for."

The responsibility for paying fees of an inquest is definitely fixed by the terms of Section 11802 R. S. Mo. 1929. Pertinent parts of this section are as follows:

> "The above fees, together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands."

It is, therefore, the opinion of this office that the costs of an inquest are properly chargeable to the county and are to be paid out of the county treasury.

II.

A WITNESS DETAINED IN CUSTODY FOR REFUSAL TO GIVE A RECOGNIZANCE FOR HIS APPEARANCE IS NOT ENTITLED TO WITNESS FEES WHILE SO DETAINED IN CUSTODY.

#3 - Elbert L. Ford

We began with the premise that witness fees are for services rendered, as is fully justified by the following excerpt from Section 11776, R. S. Mo. 1929:

> "The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided,*"

Preceding the right of an officer to receive compensation from the public treasury is the indispensability of finding statutory authorization for such payment. This principle is undoubtedly now well established in Missouri. State ex rel. v. Patterson, 152 Mo. App. 264 l.c. 268. The same is true with reference to witness fees which are only allowed when expressly authorized by statute. In State v. Oliver, 116 Mo. 188, l.c. 195, the Supreme Court said; (1893):

> "No witness has a right, independent of the statute, to enforce a claim against the state for fees for attendance upon the trial of a criminal case. The question of justice or injustice to the witness is not a matter for consideration."

In the absence of such statutory authority to pay compensation, a presumption arises that public services are rendered gratuitously, since the right to receive pay is a matter, not of contract, but of statute. King v. Riverland Levy District, 279 S. W. 195 l.c. 196 (1926). In the Riverland Levy District case, supra, the St. Louis Court of Appeals, l.c. 196, said:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract,

> and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 loc. cit. 27, 149 S.W. 658; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit, 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra.

The amount of witness fees are fixed in Section 11798, R.S. Mo. 1929:

> "Witnesses shall be allowed fees for their services as follows: For attending any court of record,* within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05."

We must now examine the statutes directly involved as to whether or not witnesses detained in jail because of their refusal to give a recognizance for their appearance, are entitled to witness fees for each day of their detention. Section 3483 R. S. Mo. 1929 provides as follows:

#5 - Elbert L. Ford

> "RECOGNIZANCE, WHEN REQUIRED.--If it appear that a felony has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutor, and all material witnesses against such prisoner, to appear and testify before the court having cognizance of the offense, on such day as the prosecuting attorney shall designate in writing duly filed with the magistrate at the time, and not to depart such court without leave."

Section 3485 provides as follows:

> "WITNESSES, WHEN COMMITTED.--If any witness so required to enter into a recognizance refuse to comply with such order, the magistrate may commit him or her to prison until he or she comply with such order or be otherwise discharged according to law."

A New York statute (Sec. 618b. of the Criminal Code) providing that upon the neglect or refusal of the witness to comply with the court order requiring a recognizance for their appearance to be given, that the judge must commit such witness to jail, was said by the Kings County Supreme Court (1921) in People ex rel. v. Sheriff of Kings County, 192 N. Y. Supplement , 553,to be unconstitutional as "an unwarrantable interference with the liberty of the individual". However, this part of the decision may be regarded as obiter dictum since the constitutionality of the statute did not need to be passed upon by the court to reach the decision made. The New York statute is broader than the Missouri statute in that it provided that upon the "neglect or refusal" of the witness to give recognizance for his appearance he should be committed to jail, while the Missouri statute provides that the witness may be committed to jail upon his refusal to give a recognizance.

Furthermore, the New York statute required the witness to furnish recognizance with sureties, while the Missouri statute (Sec. 3485) is silent as to any sureties being required, and when strictly construed, the Missouri statute would require no sureties. In Comfort v. Kettle, 81 Ia. 179, 46 N. W. 988, it was held that sureties could not be required on such recognizance, because the statute did not expressly so declare. It therefore appears that the witness in Missouri could sign and give his own bond without sureties.

While the authorities in this country are not uniform in their holdings upon the right of a witness to collect fees while detained as a witness, yet the general rule is well stated in 24 Annotated Cases, 1912, C, p. 807 as follows:

> "As stated in the reported case the authorities are not agreed as to whether a witness who is detained in custody for future appearance may recover fees for the period of detention. In the majority of jurisdictions where the question has arisen it has been held that there can be no recovery even though the failure to furnish bail results from no fault of the witness, the courts holding that statutes authorizing payment of a witness while attending court do not extend to the time while the witness is forcibly detained waiting for the trial to take place."

Further, it would appear that in Missouri the committment of a witness for the purpose of procuring his attendance in a trial later to be held, is in the nature of a contempt proceeding, because prior to any right of a court to commit a witness, the witness must refuse to give a recognizance, and such refusal places the witness in the same category as any other person who refuses to obey an order of the court. The duration of the committment is the same as for contempt proceedings, namely, "until he or she comply with such order or be otherwise discharged according to law". It would therefore

appear that the refusal of the witness to give such a recognizance is, in the eyes of the law, a wrongful act, and to allow him compensation for each day he was detained because of such wrongful act would be to allow a person to profit by his wrong, a principle which no court in Missouri would recognize. We quote further from 24 Annotated Cases, 1912 C, p. 809:

> "In a few jurisdictions, the rule adopted is that if a witness can, but will not, give security for his appearance and is committed for his refusal, he will not be entitled to a per diem fee during any part of the time he may be detained to secure his attendance, and likewise if his inability to find security results from his own misconduct or bad character he will equally not be entitled to a per diem fee."

In some jurisdictions, if the inability of the witness to give a bond for his appearance arises from his misfortune and not from his fault, he is considered in attendance at court and will be entitled to fees for the term of his detention. - 24 Annotated Cases 1912 C. l.c. 809.

The Federal Government has specifically provided in 28 U.S.C.A. 601:

> "When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to compensation of $1. a day."

We have no such statute in Missouri, and in the absence of such statutory authorization, no compensation can be paid a witness detained in custody. It is, therefore, the opinion of this office that the two witnesses who were committed to

#8 - Elbert L. Ford

jail for their refusal to give a recognizance for their appearance are not entitled to witness fees for each day they were detained in jail.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

SCHOOLS - Outside use of school property discussed unde. Secs. 9284 adn 9205 R.S. 1929 construed herein. Special meeting duly called may prohibit, but not authorize such use.

February 2, 1933.

FILED
30

Hon. Ted Frossard
Prosecuting Attorney Barry County
Cassville, Missouri

Dear Sir:

Your letter of January 27, 1933 asks our opinion as follows:

"The school house of a local dric̈t has been open to church services and other functions for a n number of years. The directors decided to close the doors on the ground that the congregation of a certain religious sect had been making the school unfit to have school in by spitting on the floors, etc. After the doors were closed a petition was circulated to call a special meeting under Sec. 9228 R.S. 1929, for the purpose of voting on whether the doors were to be open or closed.

I would like to have your opinion as to whether the school can be voted open at a special meeting. In Sec.9284, No.5, it is provided as a power of an annual meeting to determine whether or not the school may be used during the ensuing year for religious or other purposes. Sec. 9228 provides that "Special school meeting for the transaction of business authorized by this chapter, and not restricted to the annual meeting or otherwise provided for shall etc." Does the mention of No.5 under the section naming the powers of the annual restrict that power to the annual school meeting? If not, is this power, then, under any other statute, restricted to the annual school meeting? Sec. 9205 provides that the school house at any annual or special meeting may be voted closed, but says nothing about voting it open.

The petition was signed by a probable majority of the districts voters and the clerks record shows that a meeting was held and the notices of the meeting ordered published by the school

board. Two of the directors now deny that any such meeting was ever held or any such order given. Would this in itself invalidate the election, or rather the special meeting? The meeting was held, the school house was voted open, but the directors, acting on the advice of the then prosecuting attorney of this county refused to open the doors on the ground that no authority existed to call a special meeting for this purpose and that such meeting was invalid. Since that time, about two months ago, locks have continueusly from time to time been torn off the doors and the building used as a church house both on Sunday and during the week. Three men were arrested and at present are charged in circuit court with breaking into a school house. The directors want to continue to make arrests but before preceeding further I would like to have your advice on the matter.

If this special meeting was legally called and held could these men be convicted on this charge, admitting that they did break off the locks?

The directors and the teacher now complain that at these gatherings the people spit tobacco juice on the floor, tear boards off the building and in many other ways damage and destroy and deface the premises. If the building has been legally voted open is there any way by which the directors could again legally lock up the school house or prevent it from being used by this sect?"

We enclose you copy of an opinion of this Department under date of September 9, 1932, to Hubert E. Lay, Prosecuting Attorney of Texas County, Houston, Missouri, which opinion covers your case in a general way and is hereby approved by the present administration.

As heretofore cited by this Department, the annual meeting has under the fifth subdivision of Sec. 9284, R.S.1929, the right to determine the district's policy as to outside uses of the school house <u>for the ensuing year</u>, amd, while the board of directors is also given a like power under Sec. 9205, in exercising such power it is limited in our opinion by the mandate of the voters, if any, at the annual meeting, and also

in any case such outside uses are limited by Sec. 9205 to such "purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted."

We are further of the opinion that a special school meeting, if properly called under Sec. 9228, may prohibit outside use of school property, by virtue of the first proviso in Section 9205, until the next annual meeting, but that a special meeting cannot under the law authorize outside uses, as the latter is for annual meetings to determine, or the board, or both.

Sec. 9232 R.S. 1929, applies to persons injuring school property as you have no doubt noted.

Trusting we have fully answered your inquiries, we are,

Respectfully yours,

Denton Dunn.
Assistant Attorney General.

DD:SW
Enc.

APPROVED

Roy McKittrick.
Attorney General.

TAXES: Interest and penalties on back taxes, how divided.

FILED
30

February 11, 1933

Honorable Ted Frossard
Prosecuting Attorney
Cassville, Missouri

Dear Mr. Frossard:

We acknowledge receipt of your letter dated February 6, 1933, in which you inquire and state as follows:

> "Would you please advise me as to how the interest on back taxes of more than one year is to be divided between the county and the state.
>
> I have been consulted on this matter by the county collector and I would like to have your opinion before giving him my advice".

The accrued and collected penalties and interest on back taxes should be apportioned and divided as the respective amounts due the state and county bear to the whole amount of interest and penalties collected.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

Attorney General.

GL:LC

Holder of a $5.00 permit for the sale of non-intoxicating beer cannot allow the original package to be broken upon premises described in the permit. Holder of Ten dollar permit cannot sell in the original package non-intoxicating beer to be taken away from premises where sold.

May 4, 1933

13139Z6
13139Z17 } laws 33

FILED
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Honorable Ted Frossard
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

Your letter reads as follows:

"In regard to the new beer law, I would like to have your opinion on the following questions:

Can the holder of a $5.00 license to sell beer to be carried away from the premises take bottles from the cases he receives the beer in and wrap them in three, six and twelve bottle packages and sell them to be carried away from the premises.

Can the holder of a $10.00 license to sell beer sell it, not only to be consumed on the premises, but also like the holder of a $5.00 license, sell it in the original package to be taken away from the premises.

I would appreciate your opinion on the above questions at your earliest convenience. A distributor in this territory has circulated a letter to his customers containing an excerpt from a letter obtained from the Food and Drug Department holding in the affirmative on the second question above set out, and containing a further statement purported to have been given by your department to the Food and Drug Department answering in the affirmative the first question above set out. The retailers in this district are very anxious to know positively about so your early reply will be appreciated."

Section 13139z6, reads as follows:

> "It shall be unlawful for any person holding a permit authorizing the sale of non-intoxicating beer in the original package, to allow such original package to be broken, or to allow any of such non-intoxicating beer to be consumed, in or upon the premises described in such permit."

Section 13139z12, reads:

> "The phrase 'original package' as used in this article shall be construed and held to refer to any package containing three, six, twelve, or twenty-four small standard beer bottles, and any package containing three, six or twelve large standard beer bottles, when such bottles contain non-intoxicating beer as defined by this article."

It is my opinion, that the holder of a permit to retail non-intoxicating beer in the original package under a five dollar permit cannot legally take bottles from the original package in which he receives the beverage and wrap them in three, six and twelve bottle packages, and sell them to be carried away from the premises.

It is my further opinion, that the holder of a permit to sell non-intoxicating beer to be consumed on the premises where sold cannot sell such beer in the original package to be taken away from the premises and consumed.

Very respectfully,

EDWARD C. CROW.

APPROVED_____
Attorney General.

ECC:MM

SCHOOLS --Teacher required to finish term provided sufficient revenue from taxes and state aid will eventually come in for current year to meet warrants issued for salary.

Board can make contract for ensuing year before annual election.

May 10, 1933.

FILED
30

Hon. Ted Brossard
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Brossard:

Answering your letter of April 18, 1933, wherein you asked:

> "Are School teachers in Missouri required to teach an eight months term of school even tho the districts are unable to pay the sum stipulated in the contract?
>
> May a school board make a binding contract with teachers ~~before~~ before the annual school election, said contract to be for the term beginning next fall?
>
> Does a school teacher violate his contract if he refuses to continue teaching when the district fails to pay his wages but does issue warrants against the districts estimated revenue fund?
>
> After available funds are exhausted from a district may the teacher compel the district to issue warrants up to the amount of the estimated revenue?
>
> Will a district lose state aid the following year if it closes school under a term of eight months if they have exhausted all funds provided for that term and the state fails to pay the sum promised the district and which sum was part of that districts estimated revenue?"

Answering your first question, will say a teacher will be required to teach the eight months if enough revenue will eventually come in to meet the obligation from either State aid or local taxation.

Answering your second question, it is our opinion the school board can make a binding contract before annual school election for the term beginning the following fall, if made in good faith.

Tate v. School District, 324 Mo. 477, l. c. 495.

Answering your third question, it is our opinion that the school teacher would be violating his contract if he refuses to continue teaching for failure to pay his wages if the school board continues to issue him warrants against the district's estimated annual revenue funds.

Answering your fourth question, if he continues to teach as per his contract and the board refuses to issue warrants he can compel them to do so or sue the district for the unpaid balance at the end of the term.

Rudy v. School District, 30 Mo. Ap. 113.

Answering your fifth question, state aid could be withheld from them if they neglect or fail to have the eight-month school, it being our opinion the school should carry on, and warrants issued, and depend on State aid that has been apportioned and promised for the current year, if that, together with estimated taxes, will eventually take care of same.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

STATE HIGHWAY COMMISSION:

8110-8111 RS Mo 1929

Highway commission has authority to close state highway temporarily, to establish detours, travelers can not be compelled to use any particular highway or road and the highway commission has no authority to repair roads other than state highways and detours established by the board.

July 13, 1933

1-25

FILED
30
34

Honorable Ted Frossard
Prosecuting Attorney
Cassville, Missouri

Dear Mr. Frossard:

This Department acknowledges receipt of your letter dated July 6, 1933, which in part is as follows:

> "Now what I want to know is does the state, either by law or by policy, have any obligation to maintain a road which is used by traffic while the main state highway is closed up. If it does these people would like to take some steps to see about getting their due. If it does not then can the busses and trucks, operating on scheduled routes be compelled to use the road officially designated as the detour. No funds exist in the districts treasury whereby the road can be rebuilt and if it left in its present condition this winter these people will have only a rocky, rutted, muddy road where formerly was a good, all-weather road which met their needs and which was built of their own funds".

Section 8110 Revised Statutes of Missouri 1929, provides as follows:

> "The commission shall have power to close temporarily for the purpose

> of construction or repair any portion of a state highway to public use and to issue regulations controlling the use of state highways and all properties relating thereto".

Subdivision 6 of Section 8111 with reference to the powers of the highway commission, further provides:

> "Establishing detours in connection with the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof".

It is clear then that the commission had the power to temporarily close the state highway for the purpose of doing the work outlined in your letter and further that the commission was empowered to establish a detour in connection with the improvement being made. The establishing of the detour was probably for the purpose of having the same marked and maintained so that the general traveling public might be enabled to follow the route they desired to travel. However, any person desiring to travel in this state may choose any road he likes, whether it be a state highway or whether it be what is generally known as a county road, and we can find no authority in any one to compel a particular person to travel any particular route, that is regardless of the character or weight of the traffic and regardless of the effect it may have on the road that is traveled.

Article XII of Chapter 42, Revised Statutes Missouri 1929, in Section 8128 thereof, and laws 1931 page 321, make certain provisions with reference to reimbursing counties, cities or other civil subdivisions of the state under certain circumstances for moneys expended by such county, city or civil subdivision in the building of the state road system. We understand that the road designated in your letter as the "eastern route" is not a part of the state road system and we do not find any authority that would warrant the state highway commission in repairing the road designated as the "eastern route". The condition outlined in your letter is the result of traffic conditions in the state that have developed under the state highway system and we see no relief in the law

on account of the matters you mention.

We do not know as to the policy of the state highway commission with reference to these matters, you can doubtless obtain that information from the state highway commission.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

Acting Attorney General.

GL:LC

Relating to the use of State School money apportioned to the several school districts as provided under section 9257, R. S. 1929.

September 27, 1933

10-2

FILED
30
47

Mr. Ted Frossard,
Prosecuting Attorney Barry County,
Cassville, Missouri

Dear Sir:

This department acknowledges receipt of your letter in which you state and inquire as follows:

> "I have been requested by the county superintendent to submit to you the following questions:
>
> Is it lawful for a school board to apply any or all of the August apportionment (1932) of state money back on the 1931-1932 teachers indebtedness when there was a shortage in the teachers fund for 1932-1933, the latter being the year for which said appointment was made and intended?
>
> May a board of directors or school board lawfully use the money received from the state in August, 1933 for any purpose other than for teachers, when the teachers for that district have not been fully paid for the year 1932-1933?"
>
> Section 9259 R. S. 1929, reads as follows:
>
> "The state superintendent of public schools is hereby authorized to correct any error made in the apportionment of the public school funds among the various counties of this state out of the public school fund of the year next following the date when such mistake was made, and the

> amount set apart to any county for the purpose of correcting an error shall be by him certified to the state auditor and to the county clerk, and the state auditor shall draw a warrant on the state treasurer for the amount so certified in favor of the treasurer of said county, and the county clerk shall apportion said funds to the various districts in said county as the funds of the year in which said error occurred, and the county treasurer may pay outstanding warrants for teachers' wages issued during the school year in which said error occurred, not to exceed the correction made."

Now, I have quoted the above section to get the Legislative intent as to what school year the public school funds are intended to apply and to my mind it clearly appears that the public school funds are intended for teacher's wages for the school year in which said apportionment is made; that is to say, the apportionment received by a school district in August 1933, must go for teachers' wages for the school year beginning July 1, 1933.

We hold that a school board cannot lawfully use the public money received in August, 1932, for a deficits occurring in the school year beginning July 1, 1931.

Section 9312, R. S. 1929, which is applicable here, reads as follows:

> "All moneys received from the State, County and Township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees shall be placed to the credit of the teachers' fund, etc."

From the above provision it is clear that all State school

money must be placed to the credit of the teachers' fund, and cannot lawfully be used for any other purpose.

Yours very truly,

W. W. Barnes

Assistant Attorney General

APPROVED

ATTORNEY GENERAL.

GAME AND FISH - Persons or corporations using, owning or building a dam in a river, creek or stream are required to operate fish hatcheries when all requirements of Sec. 8279 are reasonable.

January 16, 1933.

FILED
31

Hon. John H. Ross, Commissioner,
Fish & Game Department,
Jefferson City, Missouri.

Dear Sir:

This office acknowledges receipt of your letter dated January 11, 1933 in which you state and make inquiry as follows:

'"Section 8279, Laws of Missouri, 1931, page 228-9, reads as follows:

"It shall be the duty of any person, firm or corporation, owning, or using any dam existing, or which may hereafter be constructed across any river, stream, or creek in this state, to erect or cause to be erected and maintained in connection therewith a durable and efficient fishway, or such other device as the game and fish commissioner may deem necessary to enable the fish to have free passage up and down said waters at all times. Such fishway or device shall be of such kind and shall be placed, operated and maintained in such manner as will meet with the approval of the game and fish commissioner. Whenever in the opinion of the game and fish commissioner the height or character of the dam or the condition of the river or stream, makes the installation of such ladders or devices, thereon impractical or unnecessary, he is authorized to require the establishment and maintenance of a fish hatchery by such person, firm or corporation using said dam, for the purpose of stocking the waters above and below such dam. The fish and game commission may, at any time, take fish from said hatchery for distribution to the public waters of the state. Such hatchery to be operated under the supervision of the game and fish commissioner. Any person who shall violate any provision of this section, or who shall refuse to establish and maintain a fish hatchery in lieu of establishing a fishway, when requested to do so by the game and fish commission shall be deemed guilty of a misdemeanor and fined not less than $100 nor more than $300 for each thirty days that such person or corporation shall refuse to comply with such order."

(Hon. John H. Ross, Commissioner)

> Please give me your official opinion as to whether or not this section of the law would require the person, firm or corporation using a dam where a fish hatchery is required to be constructed in lieu of a fish ladder, to operate said fish hatchery at his own expense, but under the supervision of the game and fish commissioner. In other words, whether the word "maintain" as used in said section implies the word "operation"'.

In reaching a conclusion as to the meaning of the above section and the intention of the law makers in enacting same, as well as the scope and effect of the section, we quote some of the cardinal principles to be applied to statutory construction. In

State ex inf. vs. Railroad, 238 Mo. 605

the Supreme Court of the State of Missouri with reference to the construction of the statute thereunder consideration at page 614 of the opinion, said:

> "As we have already suggested, an important element in the construction of this and other statutes is the consideration of the conditions to which it is to be applied, and which its remedial provisions are designed to correct."

The Supreme Court of this state in

Spicer vs. Spicer, 249 Mo. 582

at page 599 further declared:

> "Whenever consistent with reason, that construction which will make the statute operative should be applied. "It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation if the language will permit, instead of treating them as meaningless." (2 Lewis' Sutherland on Stat. Construction (2 Ed.) Sec. 498."

On the general principle of statutory construction, the case of

State ex rel vs. Robinson, 253 Mo. 271

at page 287 of the opinion holds:

> "The General Assembly cannot enact a valid law without the minds of its members considering the things to which the law is to apply, for the legislative will is what becomes the law. In a broad, general sense we discern the legislative will by the words it has spoken through its enactments, the same as we would interpret the language of an individual."

(Hon. John H. Ross, Commissioner)

With these plain and simple rules of construction in mind, the purpose and intention of the Legislature in enacting the above section 8279 may be better understood by stating succinctly the requirements and provisions of the same, outlined as follows:

> "Every person, firm or corporation owning or using any dam existing or which may be constructed across any river, stream or creek is required to erect and maintain in connection with the dam a durable and efficient fishway or other device as the Game and Fish Commissioner may deem necessary so as to permit the passage of fish up and down the water at all times. Such fishway or device shall be placed, operated and maintained so as to meet the approval of the Game and Fish Commissioner.
>
> Whenever in the opinion of the Game and Fish Commissioner, the installation of such device or ladder above provided for is impractical or unnecessary, the Game and Fish Commissioner is authorized to require the person, firm or corporation required to erect and maintain the fishway or other device to establish and maintain a fish hatchery for the purpose of stocking the water above and below such dam.
>
> After the establishment of such hatchery, the Fish and Game Commissioner may take fish from the hatchery for distribution to the public waters of the state, such hatchery to be operated under the supervision of the Game and Fish Commissioner.
>
> A penalty is provided for the refusal to establish and maintain a fish hatchery in lieu of establishing a fishway when requested to do so by the Game and Fish Commissioner.

The Legislature evidently had in mind the patent fact that any dam existing or t hereafter constructed across a river, stream or creek would obstruct the free passage of fish up and down the water and to that extent affect the right of the public to the use of such in the waters of the state. That the Legislature has the right subject to constitutional restrictions to impose regulations and limitations for the protection and preservation of the right of the public in the fish in the waters within the state is beyond question. The Supreme Court of Missouri in

Haggerty vs. Ice Mfg. & Storage Co., 143 Mo. 239

having under decision a case where it was claimed game had been killed out of seasion, and referring to the general police powers of the state,

at page 344 of the opinion, said:

> "This sovereign attribute and power as existent in the States of this Union has often been exercised by them by passage of laws in the most of these States, for the protection and preservation of game; and it seems never to have been called in question. Numerous adjudications attest this fact. In such cases the common ownership of game which otherwise would remain in the body of the people, is lodged in the State to be exercised like all other governmental powers in the State in its sovereign capacity to be exercised in trust for the benefit of the people and subject, of course, to such regulations and restrictions as the sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the state."

Even in the absence of a statutory requirement to that effect, a person or corporation building a dam across a stream within this state is required to keep open sufficient ways for the passage of fish. This is held in

State vs. Gilmore, 141 Mo. 506

at page 512 the Court saying:

> "But aside from any statute on the subject, the general rule of law is that where a person is granted authority to build a dam for mill purposes, he does it under an implied obligation to keep open sufficient fishways for the passage of fish; and this is always the case unless such implied obligation is excluded by an express provision exempting the dam-builder from such implied obligation. Com. v. Essex Co., 13 Gray, loc. cit. 248, and cases cited."

The same rule is announced by the Supreme Court of the United States in

Holyoke Water Power Co. vs. Lyman, 82 U.S. 500, 21 Law Ed. 138

the court having under consideration a somewhat similar case to the one at hand, said:

> "Laws of the kind, requiring the owners of dams across the rivers and streams of the state, to build fishways and keep them in repair, have been passed, in numerous instances, since the state Constitution was adopted, many of which are still in full force. Such laws usually require the owners of the dam to build the fishway at their own expense, and subject their doings in that behalf to the approval of some supervisory board or committee . *** ***Public rights, in all jurisdictions, are subject to legislative control, and it is settled law in Massachusetts

(Hon. John H. Ross, Commissioner)

> and has been for a century and a half, including her colonial history, that the rights of fishery in such rivers as the Connecticut and Merrimac, even above the point where they are navigable for boats or rafts, and the right to erect and maintain dams to create water-power for mill purposes, are public rights and the owners of such rights are bound by such reasonable regulations as the state may make and ordain for their protection and enjoyment."

The state having the right to preserve the public property in fish by making reasonable rules and regulations with reference to the passage of fish up and down stream as applied to owners of dams therein, there is no reason why such regulations cannot be enforced or carried out by an official of the state, such as the Game and Fish Commissioner.

Adverting then to the provisions of Section 8279, the owner of the dam is required to erect and maintain an efficient fishway. This was required by the common law. Whenever the height or character of the dam or condition of the river or stream is such that the installation of the fishway is impractical or unnecessary, the Game and Fish Commissioner is authorized to require the establishment and maintenance of a fish hatchery.

The dam is built in the stream for the gain, or at least, convenience of the persons building it. The doing of that act brings into play the right of the state to protect its rights and in its right of protection as to fish, if the state reasonably concludes that the fishway provided by the dam builder does not protect its interest, then it would have the right to make such other reasonable provisions as would protect the interest of the state in that respect.

We think it is clear from a reading of Section 8279 that the Legislature intended to provide the State Game and Fish Commissioner with authority to cause the owners of dams across streams then existing or thereafter built, to build and maintain fish hatcheries where the fishway as provided in the dam is impractical or unnecessary , and by the use of the word "maintain" in the foregoing section is meant to establish and operate.

In the case of St. Louis S.W. Ry. Co. vs. Davy Burnt Clay Ballast Co., 273 S.W. 630, the Court of Civil Appeals of Texas, having under consideration the question of whether or not the acts of the plaintiff amounted to maintaining a railway, and in defining the word "maintain" at page 633 of the opinion, said:

> "The word "maintaining", in common parlance, has a generally well-defined and accepted meaning, and it is to be assumed that the Legislature intended for that word, as used in article 1319, supra, to be so understood and applied. Webster's International Dictionary

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defines "maintain" to mean:

> To hold or keep in any particular state or condition, to support, to sustain, to uphold, to keep up, to keep possession of, not to surrender, to continue, not to suffer to cease or fail, to bear the expense of.

We can well accept this definition as our guide, for, as said in the case of Brenn v. City of Troy, 60 Barb. (N.Y.) 417, 421:

> Webster's (International) Dictionary *** has become in effect a law book on questions of construction."

In O'Connell vs. Kansas City, 231 S.W. 1040 arose the question, the meaning of the word "maintain" in a suit on account of defective sidewalks. The court at page 1041 of the opinion dealing with the word "maintain" stated some of the general definitions as follows:

> "The word 'maintain' does not mean to provide or construct, but means to keep up; to keep from change; to preserve (Worcest. Dict.); to hold or keep in any particular state or condition; to keep up (Webst. Dict.).
>
> "In Moon v. Durden, 2 Exch. 21, it was said: 'The verb "to maintain"*****signifies to support what has already been brought into existence.'"
>
> Verdin v. City of St. Louis, 131 Mo. 26,87, 33 S.W. 480,494; Barber Asphalt Paving Co. v. Hezel, 155 Mo. 391, 399, 56 S.W. 449, 451 (48 L.R.A. 285).
>
> "The word 'maintain', used as a verb does not mean to provide or construct, but as defined by lexicographers, means to keep up, to keep from change, to preserve. Worcester's Dictionary. To hold or keep in any particular state or condition, to keep up. Webster's Dictionary.
>
> "In the case of Moon v. Durden, 2 Exchequer R. 21, it was said: 'The verb "to maintain", in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence.'"

So that from the foregoing definitions of the word "maintain" it would be sufficient in this case to include the operation of the hatchery, but that is not necessary in the case at hand, because the statute provides that a fishway shall be erected and maintained. The word "maintain" is used in its most active sense and further, the fishway or device shall be placed, operated and maintained so as to meet the approval of the Game and Fish Commissioner, and upon such fishway proving inadequate, the owner of the dam is required to establish and maintain a fish

(Hon. John H. Ross, Commissioner)

hatchery for the fixed purpose of stocking the water above and below such dam. This, of course, means stocking the water with fish, or it means putting fish into the water from the hatchery, and fish could not be propogated in the hatchery unless the hatchery was operated.

The Fish and Game Commission is entitled at any time to take fish from the hatchery for distribution to the public waters of the state, and further, the hatchery is to be operated under the supervision of the Game and Fish Commission and if it were operated within the meaning of the above section, the hatchery would be used for fish hatching purposes.

We are of the opinion that Section 8279 Laws of Missouri, 1931, page 228-9 requires the person, firm or corporation owning or using a dam where a fish hatchery is required to be constructed in a river, creek or stream in this state in lieu of a fishway to operate such fish hatchery at his or its own expense and under the supervision of the Game and Fish Commissioner when all of the requirements made under Section 8279 are reasonable.

Very truly yours,

GILBERT LAMB,
Assistant Attorney General

APPROVED:

_____
Attorney General

GAME AND FISH DEPARTMENT: Right to prosecute for possession of more than twenty-five game fish.

8275 RS No 1929

FILED
31

March 17, 1933

Mr. John H. Ross
Commissioner Game and Fish Department
Jefferson City, Missouri

Dear Mr. Ross:

This Department acknowledges receipt of your letter dated March 8, 1933, as follows:

"I wish you would please give me your interpretation of that part of Section 8275, R. S. Missouri, 1929, which reads as follows:

"****No person shall take, capture or kill, when taken from the waters of this state, in any one day, more than twenty rock bass (goggle-eye), ten bass of all other specie, ten trout, fifteen crappie, five jack salmon or pike, fifteen white perch, ten channel cat, or a total of twenty-five game fish, the possession of more than the number of the fish herein stated shall be prima facie evidence of the violation of this section. ****"

I desire your opinion as to just what is the possession limit on game fish.

Please inform me in your opinion whether or not a person, who has in his possession forty-five crappie and who furnishes affidavit that he has been fishing for a period of three or more days, is guilty of violating this section of the law."

Section 8224 Revised Statutes Missouri, 1929, declares that the ownership of fish not held by private ownership is in the State of Missouri and that no fish shall be caught or taken in any manner, at any time, or had in possession except the person so catching and taking same in possession shall consent title of such

fish be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of same after the same are caught or taken. The section further providing that the catching or taking of fish at any time or in any manner, shall be deemed a consent of the person taking or catching same that the title to the fish shall be and remain in the State, for the purpose of regulating the use and disposition of same and the possession thereof shall be consent to such title in the State.

Section 8247 prohibits the possession by any person of fish during the closed season thereon prescribed by law and making such possession a misdemeanor.

Section 8248 provides it shall be unlawful for any person after the passage of the section, to fish in this state without first obtaining a license permitting him or her to do so and such license shall authorize the person named thereon to fish during the calendar year of its issue and subject to the regulations and restrictions as provided by law. Fishing in privately owned lakes or ponds where a fee is charged for the privilege of fishing, is exempted and likewise certain exemptions are made in Section 8254.

Sections 8249 to Section 8253, inclusive, cover the application for and issuance of licenses to non residents of the State.

Section 8254 provides for the issuance of county and state fishing licenses. County resident licenses shall entitle the holder to fish in the county wherein such license is issued and also in any county adjoining the issuing county. State resident licenses entitle the holders thereof to fish in all counties in the State of Missouri. Any person who has been a bona fide resident of this state for six months last past may secure a license for himself or herself, by filing an affidavit with the county clerk or the license collector of the City of St. Louis, making certain statements and giving certain information, whereupon a license to fish in the county where the applicant resides and any county adjoining the same, shall be issued, it being provided that the section shall not apply to owners and tenants of farm lands used exclusively for agricultural purposes and members of their families under the age of twenty-one years who are entitled to fish on their own and leased lands without obtaining a license so to do, it being further provided in the section that no female or minor who are resident citizens of this state shall be required to take out a fishing license and it being further provided that no person shall be required to take out a fishing license to fish in the water in the boundaries of the county in which he resides,

it being further provided that the section shall not be so construed as to permit a person to fish in any county other than that in which he resides without first taking out fishing license.

Section 8257 requires every person holding a fishing license in this state to present the same for inspection by the fish and game commissioner or any of his deputies or any sheriff, marshal or constable, making a refusal so to do a misdemeanor.

Section 8258 provides a penalty for fishing in this state without at the time being in possession of a license duly issued to such person and covering the period of time in which such fishing is done.

You have correctly set out in your letter the material part so far as your inquiry is concerned, of Section 8275 Revised Statutes Missouri, 1929.

Section 8224 first quoted from is only declaratory of the common law as to the ownership of fish in the waters of the state. The ownership being in the State, the right to fish becomes a privilege which the State may withhold from its citizens or grant upon such terms and conditions as to the State, acting through its Legislature, may seem proper and wise in the protection of the wild life of the state. That the Legislature has undertaken to do, so far as fish are concerned by means of sections of the statutes above referred to in this opinion.

The protection ordinarily afforded by the Constitution of the State against unreasonable search and seizure, as well as that a defendant in a criminal case is entitled to be confronted with the witnesses against him, do not apply in the enforcement of the laws, rules and regulations with reference to the protection of birds, fish and game. In other words, upon the acceptance of a license from the State to take and keep its property the licensee agrees to become amenable to the rules and regulations laid down by the State. Without investigation it would ordinarily occur to one with knowledge of the Constitution of the State and rules of evidence, that that part of Section 8275 making the possession of fish prima facie evidence of the violation of the Section would violate the constitutional rights of the defendant in that he is in a way producing evidence against himself and may be in a way convicted without being confronted with the witnesses against him. However, if the person being prosecuted is the holder of a license issued by the State and we assume you refer to that character of case in your letter, then such constitutional privileges have been waived by the acceptance of the license. The law of this State in

the above regard is stated by the Supreme Court of Missouri, en banc, in State v. Bennett, 288 S. W. 50, and on page 53, where the court quoted with approval the following:

> "Rights in private property must, to a reasonable extent, yield to the public welfare. The protection of game is a public advantage, to which private interests may be made to yield to some extent. The Legislature may enact a reasonable regulation to prevent an easy evasion of the law and a defeat of its purpose to protect and preserve game, and in doing that it may make it unlawful for any person to have in his possession the carcass of a deer, which does not have on it the natural evidences of its sex, whether the deer was a wild or a domesticated one, and the game and fish law of 1905 does that and is valid in that respect".

And further on the same page and on page 54 said:

> "The defendant cannot play fast and loose, that by accepting a hunter's license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case.
> In Diaz v. United States, 223 U. S. 442, 452, 32 S.Ct.250, 252 (56 L.Ed.500,Ann,Cas.1913C,1138), in considering the question of the right of the accused to be confronted by a witness against him, the court said:
> The view that this right may be waived also was recognized by this court in Reynolds v.United States, 98 U. S. 145, 148, (25 L.Ed.244), where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused."

Under Section 8275 any person entitled to fish may for instance catch 20 rock bass and 5 jack salmon in one day, or for instance he is entitled to catch 15 white perch and 10 channel cat in one day, but in no event can such person catch more than a total of 25 game fish in any one day, that is a person might catch 5 rock bass, 5 trout, 5 crappie, 5 jack salmon and

5 white perch.

If a person is apprehended and has in his possession more than 25 of the fish designated as game fish by Section 8275, th then a charge should be filed against such person before an officer having jurisdiction thereof and proof that such person was in possession of 25 game fish at a time certain is sufficient evidence upon which a conviction may be sustained. The defendant, however, would have the right to make proof that he did not catch all of the 25 fish in one day, then it would become a question for the jury to pass on. If the jury thought he did catch all the fish on the same day they would find him guilty, if they did not they would find him not guilty.

Under no circumstances should your Department accept such an affidavit as you refer to in your letter, as that permits the person in possession of the fish without a hearing and without the State having a right to present its evidence, to acquit himself of any wrongdoing. In such a case as you refer to an affidavit should have been filed before a Justice of the Peace of the proper district, charging the person with a violation of the law and the person should have been arrested and brought into court and tried, but in no event should any deputy of yours or other officer have a right to pass upon the guilt or innocence of the party and upon an affidavit furnished by the person suspected of violating the law.

In what we have thus far said we have had in mind persons who were required to have and who were in possession of fishing licenses, however, we do not want to be understood as implying that a person not required to procure a license fo fish could violate the provisions of Section 8275.

Very truly yours,

W. C. BUFORD
Assistant Attorney General.

APPROVED:

_____
Attorney General.

WCB:LC

POWER of the board of commissioners of ROAD DISTRICTS to levy and collect tax without a vote of the taxpayers. (Not under township organization) Section 8067 R. S. Mo. 1929.

February 17, 1933.

FILED
32

Hon. J. R. Gideon
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Mr. Gideon:

Answering your letter of February 15th relative to the construction of Section 8067, R. S. Mo. 1929, wherein you ask:

> "I would like to have your opinion as to whether Commissioners of such road districts have the right under this law, without a vote of the taxpayers of said district to make and collect such taxes for general road work and for maintaining the road and bridges in such districts."

Section 8067, R. S. Mo. 1929, provides as follows:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes *******"

From the foregoing section it is very clear that the legislature intended to give the commissioners exclusive power in the matter to make the levy, etc.

This is further upheld in the case of Harris v. Bond, 244 Mo. 688 l. c., where the court says,

> "It is the consensus of opinion in this country that the Legislature in the creation

> of municipal and public corporations of every description is absolute and unlimited, in the absence of some specific State or Federal constitutional provision restricting such powers.
>
> The Legislature is vested with the whole power of the State in the absence of some such constitutional limitation; and may establish any public or municipal corporation it deems necessary or expedient in the public interest.
>
> It may also confer upon such corporations such public power and authority as it may deem wise and best. ********************
>
> We are, therefore, of the opinion, that the various statutes mentioned and acts of the Legislature referred to, authorizing the creation of these special road districts, are not unconstitutional, null and void, but are upon the other hand valid existing laws of the State."

This opinion is further strengthened by several decisions in this State, and especially in the case of Embree v. Road District, 257 Mo. 593, l. c. 610 and 611; also in Rainey v. Cape Girardeau, 255 Mo. 514.

This opinion is further strengthened by a quotation from the case of State v. Becker, 49 (2nd) S. W., p 155, where the court uses this expression,

> "**** the power thus delegated or granted to one state agency (as in this case the board of commissioners) is by necessary implication at the same time withdrawn from the other agency."

It being withdrawn from the citizens and expressly given to the board of commissioners of an incorporated district, would necessarily give them, the board of commissioners, the exclusive control or power, without the vote of the taxpayers of said district, to make and collect such taxes for general

road work and for maintaining the roads and bridges in such district as may to them seem proper and right.

Very respectfully,

GEO. B. STROTHER
Assistant Attorney-General

APPROVED:
ROY McKITTRICK
Attorney-General.

GBS:EG

COUNTY SUPERINTENDENT OF SCHOOLS - State appropriation, applicability to salary under Section 9463 R. S. Mo. 1929.

179.140
179.150

March 2, 1933.

FILED
32

Hon. J. R. Gideon
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Mr. Gideon:

Your letter to the Attorney-General requesting an opinion on the construction of Section 9463, R. S. Mo. 1939, has been handed the undersigned for attention. You state that, 179.140 179.150

> "Section 9463 R. S. Mo. 1929 provides that the State of Missouri shall appro-perate annually --- four hundred dollars to each county for Co. Supt. of schools and provides that said superintendents shall receive his salary monthly from the county revenue fund in the form of a county warrant drawn upon the county treasurer.
>
> The county superintendent of Taney county has requested the county court of said county to set aside said $400.00 paid to Taney county in a special fund and draw warrants upon said special fund for payment of his salary. The county court called upon the undersigned for his opinion whether the law contemplates that said fund so appropriated by the state shall constitute a special fund or be placed in the general revenue fund upon which superintendent's salary, (as are other county officers salary) is paid.
>
> My opinion is that said fund should be placed in the general revenue and that the county superintendent shall be paid the same as any

other officer. The county superintendent is not satisfied with my opinion and I would appreciate your opinion upon the question."

From a careful reading of this statutory provision it would appear that you have correctly advised your county school superintendent.

Said section as referred to, after designating the amount to be paid in accordance with the population of the counties, continues,

"*****of which the state of Missouri shall appropriate annually out of the general revenue fund of the state of Missouri four hundred dollars to each and every county." Counties of the 2nd, 3rd & 4th Classes

The appropriation to be made goes to the county and into the revenue fund thereof. That it was not the intention of the Legislature that such appropriation was to be treated as a sacred fund to be set apart and applied only to the payment of the superintendent's salary, is evidenced by the further provision in said section, to-wit:

"The county superintendent shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasurer."

It is the opinion of this department that this section cannot be so interpreted as to give the county school superintendent preference insofar as this particular fund is concerned, but that the appropriation of four hundred dollars goes into the revenue fund of the county; the superintendent draws his warrant against said fund and is paid therefrom as other officers; the county court, therefore, would be without authority in setting it aside as a special fund for the payment of such salary.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA:FG

A supplementary opinion with authorities showing power of board of commissioners of ROAD DISTRICTS to levy and collect tax without a vote of the taxpayers. (not under township organization). Section 8067 R.S. Mo. 1929.

March 15,1933

FILED
32

Honorable J. R. Gideon,
Prosecuting Attorney
Forsyth, Missouri

Dear Sir:

Since writing you an opinion on February 17,1933, in answer to your letter of February 15th, asking for a construction of Section 8067 in which you ask:

> "I would like to have your opinion as to whether the Commissioners of such road district have the right under the law without a vote of the taxpayers of said district to make and collect such taxes for general road work and for maintaining the road and bridges in such district."

I have received a letter from Mr. Lewis Luster, Attorney and Counselor, Springfield, Missouri, stating that he had received a copy of the opinion from you and taking issue on the law and conclusions contained in my letter to you.

As this desire for a construction of that section came through you as prosecuting attorney, I am writing to you regarding same and you in turn, if you wish, may furnish him with a copy of this letter (or secondary opinion).

The Constitution in Article X, Section 1, states:

> "The taxing power may be exercised by the General Assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.

Farther on in this same article of the Constitution of the State of Missouri, Section 22 says:

> "In addition to taxes authorized to be levied for county purposes under and by virtue of Section 11, Article X of the Constitution of this State***may*** levy***a special tax not exceeding twenty-five cents on each $100.00 valuation, to be used for road and bridge purposes but for no other purpose whatever***"

Section 23, Article X, in addition to the foregoing says:

> "When authorized so to do by a majority of the qualified voters of any road district, *** make a levy of not to exceed fifty cents on the $100.00 valuation***"

You will note that the taxing power may be exercised by the General Assembly of the state for state purposes and by counties and other municipal corporations when authorized by the General Assembly, such as Counties, Townships, Road Districts or other political subdivisions. (Sec. 8132 R. S. Mo. 1929)

More particularly Section 8061, R. S. Mo. 1929, which says:

> "County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of this article shall be a body corporate and possess the usual powers of a public corporation for public purposes and shall be known and styled "____road district of _____county, and in that name shall be capable of suing and being sued."

Section 8067 R. S. Mo. 1929 says:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, GENERAL TAXES on property taxable in the district*****"

See also Section 8132 R. S. Mo. 1929.

In Haris v. Bond Company, 244 Mo. 664, the Supreme Court says: (l.c.688) and (l.c. 694-5)

> "It is the concensus of opinion in this country that the Legislature in the creation of municipal and public corporations of every description is absolute and unlimited, in the absence of some specific State or Federal constitutional provision restricting such powers."

And the Court further states:

> "These corporations are bodies politic; created by laws of the State for the purpose of administering the affairs of the incorporated territory."

One of the outstanding paragraphs in this decision is the following:

> "THESE SPECIAL ROAD DISTRICTS ARE NEWLY BORN CITIZENS, DRESSED BY THE LEGISLATURE IN THEIR OWN GARBS, AND THEY POSSESS ONLY SUCH AUTHORITY AND RIGHTS AS ARE EXPRESSLY CONFERRED UPON THEM BY THE STATUTES OF THEIR CREATION."

This decision was rendered more than twenty years ago and in all the time since then, it seems to be the outstanding decision of the state as construed by the Supreme Court on these matters and has been followed and invariably favorably commented upon by about ten to fifteen Supreme Court decisions in this State as follows:

Embry v. Road District	257 Mo. (1) 623
Embry v. Road District	240 U.S. 250
State v. Wilson	265 Mo. (1) 13
State ex rel v. Burton	266 Mo. (1) 718
Pitman v. Drabelle	267 Mo. (1) 84
State ex rel. v. Burton	266 Mo. (3) 720
Wire Co. V. Wollbrinck	275 Mo. (1) 350
State ex rel Pope v. Mansfield	299 Mo. (2) 668
State ex rel Hales v. Walker	301 Mo. (2) 125
State ex rel v. Thompson	315 Mo. (2) 65
State ex rel v. Curtis	319 Mo. (1) 327
State ex rel.v. Lollis	326 Mo. 648

"The statute relating to the organization of drainage districts

is very similar to that providing for the organization of road districts. Drainage district statutes provide for benefit assessment and also, for general tax and are organized by LEGISLATIVE AUTHORITY as if DIRECTLY CREATED by the LEGISLATURE."

Citing 239 U. S. 254, l.c. 264

> "It is apparent that when the district was duly organized it had the same footing as if it had been CREATED BY THE LEGISLATURED DIRECTLY."

In the Birmingham case, 274 Mo. l.c. 151, the Court said:

> "These districts are public corporations which may only be constituted by legislative authority, exercised through an enactment of the General Assembly and put into effect either directly or by appropriate agencies designated by legislative authority****

In the decision of State ex rel. v. Thompson, 315 Mo. l.c. 66-67, it is said:

> "This meets the requirements of our Constitution*** The Legislature itself defined and marked out the kind of a territory that may be organized into a road district, and the county court as an administrative agent of the Legislature put the Legislative will into effect***While the proceeding is initiated by persons affected by the organization, the district is created by the Legislature through its appropriate agency. The district when organized is a municipal corporation**** It is a political subdivision of the State."

The decision further states:

> "A road district being a municipal corporation, has power to levy general taxes upon property within its boundaries, for purposes of the district.***The road district here was a legislative creation*** because our Legislature has prescribed a definite method and kind of territory in which a district can be organized; and because the district wasput into operation

> and effect by the proper administrative agencies of the Legislature."

"The road district in this case is in a broad sense a municipal a political sub-division of the state, with power to impose general taxes to carry out the purpose for which it exists. The district here exists in perpetuity or until it is disorganized by legislative act."

In State ex rel v. Lollis, 326 Mo. 644, Section 48, the court said:

> "The Legislature may enact any law which does not contravene the State or Federal Constitution and in its interpretation the court will hold it valid unless its unconstitutionality is manifest and exists beyond a reasonable doubt.
>
> State ex rel. v. Burton, 266 Mo. 718.
>
> State v. Buente, 256 Mo. 227.

A State statute will not be held to violate the Constitution if any other RATIONAL interpretation or construction can be given it.

> Pitman v. Drabelle, 267 Mo. l.c. 84.

Under the above citations, from the Constitution and authorities, it will be seen that these Commissioners of road districts (as empowered under Section 8067) have the power to levy and collect general taxes.

These laws and this section have come into the limelight under the leading decision of Harris v. Bond Company, 244 Mo. 665, wherein the Legislature clothed these new "born Citizens" in appropriate power, etc., and this decision having been repeatedly followed, (always favorably commented upon)in the ten or fifteen later decisions of our Supreme Court above cited, it would stand to reason that this ruling should govern and we reaffirm our opinion expressed to you in our letter of February 17,1933.

Yours very truly,

Geo B. Strother

Geo. B. Strother
Assistant Attorney General

APPROVED_____
Attorney General

POLICE RECORDS, City of St.Louis discus ...

3794-7555 RS Mo 1929

April 10,1933

FILED
32

Mr. Joseph A. Gerk
Chief of Police
1200 Clark Avenue
St.Louis, Missouri

Dear Sir:

Your letter of April 5, 1933 addressed to this department has been referred to me for answer. You request an opinion concerning the following:

> "Permit me to explain a situation with which the Metropolitan Police Department of St. Louis is frequently confronted, expecially during the heat of a campaign like that we have just gone through.
>
> I refer to demands that are made upon us for the police records of some particular candidate or candidates, or perhaps some person who is an applicant for life insurance or some one who is a witness or a principal in a litigation of some kind. These applications for records have come from various individuals, companies and organizations.
>
> May we have an opinion from you as to just what are our rights and duties in complying with or turning down these requests for records? How about the right of the press to ask for and receive such data?
>
> The department is not in sympathy with record-giving for campaign purposes, but wants to be sure of its ground in complying with or rejecting any such applications in future. Your courtesy in telling us how far we must go in such cases will be appreciated."

You desire to know your rights and duties relative to requests for information regarding persons that the police have records concerning. The answer to your inquiry is determined by the character of the information sought and whether it is public or purely private.

Section 7555 R. S. Mo. 1929 provides:

> "The board shall cause a full journal of their proceedings to be kept, and shall also cause all their receipts and disbursements of money to be faithfully entered in books to be procured and kept for that purpose, and said journal, and all said books, and all other documents in possession of said board, shall always be open to the inspection of the general assembly of the state of Missouri or any committee appointed by it for that purpose. It shall be the duty of the board to report to the common council or municipal assembly of the said city at each annual session thereof, the number and expenses of the police force employed by it under this article, and all such other matters as may be of public interest, in connection with the duties assigned it by this article."

You will observe that it is mandatory that records of proceedings be kept and that all of said books and other documents shall always be open to the inspection of the general assembly. Also, that a report to the common council or municipal assembly shall be made concerning ; "All such other matters as may be of public interest, in connection with the duties assigned it by this Article."

Section 3794 R. S. Mo. 1929, pertains to an establishment of a Bertillion system of identification of criminals. This section provides:

> "****and the signaletic card and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law."

We have examined the statutes of this State and the above are the only ones that bear on the subject of police records. We find no case in this State exactly in point concerning your inquiry. Neither do we find any decision or statute which give every person the right to examine your records.

Corpus Juris Vol. 53 at page 624, et seq, in discussing the right to inspect or use public records sets out that at common law a person had no right to inspect public records or to make copy thereof unless he had some interest therein. One had no right to make such an inspection or to make copy for the purpose to satisfy curiosity or motives merely speculative.

Ruling Case Law, Vol. 23 p. 160, et seq, has this to say:

> "It is quite generally conceded that there is no common law right in all persons to inspect public documents or records; and that right, if it exists, depends entirely on the statutory grant.****"

And further:

> "****It has been held, however, that no one has a right to examine or obtain copies of public records from mere curiosity or for the purpose of creating public scandal.****"

And further:

> "****The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example as diplomatic correspondence and letters and despatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals.****"

In the case of People ex rel. Stenstrom v. Hornett, 226 N Y S 338 l.c. 343, the court said:

> "Secrets of State, such as diplomatic correspondence, records of the police, or communications by voluntary informers, may be withheld from inspection, even where a person directly interested is concerned." Egan v. Board of Water Supply of City of New York, 205 N.Y. 147, 41 L.R.A.(N.S) 380, 98 N.E. 467. Worthington v. Scribner, 109 Mass. 487.

There are cases that hold that a public official has to allow the county court to examine their records. These cases pro-

ceed on the theory that the statute gives the county court such authority.

State ex rel. v. Reyburn, 158 Mo.A. 173.

State ex rel. Gay v. Jones, 158 Mo.A. 170.

There are also cases that hold that a person has the right to examine a public record in regard to elections.

State ex rel. Thomas V. Noblitzelle 85 Mo. 620.

This case held that poll books are public records and open as such for every citizen's inspection under reasonable rules and regulations as the court or officer having them in charge may impose. The court in this case compelled the inspection by mandamus.

From the above and foregoing you will note that records kept in performance of your duty under Sections 3794 and 7555 would be public records and that other records purely private although kept by you as a public officer might not be thus classed as public.

In our opinion records kept by virtue of statutory provisions, supra, are such th t the public has the right to inspect, even though there are limitations as to who may inspect. However, records of a private nature or for use by the police, would not in our opinion be such as to require you to permit their inspection.

You would therefore be within your rights if you believe, in your discretion, that information should not be given concerning a person which was gathered from sources purely private and not as an official duty. And if a person desiring the information insists on obtaining same, then, he could bring a writ of mandamus and the question then could be adjudicated.

You will see therefore, the giving of information is a matter of discretion with no hard and fast rule applied. Of course, records kept under sections 3794 and 7555 would at all times be open to public inspection.

Trusting this answers your inquiry. We are

Yours very truly,

JAMES L. HOCKENSTEL
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

IN RE: MOTOR VEHICLE LAWS: RECONDITIONING SYSTEM OF THE MOTOR COMPANY DOES VIOLATE.

7781 RS Mo 1929

June 17, 1933 6-20

FILED
32
29

Honorable Joseph A. Gerk
Chief of Police
Department of Police
1200 Clark Avenue
St. Louis, Missouri

Dear Sir:

This Department is in receipt of your letter of June 3, in which you request an opinion from this office on the following state of facts:

> "It has just come to my attention that the Ford Motor Company, Detroit, Michigan, has instituted a new system with reference to reconditioning of motors manufactured by their company, which in my opinion will be a violation of the Motor Vehicle Laws of this state, as covered under Section 7781.
>
> Ford dealers are now authorized to make an exchange of motors, replacing the motor taken from a machine with a reconditioned motor which is delivered the dealer from factory at Detroit. The motor number of this reconditioned motor is removed while it is at Detroit, and when delivered the local dealer it bears no number but will plainly show that the original or manufacturers number has been removed. The motor which is removed from machine and exchanged for this reconditioned motor is then crated and forwarded the Ford Company at Detroit, where it is overhauled, its number removed and then delivered to a dealer as a replacement, thus creating an endless chain of motors with the numbers removed." * * *

I would suggest that this department communicate with the Attorney General and the Secretary of State, Jefferson City, Missouri, giving this information asking for an opinion as to how to handle such cases as may come to our attention; whether or not the dealer will be authorized to restencil on the reconditioned motor the number of the motor for which it is exchanged, or whether the owner of the motor vehicle shall apply for a Commissioner of Motor Vehicle number, as provided in Section 7781, subsection (b) and (c).

Section 7781, R. S. Mo. 1929, insofar as it is pertinent to the present inquiry provides:

"(a) No person shall destroy, remove, cover, alter, deface, or cause to be destroyed, removed, covered, altered or defaced, the manufacturer's number, the motor number or other distinguishing number on any motor vehicle, or number or other distinguishing number on any motor vehicle tire, the property of another for any reason whatsoever.

"(b) No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle, trailer or motor vehicle tire on which the original or manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced, and no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle or trailer, having no manufacturer's number or other original number, or distinguishing number;"******

In the case of Star Square Auto Supply Company vs. Gerk, 30 S. W. (2d) 447, this statute was held constitutional in all its provisions.

In order to decide this case, the statute must be scrutinized closely and applied to the facts.

Subdivision (a) of Section 7781 R. S. Mo. 1929 provides:

> "No person shall destroy, * * * * * the manufacturer's number, the motor number or other distinguishing number on any motor vehicle," * * * "the property of another for any reason whatsoever."

Under the facts as stated, subdivision (a) then is not applicable for the reason that the motor, when removed and sent to the factory at Detroit to be reconditioned, belongs to the Ford Motor Company; and, in removing the motor number, they are doing so with respect to their own property.

The remaining question then is the applicability of subdivision (b) of Section 7781, R. S. Mo. 1929, to the facts here under consideration. Subdivision (b) of Section 7781, so far as it is applicable may be divided into two parts:

(1) "No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle, trailer or motor vehicle tire on which the original or manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced,

and

(2) no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle or trailer having no manufacturer's number or other original number, or distinguishing number;" * * *

There is no doubt but that our law on this subject has its historical basis in the law of the State of Illinois. The law of Illinois being Section 236, Chapter 121, R. S. Illinois 1929, in so far as it is pertinent provides:

> "Any person or persons, firm or corporation, who, after the taking effect of this Act shall sell or offer for sale in this State, or who shall own or have the custody or possession of a motor vehicle, the original engine number of which has been destroyed,

> removed, altered, covered, or defaced, or who shall sell or offer for sale, own or have the custody or possession of a motor vehicle having no engine number, excepting electrically propelled motor vehicles, shall be deemed guilty of a misdemeanor, * * * * *Provided, that any person, firm or corporation being the owner, or custodian of, or having possession of a motor vehicle, the original engine number of which has, without the knowledge or consent of such person, firm or corporation, been destroyed, removed, altered, or defaced, may apply to the Secretary of State, on a blank to be prepared and furnished by the Secretary of State, upon request, for permission to make or stamp, or cause to be made or stamped on the engine of such motor vehicle a special engine number.* * * **

In the case of People v. Oberby, 154 N. E. 128, plaintiff in error was convicted under this law. He defended on the ground that he had purchased a second hand engine block to put into the car; that the car when he purchased it had the number 9515119 stamped on the engine block; that the engine block became damaged beyond repair, and he removed it and destroyed it as required by law; and that he purchased from a dealer another engine block of the same make; that the block he so purchased bore no number although it was a second hand block and had evidently been used as part of a motor. He further testified that upon installation of this engine block in his car he stamped thereon the number 9515119 as such number had appeared on the original engine block in the car. The court in holding that he had violated the motor vehicle law said:

> * * * *The outstanding fact in this case is that the engine block which plaintiff in error says he substituted for the one which he took out and thereby made it a part of his automobile bore evidence that the original number thereon had been defaced. His possession of it in his car is undenied, and section 35 has therefore been violated. He would have no more right to put the number of another car on a block which appeared to be blank than he had to erase the number. The intention of the statute is to prohibit

substituted numbers on engine blocks, as those are matters of identification of automobiles. The finding of the municipal court in this case that plaintiff in error violated that act is justified by the provisions of section 35 of the act.
The judgment will be affirmed.
Judgment affirmed."

The only real difference between the Illinois law and the Missouri law is that the Illinois law expressly says "a motor vehicle the original engine number of which has been destroyed," while the Missouri law contains the words "motor vehicle" alone. However, without a motor there cannot be a motor vehicle. The motor is an indespensable and integral part of the motor vehicle so that when the term "motor vehicle" is used it must of necessity include the motor. This is recognized in the case of People v. Oberby supra, when the court said: "The outstanding fact in this case is that the engine block which plaintiff in error says he substituted for the one which he took out and thereby made it a part of his automobile" " " The general assembly of Missouri also recognized this fact when it defined a motor vehicle as being "any self propelled vehicle not operated exclusively upon tracks, except farm tractors." In the case of Star Square Auto Supply Company v. Gerk, 30 S. W. (2d) 453, the Supreme Court of Missouri, in holding the automobile tires to be an integral part of a motor vehicle said: "In other words the tires are as essential to the operative use of the vehicle as is the motor or gasoline engine which propells it."

The Missouri Law was enacted in the exercise of the police power in the interest of public welfare. It was deisgned not only to protect those citizens who might be the owners of automobiles and thereby have property subject to theft but was also designed in the interest of the public at large to the end that the commission of crime and the escape of criminals in stolen automobiles might be suppressed.

Therefore, in view of the foregoing, it is our opinion that the buying or selling of a reconditioned motor, the original engine number of which has been removed, is a violation of Section 7781 R. S. Mo. 1929; nor is it possible for the owner of the motor vehicle to apply to the commissioner of motor vehicle for a new engine number as suggested in the letter addressed to this department for the reason that that provision of the statute relating to the issuance of new engine numbers is expressly limited

by the legislature to the following case:

> "* * *Provided,however, that any person being the owner or custodian of, or having possession of a motor vehicle, trailer or motor vehicle tire at the time of taking effect of this article, the original number of which has been previously destroyed, removed, covered, altered or defaced, shall, within thirty (30) days after the taking effect of this article, apply to the commissioner on a blank to be prepared and furnished by said commissioner, for permission to make or stamp, or cause to be made or stamped on such motor vehicle, trailer or motor vehicle tire, a special number:" * * *"

We are aware that the enforcement of this law may result in some inconvenience to certain individuals and a possible economic loss to the Ford Motor Car Company in that it of necessity prevents the sale by that corporation of reconditioned motors for model "A" Fords. Nevertheless, these facts cannot render a law invalid or justify this department in nullifying the law. As was said by the court in the case of Star Square Auto Supply Company v. Gerk, in construing the very law now here before us:

> "However, the mere fact that the enforcement of a law, enacted by the legislature in pursuance of the police power of the state, may result in some expense or inconvenience to those persons who come within its terms does not render such a law unconstitutional and invalid, or justify the courts in nullifying the law. The propriety, wisdom and expediency of legislation enacted in pursuance of the police power is exclusively a matter for the legislature." * * *"

Therefore it is the opinion of this department that the new system inaugurated by the Ford Motor Car Company with reference to the reconditioning of motors conflicts with Section 7781 R. S. Mo 1929, under the heading of "The Motor Vehicle Law."

Respectfully submitted,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED_____
Attorney General

JWH:MM

Relating to Construction of Section 3952 R. S. 1929 and Officer's Rights Thereunder.

September 26, 1933

10-2

FILED
32
46

Mr. Joseph A. Gerk,
Chief of Police,
1200 Clark Avenue,
St. Louis, Missouri

Dear Sir:

Receipt of your letter, dated September 12, 1933, is acknowledged, in which you state and inquire as follows:

> "I am taking the liberty of requesting an opinion from you as to the rights and privileges of the St. Louis Police Department under Section 3952 of the Revised Statutes of Missouri, 1929, commonly referred to as the hold-over law.
>
> A little explanation of my motive in requesting the opinion may not be amiss. This department frequently takes into custody persons who are dangerous menances to society. Almost before the crooks are lodged in cells and before we can complete our investigation, their attorney appears with bonds for their release. The attorney seeks to intimidate police officials with whom he may come in contact and threatens them with dire punishment unless his clients are forthwith given their liberty.
>
> This happened the other night when two suspected bombers, potential murderers, were brought in. Bonds were immediately presented for them, copies of which I inclose for your information. The officers in charge were more or less influenced by the attorney's insistent and vehement demands and released the suspects on these bonds. My impression is that under the hold-over law the police are entitled to twenty hours in which to question

and investigate suspects and that within those twenty hours they are justified in refusing to accept bonds for their release.

I shall appreciate your courtesy in setting me right upon this subject so that a precedent may be had for the future guidance of police officials under similar conditions."

Section 3952, Revised Statute Missouri, 1929, reads:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entiled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

In State ex rel Kaiser v. Miller, 316 Mo. l. c. 382, the court in part said:

" Under the provisions of section 3200, Revised Statutes 1919 (now 3952 R. S. 1929) the person arrested by a peace officer without warrant on suspicion of having committed a criminal offense, is required to be discharged from such custody within twenty hours, unless he shall be charged with a criminal offense by the oath of a credible person, and be held by a warrant to answer for such offense. The jurisdiction of the magistrate over such person accrues by the concurrence of a complaint made as provided by law and the custody of the person complained against. The jurisdiction

> of the magistrate over money or property taken by the officer in respect thereto, arises upon the concurrent facts that a criminal cause has been instituted before the magistrate and that the party charged has been taken into custody."

We say that the above opinion holds in effect that no court has jurisdiction over such officers making arrests until the arising of concurrent facts as follows:

First, that a criminal cause has been instituted by the filing of an affidavit by some credible person charging the person arrested with a crime.

Second, that the party charged has been taken into custody within the twenty hours designated in section 3985, supra. We therefore hold the arresting officers have twenty hours within which to investigate the person arrested, before either releasing said person or filing charges, and that he is not entitled to bail until charges are filed, which must be done within the period of twenty hours after his detention or his release effected.

Yours very truly,

W. M. Barnes

Assistant Attorney General

APPROVED

Attorney General.

Payment of past indebtedness of a county cannot be paid out of current revenue unless there be more than a sufficient amount for current expenses.

9874 RS Mo 1929

October 3, 1933

10-13

FILED
32
48

Mr. H. E. Gibson,
County Clerk -Crawford County,
Steelville, Missouri

Dear Sir:

We acknowledge receipt of your letter under date of September 16, 1933, in which you state and inquire as follows:

> "We have on file in the County Clerks office several hundred dollars in Criminal Cost bills that were incurred in 1931 and 1932.
>
> Should these Cost Bills be paid out of the 1933 Revenue? If paid out of the 1933 revenue, should we write a warrant to the County Treasurer and let the Treasurer hold warrant until funds are available from this years collections?
>
> Thanking you for this information, I am."

Section 9874 R. S. 1929, reads as follows:

> "The county courts of the several countips of this state are hereby authorized and empowered, at the first regular term of such court after the taking effect of this chapter, and at the May term every year thereafter, to appropriate, apportion and subdivide all the revenues collected, and to be collected, and moneys received and to be received, in the various counties in the state, for county purposes, in the following order:

I. A sum sufficient for the payment of all the necessary expenses that may be incurred for the care of paupers and insane persons of such county.

II. A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county.

III. A sum sufficient for the payment of the salary of all county officers, where the same is by law made payable out of the ordinary revenues of the county.

IV. A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of the county.

V. A sum sufficient for the payment of the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as the contingent fund of such county; which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year."

It will be observed from the above that it requires the County revenues to be appropriated to which it is solemnly pledged.

The fourth, required by that section of the Statute, relates to fees of grand and petit jurors, judges and clerks of elections and fees of witnesses for the grand jury.

Section 12, Article X of the Constitution of Missouri begins as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, etc."

In the case of Book v. Earl, 87 No. 1. c. 251, the Court said in part as follows:

> "The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

We conclude, from the reasoning of the Supreme Court in the above case, that if the County Court can take the revenue collected in a given year and pay it out on obligations of a different year, where there is not more than sufficient revenue to defray its current expenses out of said fund and absorb said funds in that way, the result would be there would be no funds with which to pay the current demands upon said funds and the consequence would be a suspension of the business affairs of the county relative to said particular fund.

We hold that the county is not legally obligated to pay demands beyond its contemplated revenues for the year in which the debt was created and it therefore follows that the cost bills for the years 1931 and 1932, mentioned in your letter, must await the collection of revenue levied for those years.

Yours very truly,

W. W. Barnes
Assistant Attorney General

APPROVED:

Attorney General.

IN RE: Matter of Interstate Extradition.

L. 3511 RS Mo 1929

FILED
33

January 23, 1933

Hon. Guy B. Park
Governor of the State of Missouri
Jefferson City, Missouri

Dear Governor:

Upon the request of your Department for an opinion on the law as it relates generally to interstate extradition, it is my privilege to submit to you the following:

The United States Constitution, Article IV, Section 2, provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime - - -".

18 U. S. C. A. Section 662 provides:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the

fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory".

18 U. S. C. A. Section 663 provides:

"Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than $500. or imprisoned not more than one year".

Section 3587 Revised Statutes Missouri, 1929, provides:

"Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable".

Section 3591 Revised Statutes Missouri, 1929, provides:

"Whenever the executive of any other state shall demand of the executive of this state any person as a fugitive from justice, and shall have complied with the requisites of the act of congress in that case made and provided, it shall be the duty of the executive of this state to issue his warrant, under the seal of the state, directed to any sheriff, coroner, or other person whom he may think fit to entrust with the execution of such warrant".

"Before a requisition for delivery of an alleged fugitive is honored, it must appear there is a demand with a certified copy of the indictment of one who is shown to be a fugitive from justice".

State ex rel Gaines vs. Westheus, 2 S.W.(2nd) 612, 318 Mo. 928.

"The requisition for delivery of a fugitive from justice will not be honored by the governor of an asylum state until all the requirements of 18 U. S. C. A. section number 662 are complied with.

Ex parte Ellis, 9 S. W. (2nd) 544.

The Governor's duty to surrender a fugitive upon the demand of the governor of another state is not absolute and unqualified, but depends upon the circumstances of each particular case.
State vs. Saunders, 232 S. W. 973, 288 Mo. 640.

To be a "fugitive from justice " a person must incur guilt before leaving the demanding state, and be within the state from which return is demanded.
Ex parte Ellis, 9 S. W. (2) 544.

The governor of the asylum state can waive its right to have the fugitive tried on a charge then pending in its courts.
Hansen vs. Edwards, 240 S. W. 489, 210 Mo. App.35.

A criminal charge sufficient under the laws of the demanding state will authorize approval of granting of requisition.
Flournoy vs. Owens, 275 S. W. 923, 310 Mo. 355.

Since extradition between states may be granted without notice or hearing, it is immaterial that the petitioner is given a hearing by the governor's private secretary instead of the governor.
Ex parte Pelinski, 213 S. W. 809.

The character of evidence at a hearing authorizing a governor to grant a requisition is not a matter of particular concern, since not prescribed by the federal statutes, and it need only be satisfactory to the governor's mind.
Albright vs. Clinger, 234 S. W. 57, 290 Mo. 83.

In the light of the above cases set out, there being no effort to completely digest the whole law of interstate extradition, but simply touch the high places as each case must in the final analysis, stand on its own footing, so long as the Constitution, Federal and State Statutes above set out are complied with, it is the opinion of this office that the following rules of practice which seem to have been so uniformly approved and followed by the authorities of several states, should be followed as a matter of policy by the State of Missouri.

RULES OF PRACTICE WHEN MISSOURI
IS DEMANDING STATE.

The application for the requisition must be made by the prosecuting attorney for the county in which the offense was committed, and must be in duplicate original papers or certified copies thereof. The following must appear by the certificate of the prosecuting attorney: (a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled in capital letters - for example: JOHN DOE. (b) that in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial at the public expense. (c) That he believes he has sufficient evidence to secure the conviction of the fugitive. (d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive. (e)If there has been any former application for a requisition for the same person, growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be. (f) If the fugitive is known to be under either civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based should be stated. (g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects. (h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same. (i) If the offense charged is not of recent occurrence, a satisfactory reason should be given for the delay in making the application.

RULES OF PRACTICE WHEN MISSOURI
IS THE ASYLUM STATE.
Before the Governor of Missouri
should grant requisition.

1. In all cases of fraud,false pretenses, embezzlement, or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant, that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required or a sufficient reason be given for the absence of such affidavit.
2. Proof by affidavit, of facts and circumstances satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is found in the state upon which the requisition was made, shall be sufficient evidence in the absence of other proof, and that he is a fugitive from justice.

3. If an indictment has been found certified copies in duplicate must accompany the application. 4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes),and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereof, if any, must be furnished upon an application. 5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrants must be duly certified. 6. Upon the renewal of an application, for example, on the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new or certified copies of the papers in conformity with the above rules must be furnished. 7. In the case of any person who has been convicted of any crime and escapes after conviction, or while serving his sentence, the application may be made by the jailor, sheriff or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same. 8. No requisition will be made for the extradition of any fugitive except in compliance with these rules. And in any interstate extradition in order for an "INFORMATION to constitute such an affidavit before a magistrate" as is required by Section 5278 of the Compiled Statutes of the United States, it must be sworn to positively before a magistrate. A clerk of a court is not a magistrate, neither is a notary public.

It is the opinion of this office that if the above rules are adopted matters of extradition will be greatly expedited, and that the law will be properly complied with. In matters not touched upon in the above opinion, which would be an extraordinary case, it will be necessary to advise with you upon the happening of such a case, and it will be our pleasure.

Very truly yours,

Wm. Orr Sawyers
Assistant Attorney General.

Approved:

Roy McKittrick
Attorney General.

WOS:LC

STATE RIGHT TO CEDE JURISDICTION TO FEDERAL GOVERNMENT OVER LANDS THERETOFORE PURCHASED

FILED
33

February 3, 1933

Governor Guy B. Park
Jefferson City, Missouri

Dear Governor:

I acknowledge receipt of your letter dated January 31, 1933, with inclosures as follows:

1: Letter dated January 25, 1933, from Patrick J. Hurley, Secretary of War, to yourself,

2: Copy of letter dated January 7, 1931, from Patrick J. Hurley, Secretary of War, to Governor Henry S. Caulfield,

3: Proposed draft of bill amending Section 11072 Article I, Chapter 66, Revised Statutes Missouri, 1929.

The seventeenth clause of Section 8 of Article I, of the Constitution of the United States reads as follows:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings".

You will observe that this clause of section 8 permits the Federal Government to exercise exclusive legislation in all cases whatsoever over what is now the District of Columbia, and by cession of any state like authority over all places purchased by the consent of such legislature when the same shall be for the purposes enumerated in the seventeenth subdivision of section 8.

The proposed draft of the bill submitted adds the comprehensive words "and for military purposes" The proposed bill attempts to give the consent of the state to the acquisition of lands by purchase or grant, which has been or may hereafter be acquired. The seventeenth subdivision of section 8 contemplates that the land shall be purchased when the consent of the legislature is first had and obtained. If the conclusion in the letter of the Secretary of War to yourself is correct that this legislation is necessary, then it would seem that the purchase was made by the Federal Government without authority from the state. According to subdivision seventeen of section 8 the legislature would not have authority to confirm a previous purchase or to cede jurisdiction over territory to the United States Government, except where the land was purchased with the consent of the legislature nor does section 8 refer to a grant of land, as is contained in the proposed bill, but only to a purchase.

The bill is in proper form so far as accomplishing the desires of the United States Government is concerned, subject of course to what is said in the preceding paragraph of this letter.

If you desire further information on the subject it will be our pleasure to advise you.

Inclosures returned herewith.

Yours very truly,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

Inclosures

IN RE: Validity of Senate Bill No. 82. Fifty-Seventh General Assembly of Missouri providing for altering form of Presidential Ballot by eliminating name of Electors and printing only Names of Candidates for President and Vice-President on the Ballot.

May 4, 1933.

FILED
33
20

His Excellency
Governor Guy B. Park
Jefferson City
Missouri

Dear Sir:

You have asked me for an opinion as to Validity of Senate Bill No. 82, Fifty-Seventh General Assembly of Missouri altering form of Official Election Ballot in Missouri by eliminating names of Presidential Electors and providing for printing only the names of candidates for President and Vice-President on the ballot, and which said Senate Bill as finally passed is now before you for executive approval or vetoe.

The title of this Bill is as follows:

"AN ACT to repeal Sections 10300 and 10310 of Article 7, Chapter 61, Revised Statutes of Missouri 1929, relating to the form of the ballot, etc., and to enact two new sections in lieu thereof, to be known by the same section numbers."

An examination of the Amendments made to Sections 10300 and 10310 R. S. of Mo. of 1929, in my opinion shows Senate Bill No. 82 as passed deals exclusively with the subject dealt with by the Statutes amended and the rule in Missouri is that a mere reference to the sections to be amended without other description of the subject matter of the amendatory law is a sufficient title to an amendatory act dealing exclusively with the subject of the act amended.

Clark vs. Atchison, Topeka and Santa Fe Ry. Co., 319, Mo. l.c. 878.

Article 7. Chapter 61, Revised Statutes of Missouri, of 1929, deals with Election Ballots, Voting and Election Returns and the two repealed sections 10300 and 10310, deal respectively with Form of the Ballot and the method to be followed by voter in

voting and the two sections enacted in lieu of the two repealed sections deal with the form of the Ballot and the procedure to be followed by voter in voting. The title of the Bill is legally sufficient.

The next question suggesting itself is the legal effect of the provisions of the Bill, providing the names of the candidates of the several political parties for Electors for President and Vice-President shall not be printed on the ballot but shall after nomination be filed with the Secretary of State, and placing on the ballot the names of the Candidates of the respective political parties for President and Vice-President and providing a vote for any candidate for President and Vice-President shall be a vote for the Electors of the Party by which such candidates were named.

Naturally the thought occurs, can the General Assembly of Missouri remove from the Ballot the names of the Electors and substitute therefor the names of the candidates for President and Vice-President and then provide a vote for such Presidential and Vice-Presidential candidate shall be a vote for the Electors of the Party by which such candidates for President and Vice-President were named?

To determine this question, we must examine the Federal Constitution because it commands the States to name a designated number of Presidential Electors.

Our State Constitution contains no specific provision as to the manner of selecting, nor number of Presidential Electors but Chaper 63 Revised Statutes of Missouri of 1929, does designate number of and provide method for selecting Presidential Electors and said statutory provisions are in harmony with both the Federal Constitution and the Federal Statutes on the subject and if a conflict existed between either State constitutional or statutory provision and Federal constitutional or statutory provisions, the State enactment would have to yield to the Federal provision.

Turning our attention now to the Federal Constitution, we find the Second Clause of Section One of Article II. of the Federal Constitution provides as follows:

"Each State shall appoint,in such Manner as the Legislature thereof may direct, a

Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. "

Observe the language of the Federal Constitution is:

"Each State shall appoint in such manner as the Legislature thereof may direct****."

This constitutional provision not only commands Presidential Electors shall be appointed by the State but it equally commands the appointment must be made in such manner as the Legislature of the State may direct.

The leading case construing clause 2. Section 1. Article II of the Federal Constitution above quoted, is that of McPherson vs. Blacker, 146, United States R., P. 1, which case went to the Federal Supreme Court from a Decision of the Michigan Supreme Court construing the Michigan Statutes controlling election of Presidential Electors.

The manner of appointment of Presidential Electors by the Michigan Act was the Election of an Elector and an Alternate Elector in each of the Twelve Congressional Districts of the State and of an Elector and Alternate Elector at large in each of two Districts defined by the act.

It was insisted it was illegal for the Michigan Statute to provide this method of appointment for the reason the state must appoint as a body politic and must act as a unit and could not delegate authority to subdivisions of the State created for that purpose; and it was claimed the appointment of Electors by the Two Districts was not an appointment by the State because all of its citizens otherwise qualified would not be permitted to vote for all the Presidential Electors.

Answering these arguments the Federal Supreme Court (146 U. S. R. l.c. p. 35) said:

"'A State in the ordinary sense of the Constitution,' 'is a politidal community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.'

"The State does not act by its people in

in their collective capacity, but through such political agencies as are duly constituted and established.*****

"In other words, the act of appointment is none the less the act of the State in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the State, and the combined result is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed.*****"

The Constitution does not provide that the appointment of Electors shall be by popular vote nor that the Electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone name the Electors.

"It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

The historic setting of the Federal constitutional clause commanding the States to name Presidential Electors sustains the construction thereof by the Federal Supreme Court. In the Federal constitutional convention, members thereof proposed various different Methods of Selecting the President.

Gerry proposed the choice should be made by State executives; Hamilton that the election be by electors chosen or elected by the people; James Wilson and Gouverneur Morris were strongly in favor of a popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the Legislatures; Roger Sherman wished to have appointment by Congress.

And as the Federal Supreme Court says:

"The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed."

It is not surprising therefore that various modes of choosing Presidential Electors were pursued in early days of our nation's existence.

At the first Presidential Election, presidential electors were appointed by the Legislatures of the States of Connecticut, Delaware,

Georgia, New Jersey and South Carolina. Pennsylvania provided for election of electors on a general ticket. Virginia divided the State into districts and then elected Electors by Districts. Massachusetts divided the State into districts and the people voted for two candidates in each District and from the two persons in each District having the greatest number of votes, the general court by Joint Ballot elected one as Elector and in the same way selected two Electors at large. In Maryland, five Electors from West Shore and five from East Shore were elected on a general ticket.

Fifteen States participated in the Second Presidential Election and there was a similar variety in modes of electing Presidential Electors.

Sixteen States took part in the Third Presidential Election.

> "In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, 'one in the district of Washington, one in the district of Hamilton, and one in the district of Mero,' and 'that,the said electors may be elected with as little trouble to the citizens as possible,' certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero."
>
> Here we find an instance where the legislature of a State named by a legislative act certain persons who were given the power to designate the Presidential Electors in each of their three respective districts.

Story in his commentaries on the Constitution first ed. par. 1466, says:

> "In some states the Legislatures have directly chosen the Electors by themselves;

In others they have been chosen by the People by a General ticket throughout the whole State; and in others by the people by Electoral Districts, fixed by the Legislature a certain number of Electors being apportioned to each District,**** No question has ever arisen as to the constitutionality of either mode except that by a direct choice by the Legislature. But this, though often doubted by able and ingenious minds (3. Elliott's Deb. 100-101) has been firmly established in practice ever since the Adoption of the Constitution and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it."

In 1874, Senator Morton of Indiana as Chairman of the Senate Committee on Privileges and Elections recommended in a report to the Senate that a majority vote of the People of each District should give the candidate one Presidential Vote but the Senate failed to adopt such a proposed constitutional amendment; but in the Report, Senator Morton said:

"The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." Senate Rep. 1st Sess. 43 Cong. No. 395.

"From this review, ********** ********** ********** it is seen that from the formation of the government until now the practical construction of the clause has

conceded plenary power to the state legislatures in the matter of the appointment of electors."

"In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in 'In re Green,' 134 U. S. 377, 379, 'no more officers or agents of the United States than are the members of the state legislatures when acting as electors of Federal Senators, or the people of the States when acting as the electors of representatives in Congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.

"The question before us is not one of policy but of power, and while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, the fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive."

We see therefore so far as the Method of Selecting Presidential Electors is concerned, the Federal Supreme Court holds the Legislature of the State have the supreme power by reason of Clause 2. of Section 1. Article II. of the Federal Constitution.

The Federal Supreme Court held the Michigan Statute valid.

The contention was also made in McPherson vs. Blacker that the Michigan Statute as to election of Presidential Electors Violated the Fourteenth and Fifteenth Amendments to the Federal Constitution, in that all of the Voters of Michigan could not vote for all of the Presidential Electors as the State was divided into Two Districts for election of Presidential Electors at Large. But the Federal Supreme Court said: (146 U.S. l.c. pp. 38-39).

> "******, that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for the protection of such as the citizen already has; that at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the State; nor was it at the time of the adoption of the Constitution; and that neither the Constitution nor the Fourteenth Amendment made all citizens voters.
>
> "The Fifteenth Amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of face, color or previous condition of servitude. The right to vote in the States comes from the States but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. United States v. Cruikshank, 92 U. S. 542; United States v. Reese, 92 U. S. 214.
>
> "If because it happened, at the time of the adoption of the Fourteenth Amendment, that those who exercised the elective franchise in the State of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of Article II has been so amended that the States can no longer appoint in such

> manner as the legislatures thereof may direct; and yet no such result is indicated by the language used nor are the amendments necessarily inconsistent with that clause.*****
>
> *****Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors." ***

The Federal Supreme Court holds in above cited case that there is no Federal constitutional right given to voters to vote for Presidential Electors and this meets the question of right of the General Assembly of Missouri to insert the Provision in Senate Bill No. 82. removing the names of Presidential Electors from the Ballot. This case decides, the Federal Constitution gives the Missouri General Assembly the <u>power</u> to <u>designate</u> the <u>Method</u> by which Presidential Electors shall be named and therefore the Legislature of Missouri could provide as they did that the Names of the candidates for President and Vice-President should be Printed on the Ballot and that a vote for any such candidate for President and Vice-President shall be a vote for the Presidential Electors of the Party by which such candidates were named.

I have, for the purpose of comparison, assumed Amendments of Missouri Statute proposed by Senate Bill No. 82 to be in effect and have compared the Missouri Statute with the Federal Statute as to Election of Presidential Electors and I find no conflict between the two Statutes.

It is true, Section 9, Article II. of the Missouri Constitution provides as follows:

> "ELECTIONS MUST BE FREE AND OPEN.— That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

And under above quoted Provision of Missouri Constitution, it might be argued that as the Federal Supreme Court holds Presidential Electors are not Federal officials that all the voters of the State of Missouri would have the right to vote at least for the Presidential Electors at large and therefore the Missouri Legislature could not remove from the Presidential Ballot the names of the Presidential Electors at Large. But the all sufficient legal answer to this argument is That the Power to fix the Method by which the Presidential Electors are named is given to the Missouri Legislature by the United States Constitution and cannot be taken from the Missouri Legislature by the State Constitution.

It is my opinion, Senate Bill No. 82. violates no Provision of the United States or State constitution nor is it in conflict with the Federal Statutes.

Yours very respectfully,

EDWARD C. CROW

APPROVED:_____

ROY McKITTRICK
Attorney-General

ECC:AJ

County Budget Bill

GOVERNOR: Title to bill must contain what, and when germane.

SB 154 Laws 33

May 11, 1933

FILED
33

Governor Guy B. Park
Capitol Building
Jefferson City, Missouri

Dear Governor Park:

This Department replies to your oral request for an opinion as to the constitutionality of Senate Bill Number 154, as we understand, on the particular question of whether or not the enactment violates Section 28 of Article IV of the Constitution of the State of Missouri.

The title to Senate Bill Number 154 is as follows:

"To provide for a County budget placing certain duties upon the County Court of the several Counties of this State, upon the County Clerks, the County Treasurer, and State Auditor; authorizing the County Court to designate someone to prepare a budget estimate, providing that certain officers shall furnish certain information, providing for the time that such estimate shall be furnished, providing for the settling out of the estimated receipts and expenditures, providing for the classification of expenditures and for priority of payment, giving to the County Court power to review such estimates, requiring the filing of such estimates with certain officers, providing certain penalties for the violation of the provisions of this act and repealing all laws in conflict herewith".

The above mentioned section of the Constitution provides in part that:

> "No bill ****** shall contain more than one subject, which shall be clearly expressed in its title".

The object of the quoted provision of the organic law was to make the title to the bill express the subject of the act in such terms that members of the General Assembly and the people, upon reading the title, would not be left in doubt as to what matter is treated in the body of the bill.

State ex rel v. Becker, 47 S. W. (2nd) 781, 782 (and cases cited).

Under such constitutional provision a bill cannot treat of more than one subject. The section of the Constitution is entitled to be liberally construed.

State ex rel v. Becker, 47 S. W. (2nd) 781, 783.

There does not appear to be any ambiguity in the title to Senate Bill Number 154 hence the same is not up for construction.

Sections 1 to 8 both inclusive, of the bill, deal with counties having a population of 50,000 inhabitants or less, according to the last Federal decennial census. So far as those eight sections are concerned the matter of preparing a budget is left to the county court and the title to the act seems to indicate clearly enough what might be expected to be found in such eight sections of the bill.

Sections 9 to 20 both inclusive, deal with the preparation of an annual budget in counties having a population of more than 50,000 inhabitants, according to the last Federal decennial census.

Section 11 on page 12 of the bill provides that the county court shall have power to fix all salaries of employes, other than those of elective officers, except that no salary for any position shall be fixed at a rate

above that fixed by law for such position.

Section 17 of the bill further attempts to authorize the county court to borrow money in anticipation of the collection of taxes for the current fiscal year.

If the matter of fixing salaries by the county court and the matter of borrowing money by the county court are germane to the main subject of the act, then it is not necessary to mention such items in the title; on the other hand if the fixing of such salaries or the borrowing of such money are not germane to the general subject of the act that is, county budget, that part of the bill would be unconstitutional and inoperative.

Discussing the motor vehicle law, State ex rel v. Becker, and on the question of whether the provisions that the prison board should manufacture license plates and badges were germane to the motor vehicle act, the Supreme Court at page 783 of the opinion said:

> "As stated by relators, "motor vehicles" form the groundwork of the act. Of course, all matters germane to this subject may be incorporated in the act. But the provision for the manufacture of plates and badges by convicts is not germane to the subject "motor vehicles". It has no natural connection with said subject, and there is no word in this title tending to even cause a suspicition that hidden away in one of the thirty-two sections of the bill are provisos providing for the manufacture of plates and badges by convicts. No member of the Legislature or the public could have been notified by this title, that the bill dealt with the employment of convicts. For the reasons stated, the provisions are unconstitutional and invalid".

So as to Senate Bill Number 154 we fail to see any natural connection between the wisdom of or the detail in carrying out a county budget law and the fixing of salaries of the county employes by the county court, and particularly the borrowing of money by the county court.

The power to borrow money by a county court is such a radical departure from the practice and the law in the past in this state, that the attention of the members of the Legislature should have been challenged when such a bill was up for passage.

Vice v. Kirksville, 280 Mo. 248, 357, 358.

The term budget is defined by Webster as follows:

> "The annual financial statement which the British Chancellor of the Exchequer submits in behalf of the ministers to the House of Commons for approval. It comprehends a general view of the finances of the country, with the proposed financial measures for the ensuing year. Also, the financial condition shown by such a statement, or the measures proposed in it. Sometimes, a similar statement in other countries or of a quasi-public body".

From this definition of "budget" we see no connection between that and the fixing of salaries by the county court or empowering them to borrow money.

We are of the opinion that neither the quoted part of Section 11 with reference to fixing of salaries of employes by the county court, or that part of Section 17 attempting to authorize the county court to borrow money, are expressed in the title to Senate Bill Number 154 nor are either germane to the subject of the act.

We would call attention to another thing in connection with this bill. Section 36 of Article VI of the Constitution of this state provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By virtue of the foregoing provision of the Constitution county courts of this state have the sole management, control and jurisdiction of the property and financial interests of the respective counties and have original and exclusive jurisdiction to transact all of the business of such county.

State ex rel Buckner v. McElroy, 309 Mo. 595, 608.

In so far as Sections 9 to 20 both inclusive, of the bill may seek to oust the county court of any jurisdiction to transact all of the business in the county, then such parts of the act in that respect would be of no effect.

It is well settled law in this state that a part of an Act may be declared unconstitutional and the remainder of the Act will take effect so long as the substance of the act is not destroyed in holding a part thereof unconstitutional.

State ex rel v. Becker, supra, pg. 782 (cases cited),

Mayes v. United Garment Workers, 320 Mo. 10, 19.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

Attorney General.

GL:LC

HOUSE BILL NO. 263 does not violate Article IV, Sec. 28, Missouri Constitution.

HB 263 Laws

May 11, 1933.

FILED
33

Hon. Guy B. Park
Governor of Missouri
Jefferson City, Missouri

Dear Sir:

We have your request of May 8th, 1933, for an opinion with reference to House Bill No. 263, which request is as follows:

> "Will you please furnish me with your opinion as to whether in House Bill No. 263 recently passed, the variance between the Title 'In Counties having population of 75,000 and not more than 90,000 inhabitants', and in the Act 'a population of 75,000 inhabitants and less than 90,000 inhabitants,' is sufficient to invalidate the Bill."

House Bill No. 263 is an Act to fix the salaries of certain county officials in certain counties, and the title of the Act includes counties of 75,000 population and over, and up to and including counties of 90,000 population, while the provisions of the Act itself include counties of 75,000 population and over, and up to and including counties of 89,999 population. The title of the Act is therefore broader and more inclusive than the Act itself.

In determining whether this Act is in violation of Article IV, Section 28, of the Missouri Constitution, requiring legislation to contain a single subject to be clearly expressed in its title, we must bear in mind that this provision of the Constitution must be reasonably and liberally construed.

The Supreme Court in Star Square Auto Supply Company v. Gerk, 30 S. W. (2d) 447 l. c. 453, said:

> "While the constitutional requirement is mandatory, nevertheless it is the universal policy of the judiciary to give to the constitutional requirement

> a reasonable and liberal application and construction, so as not to unreasonably hamper or cripple proper legislation on the one hand, but so as to prevent trickery and the surreptitious enactment of vicious and incongruous legislation on the other hand."

The purpose of the above constitutional provision is well stated in Asel v. City of Jefferson, 229 S. W. 1046 l. c. 1048, as follows:

> "'The evident object of the provision of the organic law relative to the title of an act was to have the title like a guide board, indicate the general contents of the bill, and contain but one general subject which might be expressed in a few or a greater number of words. If those words only constitute one general subject; if they do not mislead as to what the bill contains; if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title and does not impinge on constitutional prohibitions.'"

The most that can be said is that House Bill No. 263 has a title broader than the Act itself. This feature is insufficient to invalidate the bill. Brown, J. in The State v. Missouri Pacific Railway Company, 242 Mo. 339 l. c. 369, said:

> "A title which was broader than the statute enacted thereunder could not mislead anyone. The effect of such title would be to convey notice not only to those really affected by the law, but also to others not concerned in its passage."

We, therefore, hold that House Bill No. 263 has reference to one subject and that the title meets the requirements of the Constitution, and that the Act, on the question presented, is constitutional.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

FER:EG
Enc.

BEER LAW:

State Fair Grounds,
not unlawful for directors
to sell concessions for sale
of beer therein.

12480 RS Mo 1929
121927 & 28 Laws 33

6-23

June 14, 1933.

FILED
34
28

Mr. Charles W. Green,
Secretary Missouri State Fair,
Sedalia, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 6, 1933, in which you inquire as follows:

> "Will you please give me a ruling on how I can handle beer concessions on the State Fair Grounds this year. I am getting a lot of inquiries relative to the sale of beer and would like to know how I can handle it.
>
> Especially, I would like to know if I may sell the privilege to anyone to peddle beer in the grandstand.
>
> Thanking you very much for an early reply, I am."

Section 12480 R. S. Mo. 1929, provides that the board of directors shall have power to make all rules, regulations and by-laws necessary for the conduct and government of the exhibitions and sale of privileges etc., in connection with the State Fair. In addition thereto the Act specifically provides as follows:

> "*** Provided it shall not, directly or indirectly, permit any gambling devices of whatever nature to be operated on the grounds, nor permit any intoxicating liquor, wine or beer to be sold thereon ***."

The above prohibition against the sale of intoxicating liquors at the Fair Grounds has been on our Statute books long prior to the 1909 Revised Statutes. The word "intoxicating" modifies and qualifies the words "liquor," "wine" and "beer." the prohibition of this Section of the Statute is against the State Fair permitting the selling of "intoxicating" beer. This prohibition does not mean that malt drinks are prohibited. Beer is a malt drink but, as used in the Statute, the Legislature was not seeking to prohibit the sale of malt drinks, but was seeking to prohibit the sale of intoxicating beer.

Such deduction must result from an analysis of the situation existing at the time of the enactment and continuation of Section 12480. During that period of time there was no such thing as non-intoxicating beer. Under the Dram Shop License Laws

and Local Option Laws in effect during this period of time, the word "beer", both by popular conception and legal definition, was construed to mean "intoxicating beer," and not malt drinks. It is said in State v. Mitchell, 134 M. A. 540, 543:

> "In People v. Wheelock, 3 Park 9, the Supreme Court of New York held, that the word 'beer' in its ordinary sense, denotes a beverage which is intoxicating.
>
> The Kansas City Court of Appeals, in the case of State v. Heinze, 45 M. A. 403, held that section 4395, Revised Statutes 1889, in effect defined beer to be intoxicating liquor. To the same effect is State v. Houts, 36 Mo. App. 265.
>
> In the light of these authorities and in obedience to the legislative will, as interpreted by the Kansas City Court of Appeals in State v. Heinze, supra, we construe the word 'beer' as used in the indictment, and instructions given in this case, to mean a fermented and intoxicating liquor."

It is, therefore, apparent from the foregoing that when the Legislature used the word "beer" in Section 12480, that it meant "intoxicating" beer. It expressly so stated in said Section and the courts in construing the Statute in existence prior to the adoption of the Eighteenth Amendment did so hold. It is, therefore, our opinion that Section 12480 only prohibits the board of directors from permitting the sale of intoxicating beer and does not prohibit them from permitting the sale of non-intoxicating beer. The board of directors may, therefore, permit the sale of beer in such manner and under such conditions as is imposed by the Legislature in the recently enacted Beer Law, the terms of which we shall now discuss.

The Beer Act recently passed is the exclusive legislation upon the subject of manufacture and sale of beer. We shall only call your attention to the various sections which are pertinent to the answer of your inquiry. Section 13139a, declares that beer not exceeding 3.2 per cent by weight is non-intoxicating and may be lawfully manufactured and sold under regulations set out in the Act.

> Sub-paragraph "c" of Section 13139e provides as follows: "For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, $10.00."

Section 13139u provides that under a permit authorizing the sale of non-intoxicating beer for consumption of the premises described in such permit, the holder of the permit may sell beer by bottle, by glass, on draught and in the original package.

The only two Sections in the Act providing restrictions as to how the holder of the permit shall sell beer are Sections 13139z7 and 13139z8. Section 13139z7 prohibits the sale of non-intoxicating beer to any person while standing at or near any bar or counter in or upon such premises, but permits the sale at tables or counters while such customers are seated at such tables and counters.

Section 13139z8 prohibits the holder of a permit authorizing the sale for consumption upon the premises to maintain in any room on said premises any bar, mirror or other fixtures having the appearance of a saloon, such as existed prior to the effective date of the Eighteenth Amendment, and prohibits the maintaining of any blinds or screens such as will obscure such room from public view.

The two above Sections, therefore, prohibit the sale of beer at bars and counters to people while standing, but do not prohibit the sale at counters and tables to customers while seated, and provide that the premises shall not be so equipped with mirrors, blinds and fixtures as to give the appearance of a saloon. There are no other restrictions in the Act regulating the sale of beer for consumption on the premises by the person holding such a permit. It must, therefore, be held that the Legislature did not intend to prohibit the sale in any other manner or under any other circumstances than as provided above. A person holding a permit for consumption on the premises who sells in a manner and under circumstances not in conflict with the two above Sections, will be making a legal sale under the terms of the Act. There is nothing in the terms of the Act, either expressly or by implication, which would prohibit the holder of such a permit from having his employes solicit sales and deliver a bottle of beer from a container which he carries. The law does not require, in order for the sale to be legal, that the beer be drunk while consuming food, or that the holder of the permit sell food on the premises.

In State v. Fezzette, 69 Atl. 1073, the word "premises" was held to mean a room,or a shop, or a building, or a definite area, but in either case the locality is fixed.

In re Cullinan, 99 N. Y. S. 375, it is said:

> "The 'premises' and lands are synonymous and if there is any distinction between the words, it is that the word 'premises' is more inclusive."

The word "premises", therefore, may mean a room, a building, or a definite area which is not inclosed like a room or building. As for example, beer gardens. The area known as the"grandstand" located upon the State Fair Grounds is a

definite area, the limits of which are well defined and fixed. If a person should obtain a permit to sell beer for consumption upon the premises known as the grandstand, we do not believe that the law would prohibit such holder of the permit from having his employes pass among the occupants of the grandstand for the purpose of soliciting sales and delivering beer to be drunk.

Section 13139z1 prohibits the holder of a permit from permitting any person to mix any ingredient with beer for the purpose of increasing its alcoholic content. Section 13139z3 makes it a misdemeanor for any person to add any ingredient which will increase the alcoholic content.

It is, therefore, the opinion of this Department that the board of directors may sell concession permits and may lease certain defined areas within the State Fair Grounds to persons who intend to sell beer for consumption upon the premises. The holder of such a concession must pay a license to the Federal Government and the State of Missouri for the privilege to sell beer for consumption on the premises. The premises upon which beer is to be sold should be well defined in the permit and should be as extensive as the premises leased. Holders of permits cannot sell beer at bars or counters to people while standing, but may sell beer to customers while seated at counters or tables. Such premises shall not contain bars, mirrors, screens, or other fixtures which would give the appearance of a saloon as it existed prior to the adoption of the Eighteenth Amendment.

If a person should obtain the necessary permit for the sale of beer for consumption on the premises known as the "grandstand" in the Fair Grounds, we do not believe it would be a violation of law for the holder of such permit to peddle beer among the people occupying the grandstand, if he has complied with the above restrictions and limitations required by law.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

REFORMATORY, MISSOURI: Authority of officer of institution to carry arms while attempting to arrest escaped person.

40x9 R S Mo 1929

June 15, 1933. 6-20

FILED
34
28

Mr. Herve G. Gray
Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Mr. Gray:

This department is in receipt of your letter of June 6th, with request for an opinion, which letter of request is as follows:

> "It has been our custom, when a boy escapes from this Institution, to permit the officers of the Institution to carry arms while they are out in the attempt to capture said boy, in as much as we never know what shape we will find the boy in.
>
> I would appreciate it very much if you will write me a letter or permission of some kind, whatever may be required, that the officers will be legally entitled to carry arms when on such duty."

Section 4029 R. S. 1929, under "Crimes and Punishments", provides as follows:

> "CARRYING CONCEALED WEAPONS.--If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or

meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, spring-back knife, razor, metal knucks, billy, sword cane, dirk, dagger, slungshot or other similar deadly weapons, or shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment: Provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."

Section 8355 R. S. 1929, Chap. 44, Art. II, under "The Missouri Reformatory", provides as follows:

"It shall be the duty of every sheriff, deputy sheriff, constable or marshal, and every officer and employe of such reformatory, to arrest, with or without warrant, any person who shall have escaped from such institution and return him thereto, and such officer, except officers and employes of the institution, shall receive such compensation as shall be allowed by law for like services rendered and shall be paid out of any fund in the treasury of such institution not especially appropriated."

Under 40 Cyc. p. 857, it is stated,

"An exception of peace officers from the application of a statute prohibiting the carrying of weapons includes the county judge who is a conservator of the peace by constitutional

provision, as well as persons specially deputized or appointed to make an arrest or preserve order, and persons specially summoned to aid in executing a search warrant or a warrant of arrest, although the exception operates in favor of these latter cases of persons only during the limited time and for the particular purposes for which they may be and are appointed."

It is, therefore, our opinion that the officer and employee mentioned in Section 8355, supra, who has the authority "to arrest, with or without warrant, any person who shall have escaped from such institution and return him thereto," comes within the proviso of Section 4029 R. S. 1929, when on the mission of arresting or attempting to arrest a person who has escaped from said institution, and therefore is legally entitled to carry arms when on such duty. Of course, we do not intend to convey the idea that the officer or employee of your institution has this authority beyond the borders of this State.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

ELECTIONS: City of Kansas City.
Who eligible to vote -- Weeks Bill.

July 26, 1933.

FILED
34

Hon. W. W. Graves, Jr.,
Chairman
Board of Election Commissioners
Kansas City, Missouri

Dear Sir:

This is to acknowledge your letter of July 21st, 1933, which is as follows:

> "Owing to the fact that there is not sufficient time to hold a registration, according to law, prior to the coming Special Election which the Governor is to proclaim, Tuesday, July 25, several questions have arisen on which the Board would like to have an opinion from your office.
>
> Section 10593 Revised Statutes of Missouri 1929 provides that a person who has been duly registered as a voter in a precint in Kansas City may if he changes his residence after such registration and prior to the election next following said registration transfer his registration to the precinct in which he has moved. As we have no registration prior to this election, in your opinion would a voter who has moved his place of residence, since the last registration in September, 1932 be entitled, at this time, to be transferred upon the books to his present address? In this respect we beg to inform you that the opinion of most of the members of the Board is that transfers at this time should be allowed.

Undoubtedly since the last registration there have been a great number of people who have become of age and also a great number of people who have become naturalized who would be entitled to vote if they were upon the registration books. As we have no registration, what is the opinion of your office as to whether or not these people are entitled to vote at this Special Election? We refer you in this respect to Sections 10582 and 10612 Revised Statutes of Missouri 1929. A precedent has been established here in Kansas City, particularly in a certain Special Bond Election, that people who had changed their residences and people who had obtained their majority or become naturalized were permitted at such election to vote in the precinct in which they lived, although not registered, upon the signing of an affidavit by such person or persons, that they were citizens of the United States and that they had resided at such address in said precinct and ward for so many days prior to such election and had been residents of the state of Missouri for more than one year preceeding said election and that they had never been convicted of any felony or any misdemeanor connected with the right of suffrage. Members of the Board have found no sections of the Constitution Statutes, or any case law which would indicate that this would be proper.

Kindly advise us the opinion of your office in this respect.

Thanking you for any courtesy in these matter, we remain "

You state that owing to the fact there is not sufficient time to hold a registration according to law prior to the election to be held by virtue of a proclamation of the Governor, that you would like to have answered questions that have arisen, these being;

First: Whether or not a person who is registered in one precinct and who since the last election moved or changed his address to another precinct may be transferred upon the books to his present address by the board?

Second: Whether or not persons who since the last registration are entitled to vote, having become of age, naturalized or acquired citizenship in the State and/or Kansas City, shall be eligible to vote if their names do not appear on the registration books?

The premise stated in your letter, namely, that a registration can not now be had (owing to insufficient time) according to law, must be borne in mind.

You ask if Section 10593 R. S. 1929, does not permit the Board to make such transfers on the registration books. This section in our opinion does not permit of the results you seek to accomplish. It provides in part as follows:

> "Whenever any person who has been duly registered as a voter by the board of registration of the precinct in which he then resides, etc. * * * * *, after the close of registration shall change his residence from one precinct in said city to another, or from one part of such precinct to another part thereof, before the day of the election next following his registration, and shall after making such change at any time on or before the tenth day preceding such election, apply to the board of election commissioners to have his name transferred from the precinct in which he is registered, etc. * * * * *; if said board shall be satisfied that the applicant has changed his residence, as stated, and that he is entitled to have his name transferred and his place of residence changed, they shall first cause his name, where he moved from his former precinct, to be erased from the registry thereof, and transferred to the precinct in which he then resides, etc. * * * * *."

We come to the conclusion it does not apply because we believe the statute contemplates that the revision of registration books shall be only for the election for which the registration was held.

Section 2, Laws of Missouri, 1933, page 234, provides in part the following:

> "For the purpose of electing delegates to any convention to vote upon the ratification

> of any proposed amendment to the Constitution of the United States, the Governor is hereby authorized by proclamation to call a special election and fix the date of holding thereof, etc. * * * * *. In all other respects, such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, insofar as such laws will apply, etc. * * * * *."

Section 10582 R. S. 1929, provides who shall be entitled to vote, and we quote a part of same:

> "* * * * * shall be entitled to vote at such election, for all officers, state or municipal, made elective by the people, or at other elections held in pursuance of the laws of the state, but shall not vote elsewhere than in the precinct where his name is registered and where he is registered as a resident."

Section 10612 reads as follows:

> "The vote of no one shall be received by said judges whose name does not appear upon said register as a qualified voter."

We hold to the conclusion that a person in order to vote should be a registered voter and should vote where registered. However, this is a special election (Section 2) "and that it shall be conducted under the provisions of the election laws of this state insofar as such laws will apply."

You will note that said provision uses the words "shall be conducted". In the case of The State v. Adams, Alabama Reports, 2 Stewart, 231 l. c. 242, the court in its opinion discussed the word "conducting", having this to say:

> "Does this provision, for deciding in the event of a tie, form a part of the 'manner of conducting the election?' If it does, then the relator was duly elected; if it does not, he w as not. There is certainly a great distinction between the manner of conducting an election, and the election itself. By 'the manner of conducting the

the election.' I understand the formal part of the election, viz: the mode of voting, the mode of receiving and registering the votes, of computing them, &c. The word 'manner' has never been considered as including substance, but form only, and the word 'conducting', certainly cannot be synonymous with 'effecting'. Now the giving a casting vote is clearly not a part of the 'manner of conducting,' but it is effecting the election. The qualifications of the electors is substance, the manner of determining upon those qualifications is form. Under the provision which we are considering, it devolved upon the managers to determine whether the voters possessed the necessary qualifications to vote; but the law must definitely prescribe those qualifications. * * * *"

Also, in the case of Blake v. Walker, 23 South Carolina Reports, 517 l. c. 525, the court said:

"It is true that the act does provide that the election should be conducted according to the law governing municipal elections in the city of Spartanburg, and it may be true that, according to a strict and literal construction of the word 'conducted,' it would not embrace a declaration of the result; but if there is anything else in the act tending to show that the legislature did not intend to use this word in its limited sense, then it is the duty of the court to give effect to such intention.

Now, it seems to us clear that the legislature intended to apply the same law regulating the municipal election to the election provided for in the local option act, and that this act must be read as if the provisions of the fifth section of the charter of the city of Spartanburg had been incorporated into it. So reading it, we think it manifest that the legislature did not intend to use the word 'conducted' in its strict and limited sense, but intended it also to embrace the declaration of the result. * * * *"

We believe the Legislature in the present act intended that all people qualified to vote shall be permitted to vote, yet restricted so that the election insofar as practicable would follow the procedure and method employed in other elections held under the laws of the State.

It is needless to call to your attention that in a city such as Kansas City there must be some method employed to see that only eligible voters are permitted to vote. If such were not the fact it would be impossible for the judges to determine who the voters were. Therefore, the registration books should be at their command and persons who are on such books should be permitted to vote. However, the question arises that many voters (having no opportunity at this election) who are by the Constitution permitted to vote, by not being registered (having become of age or naturalized, or having changed their place of residence) would be disenfranchised. Inasmuch as the election laws apply only where consistent with such, it is our opinion that the judges in charge of the special election upon becoming satisfied that such persons are eligible to vote should permit them to so vote, and if it is your policy to require an affidavit to be signed by persons wishing to vote, who are not on the registration books, we see no harm in that.

Now, as to your first inquiry, we would suggest a list be certified by the election commissioners to the various precincts of persons who were on the books in other precincts, stating thereon the fact that such persons removed their residences. In this manner the judges of election will have a list of every person who would be entitled to vote the same as if a registration were held.

Trusting the above answers your questions, we are

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

CIRCUIT CLERKS & PROSECUTING ATTORNEYS: Cannot apply money collected on salary.
COUNTY WARRANTS: 1932 warrants cannot be paid out of 1933 revenue.

11-3

October 23, 1933.

FILED
34

54

Hon. L.G. Graven,
County Treasurer,
Lincoln County,
Troy, Missouri.

Dear Sir:

Your letter addressed to General McKittrick with post script attached has been handed to me for reply, same being as follows:

> "There has been some collections from this office that I do not think are proper and am asking your opinion in writing: First does the Circuit Clerk have the right to collect fees from criminal cost and hold same for salary; second, does Prosecuting Attorney have right to collect any of said fees from Treasurer's office for any cause; third, can any warrant either school or county of 1932 issue be paid out of 1933 revenue.
>
> I would appreciate the above information as soon as possible."

I.

The Circuit Clerk does not have the right to collect fees from criminal costs and hold the same for salary.

In answer to your first question, we are enclosing copy of an opinion rendered to Hon. Howard R. Maness, Prosecuting Attorney, Doniphan, Mo., which we believe fully answers your question.

II.

Prosecuting Attorney does not have the right to collect any of the fees from the Treasurer's office for any cause.

We assume that this question embodies the same condition as your first question and relates to the Prosecuting Attorney's right to apply any fees which might come into his hands on his salary.

We refer you again to the same opinion (Hon. Howard R. Maness) wherein the question has been answered to the effect that the Prosecuting Attorney cannot apply fees in payment of his salary.

III.

Warrants, school or county, of 1932 issue cannot be paid out of 1933 revenue.

The leading case in Missouri on this question is that of Kansas City, Fort Scott & Memphis Railraod Company v. Thornton, 152 Mo. 570, l.c. 575-576. In this case the Court said:

> "As claimed by counsel, Section 3205 has been on our statute books since 1835, but prior to the adoption of the Constitution of 1875 there was no organic law which stood in the way of its enforcement. The result was, overwhelming debts were contracted, which necessarily went unpaid or excessive taxation had to be levied to pay them; the effect of which impaired the credit of the counties and cities, engendered recklessness and extravagance in the management of the public business and constantly oppressed the tax-payers. These were the evils that sections 11 and 12 of article X of the Constitution were intended to remedy, first by limiting the rate of taxation and, second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed

before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish a cash system in public business. If this rule results in any county not having money enough to pay as it goes or to run its governmental affairs, the remedy is not with the courts. Having reached this understanding of the meaning of the Constitution it follows, without the necessity of any analytical examination or comparison of statutes or prior decisions, that all statutes or decisions providing or holding a contrary rule must give way."

In view of this decision, it is the opinion of this department that the 1932 warrants cannot be paid out of 1933 revenue.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

Bank Shares - Place of assessment Sec 9765 RS Mo 1929

9765-66- RS Mo 1929

January 31, 1933

FILED 35

Hon. Jos. L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

Your letter of January 27, 1933 addressed to the Attorney General has been handed the undersigned for attention. You submit to this department, the following statement of facts:

> "I have been asked by the Collector of Clark County for an opinion on the assessment of the taxes on bank stock on which I would like to have a ruling by your office, as the same question has arisen in connection with the stock of two different banks here in the County.
>
> "The stock in banks located at Revere and Kahoka is held partly by individuals living in various School Districts through the County. On account of the fact that the School taxes in both of the above mentioned towns is much higher than in rural districts, some of these stockholders take the position that their bank stock is personal property and should therefore be assessed in their home school district along with other personal property that they own rather than in the school district in which the bank is located and are withholding payment of the tax on their stock.
>
> "This condition has been in existence right along, that is, the assessment has always been run according to the location of the bank but it has just now been brought to me by several of those concerned and I will certainly appreciate whatever assistance you can give me on it."

Section 9765, R.S. Mo. 1929, provides in the first portion thereof, that:

> "The property of manufacturing companies and other corporations, where not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate names."

The assessment to be made against banks and trust companies as provided in the next portion of the same section, is to be arrived at by valuation of the stock to be determined as therein provided, said section of the statutes being as follows:

> "Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock."

Section 9766, R.S. Mo. 1929, provides:

> "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

So far as we have been able to ascertain, the exact point of your inquiry has never been passed upon in this state. We find, however, in the opinion by Valliant, C.J., in State ex rel v. Lesser, 237 Mo. 310, the following language:

> "The law as it now is does not by express terms impose a tax on shares of stock in any corporation except in banks, or concerns that do a banking business, insurance companies, concerns owning steamboats or other water craft, and building associations; the property of all other corporations is taxed like property of persons. Banks and insurance companies pay taxes only on their real

> estate, their personal property is taxed indirectly by taxing the shares of stock. The reason for that system of taxation is that national banks usually have a large part of their capital invested in Government bonds which are not subject to taxation, but an act of Congress authorizes the State to tax the stock of the bank according to its real value, which includes in its estimate the non-taxable bonds, and the General Assembly, to avail itself of that act, put state banks and insurance companies on a plain with national banks. (State ex rel. v. Shryack, 179 Mo. 424.) The peculiar character of steamboats, here to-day and beyond reach to-morrow, is the reason for requiring the resident owner of such stock to include it in his list to be returned to the assessor, and the peculiar nature of interests in building association also furnishes a good reason for making an exception as to such stock.
>
> "The reason for making exceptions of banks, insurance companies, steamboat companies and building association is the difficulty in reaching the tangible property in those concerns; the stock is treated as representing the property and taxed in lieu of taxing the property."

It will be also noted that the section requires that the assessor be furnished with a list of the shares. In a number of cases, this has been treated as a requirement to furnish the number of shares and the name or names of the persons owning such shares. This is due possibly to the fact that under Section 9766, R.S. Mo. 1929, such shareholders are rendered secondarily liable for the payment of the tax. The omission of the Legislature to require that the residence of such owners be furnished by the executive officer to the assessor is possibly due to the fact that the Legislature had in mind that a large number of such shareholders might be non-residents of the state.

In the case of State ex rel Donnell, Collector, v. Peoples Bank of De Soto, 263 S.W. 205, while not passing upon the proposition here discussed, Walker, J. in the course of his opinion said:

> "The manifest purpose of section 12775, R.S. Mo. 1919 (now Section 9765, R.S. Mo. 1929) is to afford the assessor, authentic information as to the owners of the shares

> of stock in a corporation, that such shares may be properly assessed against them. St. L. Bldg. & Sav. Assn. v. Lightner, 42 Mo. l. c. 426. Why thus assessed when the banking corporation is required to pay the taxes on the shares, and be repaid by the shareholders, is of no concern to us in the solution of the question at issue. The Legislature, in its wisdom, saw fit to prescribe this manner of assessing and collecting taxes of this character, and therefore our inquiry is limited to ascertaining and determining whether the statute has been substantially complied with in furnishing the assessor with the required information to enable him to make a valid assessment. "

It would appear from the language of Section 9766 that the intention of the Legislature was (for the purpose of taxation) to completely separate the stock from its owner because the payment of the tax is made mandatory upon the bank, and the bank is rendered primarily liable for the payment thereof. It is true that the statute gives the bank a lien upon the stock for the recovery of the amount of tax so paid, but such repayment or the enforcement of the lien so given is left optional with the bank.

Following the reasoning of the court in the above cited case together with the omission of the statute to furnish the residence of the shareholder and the fact that the assets of the banking institution, which fixes the value of the shares of the capital stock, are located at the banking instiution, it is the opinion of this department that the tax upon such shares should be ascertained by the assessor upon the tax rate in the township of the county where the banking institution is located.

Very truly yours,

Carl C. Abington,
Assistant Attorney-General

Approved:

Roy McKittrick,
Attorney-General

INRE: Obtaining motor vehicle license by January 31st, but custom and practice permits to approximately March 15th.

7762 RS Mo 1929

March 2, 1933

FILED
35

Hon. Joseph L. Gutting,
Prosecuting Attorney,
Clark County,
Kahoka, Missouri.

Dear Sir:-

In a postscript to a letter of February 27th, 1933 regarding John Martin etc., you state,

> "Please inform me by <u>return mail</u> when you think all county officials should start picking up motor drivers on licenses so all counties could start enforcing this law at the same time and make it uniform."

I will answer the postscript at the present time by saying the securing of plates and paying these license fees seems to be due and obtainable beginning January 31st of each year: Sec. 7762.

On account of the difference in the size of the numerous cities in Missouri in the different counties thereof, it would be very hard to begin enforcing the law at a uniform date as suggested in your postscript. In the larger cities for instance like St. Louis and Kansas City, all of the people could not under any circumstance get their licenses as quickly as in smaller localities where there isn't such a largernumber of people using automobiles.

The officers in each county (the Sheriff) may begin to pick up offenders as soon after the beginning of the time fixed by law for securing these plates and licenses and paying the fees therefor as in his discretion may seem proper but in view of the scarcity of money, we would rather suggest being fairly liberal in the matter of time of starting to pick them up, I understand State Patrol will start picking up some March 15th.

Hoping this suggestion may be of some assistance in the matter, I will close in reference to that feature of your letter.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER,
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney General

Hon. Jos. L. Gutting March 2nd,1933

Postscript:

In the main part of your letter regar ing John Martin, who you state resides in the city limits of Kahoka, you do not give enough information as to when he moved there, who he is or where his property is situated to give a proper answer to the question therein asked.

Is he minor, a high school attendant, a voluntary moved in resident, a voted in resident of your city, and if so when; and if so, was just a part of the School District voted in or was he listed by mistake in Lincoln College School District and is the last high or ordinary school district?

Will you kindly give me some additional information before I answer that portion of your letter.

Thanking you, I am

Respectfully yours,

Geo B Strother

GEO. B. STROTHER
Assistant AttorneyGeneral

GBS/mh

IN RE: Power of County Court to accept warranty or quit claim deed in satisfaction of school fund mortgage and bond or should they foreclose; And cannot knock off or reduce interest.

9256 RS Mo. 1929

March 7, 1933

FILED
35

Hon. Jos. L. Gutting,
Prosecuting Attorney,
Clark County,
Kahoka, Missouri.

Dear Sir:-

Answering your letter of February 27th,1933, relative to the County Courts' power to take deed to the County rather than foreclose mortgage, will say;

The County Courts of the State get their authority largely from Section 36, Article VI of the State Constitution and from the following Sections of the Statutes (which statute I am setting out pretty fully).

> "SEC. 9243--COUNTY SCHOOL FUNDS--It is hereby made the duty of the several county courts of this state to diligently collect,preserve and securely invest, at the highest rate of interest than can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion require personal security in addition thereto.* * * belonging to the County School funds; * * *"

> "SEC.9245--COUNTY COURT TO HAVE JURISDICTION OF COUNTY SCHOOL FUND--Whenever any county in this state may have, separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds."

Then to the same effect they have power to manage the several township funds in their counties.

> "SEC.9248--MANAGEMENT OF SCHOOL FUNDS--The County courts, respectively shall have the care and management of the school funds of the several townships within their respective jurisdictions, * * *."

The county courts have power to require additional security.

"SEC. 9253--COUNTY COURT MAY REQUIRE ADDITIONAL SECURITY--The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. * * *"

"SEC.9254--COUNTY COURT MAY MAKE ORDER OF SALE,WHEN--Whenever the principal and interest, or any parts thereof secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

The county courts have power to sell, but should make order first.

"SEC.9252--FORM OF MORTGAGE-NOTICE OF SALE-FEES,HOW PAID--Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, * * *."

May become the owners when and how.

"SEC.9256--AUTHORITY TO REPOSSESS PROPERTY BY PURCHASE--Whenever any property heretofore or hereafter conveyed in trust or mortgage to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the

county court having the care and management of the school fund or funds out of which such loan was made, in its discretion, for the protection of the interest of the schools, become through its agent thereto duly authorized, a bidder on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools. * * *"

You will note;

"The statutes provide that when money belonging to the school fund shall be loaned, the county court shall cause the same to be secured by a mortgage in fee on real estate situated within the county, * * * and of the value of double the amount of the loan, and also with a bond and personal security. * * * No authority is anywhere conferred upon the county courts to dispense with the real estate security required to be taken."***"

Lafayette County v. Hixon, 69 Mo., 581.

"The county courts of Missouri are creatures solely of statutory origin and have no common law or equitable jurisdiction. "

State ex rel. V. Johnson, 138 Mo.Ap. 306,l.c. 314.

"In relation to these funds the county courts are trustees. They have no authority to dispose of the principal entrusted, or any of its interest, otherwise than is prescribed by law. There is no difference

in this respect between the principal and interest of these funds. If they can give away the one they can give away the other. * * * The welfare of the State is concerned in the education of the children. She has provided and is providing means for that purpose, not only for these now in existence, but for those who may come after them. The fund as has been said, is a permanent one, and if every man, woman, and child in a township should petition the county court to give away, that which is by law entrusted to it, for the education of its children, it should without hesitation reject their prayer.' "

Montgomery County v. Auchley, 103 Mo. 492, l.c.503,
Veal v. County Court, 15 Mo. 412, l.c. 414.

We are, therefore, of the opinion that while in this instance, it might seem to be expedient and less expensive as you say, to the county to accept a deed instead of foreclosing the mortgage, yet it would be unwise, (on account of the bad precedent) and I think unconstitutional and without authority of law to do otherwise than to foreclose the mortgage as provided in the statutes above quoted.

Under no circumstances, can the County Court knock off any of the principal or interest as can be readily seen by the foregoing opinion.

In the matter of disposing of the property after the county acquires it by foreclosing, the comparatively new section of 9256 will govern and prescribe their duties regarding same.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER,
Assistant Attorney General

GBS/mh

APPROVED: _____
ROY McKITTRICK
Attorney General

Schools--City Extending its limits shall (Ipso Facto) have the effect to extend the limits of such school district to the same extent.

9325 RS Mo 1929
§162.421, RSMo. (1967)

March 10,1933

FILED
35

Honorable Jos. L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Mr. Gutting:

Answering your letter of February 27th, 1933, relative to John Martin who resides within the city limits of Kahoka, an incorporated City of the fourth class, and from further information that his property is in the City of Kahoka, will say that the Statutes of Missouri, namely, Section 9325, states:

> "****that every extension that has heretofore been made, or that hereafter may be made, of the limits of any city, town or village that is now or may be hereafter organized under the laws of this state, SHALL HAVE THE EFFECT TO EXTEND THE LIMITS OF SUCH TOWN OR SCHOOL DISTRICT to the same extent, and such extension of the limits of any city or town school district shall take effect on the first day of July next following the extension of the limits of such city, town or village:****"

Section 9344 is cooperative of the foregoing.

In State ex rel v. Brown, 31 S. W. (2nd) 215, l. c. 217, the court quoted with approval from the Kansas City court of appeals:

> "That the passage of the act ipso facto transferred to the school district of the City of Nevada so much of the territory of the outlying district as was situated within the limits of the city of Nevada."

Litson v. Smith, 68 Mo. Ap. 397. And then held that the extension of the city limits of the city of Kirkwood ipso facto extended the limits of the Kirkwood school district.

State ex rel V. Brown
31 S. W. (2nd) 215 l. c. 217.

State ex rel V. Smith
53 S. W. (2nd) 371.

Litson V. Smith
68 Mo. Ap. 397.

Assuming as your letter indicates that your city limits was extended several years ago, and took in John Martin, and his property, it is our opinion that ipso facto he was transferred to the school district of the city of Kahoka, as well as his property in said extension and he is therefore a resident not only of the municipal corporation but also of the Kahoka school district.

Very truly yours,

Geo B. Strother

GEO B. STROTHER
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

GBS:mm

DRAINS AND LEVEE DISTRICTS: Power of County Collector to accept warrants in payment of drainage taxes.

9911 - 0788 - 1076 RS Mo 1929

July 31, 1933

FILED 35

Honorable Joseph L. Gutting
Prosecuting Attorney
Kahoka, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of July 17, 1933 in which you request an opinion relating to the tax question of the Wyaconda Drainage District in your county. For convenience your letter is herein quoted:

"As advisor for The Collector of Revenues of Clark County, I wish to state the following set of facts and ask your opinion.

Wyaconda Drainage District #3 has defaulted in the payment of its past due bonds and necessarily a lot of the drainage taxes in said district are delinquent. One of the taxpayers in said district presented the collector with a warrant issued by the Board of Supervisors for the payment of his taxes and demanded that the collector accept said warrant for the payment of his drainage taxes. Under Section 9911 I directed the Collector not to accept the said warrant as payment of taxes for the reason that the said section 9911 R.S. Mo.1929 states that past due bonds and coupons shall be accepted by the Collector in the payment of drainage Taxes but does not give him the right to accept warrants drawn on the district, said section mentions state warrants, county and city warrants but does not state that the Collector can accept warrants drawn on a drainage district for the payment of drainage taxes. This drainage district floated its bonds for its plan of reclamation but this was not sufficient to pay for the entire construction under the plan of reclamation so the district issued about seven thousand dollars in warrants which were purchased by individuals and the money derived

therefrom was used by the district to finish paying the contractors for digging the ditches. These warrants were issued several years ago and are unpaid, I believe that the issuance of these warrants were illegal, one of these warrants was the one that was presented for payment of taxes. Also this district does not have a maintenance tax and hasn't for years but calls its funds a general fund and this is the fund the warrants were drawn on.

Now the district has just more than enough installment tax money due from the collector to pay said warrant, but can this warrant be paid out of the money derived from taxation for the payment of maturing bonds? I think not under section 10788 R. S. Mo. 1929 and that the Collector cannot cash said warrant out of said funds nor can the Treasurer of the Drainage district be compelled to pay said warrant out of said funds nor accept it for the payment of taxes.

Supposing three taxpayers in said district buy a past due bond and present it for payment of all three of their taxes, (this also is presented to the collector) should the collector receive it in payment for the three the same as he would for one? I advised him that he should.

I would appreciate your opinion on the above questions."

At the outset we are handicapped in answering your questions for the reason that we cannot ascertain whether or not the Wyaconda Drainage District No. 3 was organized "under drainage districts by Circuit Courts" or "levee districts by county courts". Since you refer to sections in your letter relating to drainage districts by circuit courts, we are going to assume that the district in question comes under the laws governing drainage districts by circuit courts.

In the first portion of your letter you state that a taxpayer demands that the collector accept a warrant for the payment of his drainage taxes; under Section 9911 R. S. of Missouri, 1929, governing "collectors and collections of taxes, which is as follows:

> "Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levidd for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

This Department agrees with you in having given your opinion that only "past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue but not in payment of any tax levied for any other purpose. In this statute the law is plain - - it states definitely just what a collector may receive in payment of the taxes levied and then states definitely the kind of warrants that may be accepted by the collector, and does not include warrants of this character.

You further state that the drainage district, after it had floated its bonds, the same being insufficient to pay for the entire construction, issued $7,000 in warrants. Bearing in mind that this is a district organized by circuit court procedure, there is no section which gives the board authority to issue warrants for the purpose of constructing drainage projects or their completion.

We therefore hold that these warrants are not valid for the reason that there is no authority for the issuance of same.

Section 10788 R. S. of Missouri 1929 sets out the powers of the Board of Supervisors in regard to issuing bonds, said section being as follows:

> "The board of supervisors may, if in their judgment it seems best, issue bonds not to exceed ninety per cent. of the total amount of the taxes levied under the provisions of section 10759 of this article, in denominations of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent. per annum, payable semi-annually, to mature at annual intervals within twenty years, commencing after a period of years not later than five years, to be determined by the board of supervisors, both principal and interest payable at some convenient banking house or trust company's office to be named in said bonds, which said bonds shall be signed by the president of the board of supervisors, attested with the seal of said district and by the signature of the secretary of the said board. All of said bonds shall be executed and delivered to the treasurer of said district, who shall sell the same in such quantities and at such dates as the board of supervisors may deem necessary to meet the payments for the works and improvements in the district. Said bonds shall not be sold for less than ninety-five cents on the dollar, with accrued interest, shall show on their face the purpose for which they are issued, and shall be payable out of money derived from the aforesaid taxes.

A sufficient amount of the drainage tax shall be appropriated by the board of supervisors for the purpose of paying the principal and interest of the said bonds and the same shall, when collected, be preserved in a separate fund for that purpose and no other. All bonds and coupons not paid at maturity shall bear interest at the rate of six per centum per annum from maturity until paid, or until sufficient funds have been deposited at the place of payment and the said interest shall be appropriated by the board of supervisors out of the penalties and interest collected on delinquent taxes or any other available funds of the district. Any expense incurred in paying said bonds and interest thereon and a reasonable compensation to the bank or trust company for paying same, shall be paid out of other funds in the hands of the treasurer and collected for the purpose of meeting the expenses of administration. It shall be the duty of said board of supervisors in making the annual tax levy, as heretofore provided, to take into account the maturing bonds and interest on all bonds, and to make ample provisions in advance for the payment thereof. In case the proceeds of the original tax levy made under the provisions of section 10759 of this article are not sufficient to pay the principal and interest of all bonds issued, then the board of supervisors shall make such additional levy or levies upon benefits assessed as are necessary for this purpose, and under no circumstances shall any tax levies

> be made that will in any manner or to any extent impair the security of said bonds or the fund available for the payment of the principal and interest of the same* * * * *. * * * * * The funds derived from the sale of said bonds or any of them shall be used for the purpose of paying the cost of the drainage works and improvements and such costs, expenses, fees and salaries as may be authorized by law and used for no other purpose."

This section is definite and does not give the Board of Supervisors power to use the money for retiring bonds to use for purposes of meeting the expenses of administration, or to issue warrants in lieu of bonds. We hold this to be the opinion of this Department unless the Wyaconda Drainage District later reorganized under Section 11009 R. S. of Missouri 1929, which is as follows:

> "Any levee district now organized or existing under the provisions of any other law of this state either general, special or local law, may, elect in the manner hereinafter provided to be and become organized under the provisions of this article: Provided, that no such election or change or organization shall have the effect to repudiate or to permit the repudiation of any indebtedness or liability of such levee district which was made or incurred under its former organization, but all such indebtedness or liability shall attach to and become the debt or liability of the new organization till the same is fully paid off and discharged and all debts owing to, and all rights, privileges and immunities held or

> enjoyed by the old district under its former organization, shall be held and enjoyed by the new district when the same shall reorganize under the provisions of this article."

In that event warrants could have been issued under Section 10966, R. S. of Missouri 1929, which is as follows:

> "The board of directors may, at its option, in lieu of bonds, issue warrants on the county treasurer, payable out of the funds of the levee district, in payment of any indebtedness incurred, including the entire expense of constructing the levee, repairing or extending the same."

The warrant in question would then be legal.

Under Section 10788 R. S. of Missouri 1929, which we have quoted above, this Department agrees with you in having given your opinion that the payment of the warrant in question cannot be made out of the funds for the retiring of the maturing bonds, as the statute is definite as to what shall be paid and what shall not be paid out of the various funds.

As to the last paragraph of your letter "supposing three taxpayers in said district buy a past due bond and present for all three of their taxes, should the collector accept it", under Section 9911 R. S. of Missouri 1929, which we have quoted at the beginning of this opinion, the county collector would have power to accept the past due bond in question in payment of drainage district taxes, and the fact that three taxpayers owned said bond and proffered it in payment of their taxes, the same should be acceptable. The fact that one or three may own the bond should make no material difference, so long as they are the legal holders of same.

In the event we have assumed the wrong facts, we would welcome a further letter from you.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:AH

STATUTES -- IF THE TITLE OR CAPTION AND THE BODY OF BILL IDENTIFIES THE STATUTE TO BE REPEALED SO NO DOUBT EXISTS AS TO WHAT STATUTE IS INTENDED TO BE EFFECTED, IT IS SUFFICIENT.

- -

11-27 H B 92 Laws 33

November 27, 1933.

FILED 33

Honorable J. H. Gunn
Member of the Senate
State of Missouri
Jefferson City, Missouri.

Dear Sir:

Perfected House Bill No. 92 of the Fifty-Seventh General Assembly (Extra Session) has been submitted to this department with a request for an opinion as to whether or not, in the form in which it now appears, it will be a legal enactment and will repeal Sections 5312, 5313, 5314 and 5315 of Article I. of Chapter 34 of the Revised Statutes of Missouri, 1929, entitled, "State Department of Finance".

The record of the bill, as it appears in a printed copy submitted to this department, discloses the fact that said bill has been ordered perfected and printed. This department is further informed that the bill, in the form in which it has been submitted for an opinion, has also passed the Senate.

The title of the Act reads as follows:

"AN ACT

To repeal Sections 5312, 5313, 5314 and 5315 of Article I of Chapter 34 of the Revised Statutes of 1929, entitled "State Department of Finance", in relation to issuance and sale of certificates of indebtedness by banks and trust companies, denominations, rate of interest thereon and maturity thereof, for what purpose issued and how renewed or reissued and providing for

> the creation of a separate fund to be held in trust for the holders thereof, and providing that certain obligations shall be a prior claim, and to enact four new sections in lieu thereof to be known as Sections 5312, 5313, 5314 and 5315 authorizing banks and trust companies to issue and sell capital notes, and providing that in cases where the capital of the bank or trust company issuing such notes is impaired, and such notes are issued and sold in an amount equal to, or greater than, the amount of such impairment, the capital of such bank or trust company shall for all purposes be deemed to be restored, and prescribing the nature of such capital notes, the denominations, income return thereon, retirement, and extension thereof, and providing for setting apart a separate fund to be held in trust for the benefit of the holders thereof, with an emergency clause."

That part of the Act purporting to repeal certain sections of the Statutes is found in Section 1. in the following language:

> "Section 1. That Sections 5312, 5313, 5314 and 5315 of Article I of Chapter 34 entitled, "State Department of Finance", be and the same are hereby repealed, and four sections enacted in lieu thereof to be known as Sections 5312, 5313, 5314 and 5315, and to read as follows:
>
> " *"

It will be observed that the numbers of the sections to be repealed are given, together with the article and the chapter, but Section 1. fails to give the style and date of the Revised Statutes of Missouri, and this presents the question as to whether or not the bill is legally in shape to become a law if signed by the Governor, and whether or not Sections 5312, 5315, 5314 and 5315 of Article I.

Chapter 34, Revised Statutes of Missouri 1929, are repealed.

The title of the Act clearly identifies the sections to be repealed in the following language:

" AN ACT

To repeal Sections 5312, 5313, 5314 and 5315 of Article I of Chapter 34 of the Revised Statutes of 1929 entitled, 'State Department of Finance', * * * *"

An examination of the four new sections enacted in lieu of the four sections - 5312, 5313, 5314 and 5315 - now composing part of Article I., Chapter 34, of the Revised Statutes of Missouri, 1929, entitled, "State Department of Finance", reveals that the subject-matter dealt with in the four new sections set out in House Bill No. 92, is the same subject-matter dealt with in the four sections named in Article I., Chapter 34, R. S. Mo. 1929.

It is perfectly clear what the Legislature intended to do. The caption or title of the Act, taken in connection with Section 1. and with the four new sections, clearly discloses beyond any question of doubt that the Legislature intended to repeal Sections 5312, 5313, 5314 and 5315, Article I., Chapter 34, Revised Statutes of Missouri, 1929, entitled "State Department of Finance," and to enact in lieu thereof four new sections numbered Sections 5312, 5313, (a), (b) and (c), Section 5314 and Section 5315. The intention of the Legislature in this legislation is made still more apparent by reference to Section 3. of the Act providing the reason for an emergency clause in the following language:

"That the Congress of the United States recently passed an act authorizing the organization of a federal corporation known as

> the Federal Deposit Insurance Corporation, which is authorized to insure on January 1, 1934, certain deposits in banks and trust companies, including all state banks and trust companies in Missouri; that many banks of Missouri may desire to take advantage of the benefits and privileges extended by said Federal Deposit Insurance Corporation; that the general welfare of the state and the people thereof, will be greatly advanced by having the privileges extended by said Federal Deposit Insurance Corporation open to the banks and trust companies organized under the laws of this state; that such banks and trust companies cannot have all advantages extended by said Federal Corporation without they acquire such advantages under the provisions of this act. * * * * *."

Section 33. of Article IV. of the Constitution of Missouri reads as follows:

> "No act shall be revived or re-enacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original act."

Section 34. of Article IV. of the Constitution of Missouri provides:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out, and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

This state of facts presents the legal question as to whether or not, if the caption or title of the bill and the body thereof clearly indicate the intention of the Legislature and beyond question identifies the statutes and identifies the section or sections to be repealed and effected by the legislation, such an enactment is a legal statute although in the repealing clause the Legislature omitted to specify the particular Revised Statutes in which the sections repealed are to be found.

It is plain common sense that all construction of the Statutes is based on the fundamental proposition that it is the object of the courts to determine and carry out the intention of the legislative body. That is all there is to statutory construction and all that statutory construction was ever intended to accomplish.

The legal rule for identification of a repealed statute is expressed in 59 Corpus Juris, Section 504, page 901, in the following language:

> "To effectuate an express repeal, a statute must so describe and distinguish the statute to be repealed, as by designation of its name, title or caption or by reference to its subject, contents or substance, as to leave no doubt as to what statute is intended. However, in the absence of an applicable constitutional provision prescribing or prohibiting a particular mode of identification, an identification of any kind, either in the body or in the title or caption of the repealing act, which points with certainty the law to be repealed is sufficient; and where the intention is otherwise plainly and clearly expressed, effect may be given to a repealing statute notwithstanding an error or inaccuracy in its description of the statute to be repealed. * * * * *."

On this question of identification of statutes, the Tennessee Court announces the same rule in Greenwood, v. Richardson, 145 Tenn. l.c. 73, in the following

language:

> "This court has established a liberal interpretation for upholding amendatory acts where the caption and the body of the act taken as a whole and from a practical standpoint indicate the subject of the legislation sought to be effected."

In the North Carolina case, where the repealing provision of the act named an entirely different statute and did not mention the statute intended to be repealed, but the title of the act and the whole body of the act showed clearly what statute was intended to be repealed, the Court, in Murphy v. Webb, 156 N. C. 402, said that the intention of the Legislature should be followed and the enactment was valid.

To the same effect is School Directors v. School Directors, 73 Ill. 249, wherein the Court said, the reasonable intention of the Legislature should and will be carried out.

A still later case of House et al. v. Greveling, 250 S. W. l.c. 360, wherein the caption or title of the Act pointed to the laws establishing certain administrative offices of the State as those to be effected, which were abolished, but did not detail these laws; but the body of the act abolishing said offices, theretofore created by law, did indicate the laws to be repealed, and the Court said:

> "Bearing in mind that we can look both to the caption and body of an act to see that, if it sufficiently identifies former laws sought to be repealed or amended, and looking to the body of this act, we find it supplements the caption and removes any doubt as to the particular laws designed for excision."

To the same effect is State v. Knoll, 69 Kans. 767.

PROVISIONS OF MISSOURI CONSTITUTION HEREIN ABOVE QUOTED, SECTIONS 33 and 34 OF ARTICLE IV. DO NOT INTERFERE WITH APPLICATION OF THE ABOVE STATED RULE AS TO IDENTIFICATION OF A REPEALING STATUTE TO HOUSE BILL NO. 92.

Said Sections 33 and 34 deal with reviving or re-enacting by reference to title other acts, and with amending statutes by insertion of designated words or by striking out designated words, or striking out certain words and inserting other words in lieu thereof, and provide that where words are stricken out and others inserted in lieu thereof, the same together with acts or sections amended should be set out in full.

The fact that the repealing clause here merely refers to the sections of the statutes by number does not affect the validity of the repealing clause.

Our court has said in State ex rel. Drainage District v. Hackmann, 305 Mo. l.c. 701

> "The practice of amending statute laws by reference to the sections contained in the volumes of authorized revisions of the laws of this State is the established law."

The House Bill No. 92 does not revive an act or re-enact another act, nor does it amend an existing statute by inserting designated words therein. It merely repeals four sections and enacts four new sections in lieu thereof.

The House Bill No. 929

House Bill No. 62, in Section 3, thereof provides that if any part of the act be found invalid, the General Assembly declare that it would have passed the remainder of the act without such invalid section or provision.

While this provision, placed in many recently enacted statutes only re-enacts, in other language, a rule of law well established by the courts as to the construction of statutes, yet the court will give weight and consideration to it as evidence of the intention of the Legislature.

Applying that Section 3 to Section 1. of the Act, and eliminating Section 1. as illegal, there would still be a complete statutory enactment expressing the intention of the Legislature; and, while no mention would be made therein of Sections 5312, 5313, 5314 and 5315, Article I., Chapter 34, R. S. Mo. 1929, entitled, "State Department of Finance", yet to the extent that the four new sections conflicted with the four existing sections in Article I. of Chapter 34, R. S. Mo. 1929, the said sections in the 1929 Statutes would be repealed by implication. There is no constitutional provision in this State prohibiting repeal by implication.

Our Supreme Court said in Kansas v. Bonner, 47 Mo. l.c. 32:

> "* * * * The Constitution has gone so far as to prohibit amendments in terms, except in particular way, but it has not prohibited amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. This must be so in the nature of things, for the last enactment is the latest expression

> of the Legislative will, and must prevail, unless it contains some inherent vice that prevents it becoming a statute."

And later, after the adoption of the Statutes of 1875, our Supreme Court in State ex rel. Attorney-General v. Miller, 100 Mo. 446, used the following language in a case where the new act did not mention the repealed statute:

> "It is there shown that when an act undertakes to amend a former statute it is not sufficient to say certain words are stricken out, or certain words inserted, but the section as amended must be set out in full, and this is all that is required. Here, it is true, portions of the special act creating the school corporation are repealed or modified by this act of March 30, 1887, and the last-named act does not name the sections which are thereby repealed, nor are the sections thereby modified set out in their modified form. This may lead to inconvenience in requiring a comparison of the old and the new law, but such legislation is not prohibited by the provision of the constitution before quoted. The constitution of 1865 contained a provision much like the one now in question, under which it was held that repeals by implication were not prohibited. * * * * ."

It is the opinion of this department that the caption or title of House Bill No. 92, together with the body of the act, clearly identifies the sections of the Statutes - Revised Statutes of Missouri, 1929 - intended to be repealed; and that the bill, as it stands, if signed,by the Governor, will be a legally enacted statute.

It is the further opinion of this department

that regardless of the rule as to identification of a statute by an examination of the caption or the title thereto and the remainder of the Act, that eliminating Section 1. of the Act, the remainder thereof is a complete statutory enactment and to the extent that same conflicts with Sections 5312, 5313, 5314 and 5315, Revised Statutes of Missouri, 1929, Article I. Chapter 34, said last named sections of Revised Statutes of Missouri, 1939, are repealed by implication and that,upon this theory, the bill when signed by the Governor, will be a legally enacted statute.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

OPTOMETRY BOARD: Fourteen different questions answered with reference to the practice of Optometry in the State of Missouri.

Secs 13501-03-09 - 3898 RS Mo 1929
Sec 13501, Laws 31

FILED
35

December 29, 1933

Dr. F. J. Guilbault
President State Board of Optometry
423 North Broadway
St. Louis, Missouri

Dear Dr. Guilbault:

This office acknowledges receipt of your letter dated December 2, 1933, as follows:

"For the guidance of the State Board of Optometry, we desire your opinion on the following questions, in the light of Chapter 101, Article 1, Revised Statutes of Missouri 1929, relating to the practice of Optometry, as follows:

(1) May corporations practice the profession of Optometry in the State of Missouri?

(2) Are corporations exempt from the operation of the Optometry Law under Section 13502 and Session Acts of 1931, page 283, if such corporations sell eye glasses and spectacles at a permanent place of business on prescriptions?

(3) Does Sub-section C of Section 13502, as amended by Session Acts of 1931, page 283, exempt corporations, who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, from the operation of the law, or does it prohibit it from the practice of Optometry?

(4) Does Sub-section B, Section 13502, exempt corporations who sell eye glasses or spectacles, on prescription, in a store, shop or other permanently established place of business, from the operation of the Optometry law, or does it authorize such corporation to practice Optometry?

(5) Are the several subdivisions of Section 13503, relating to who is qualified to receive a certificate of registration, in the disjunctive or conjuctive?

(6) If your answer to Question No. One is in the affirmative, and it is your opinion that corporations can practice Optometry, then do such corporations violate Sub-section F of Section 13509, Revised Statutes of Missouri 1929, by advertising their Optometry Department under the name of individual optometrists holding a license?

(7) Is the board empowered to revoke a license of an optometrist under Subsection F of Section 13509, who permits a corporation to advertise its department under his name?

(8) If your answer to Question No. One is in the negative, then is a corporation practicing Optometry who uses its own assets, business facilities and employees, in promoting for finance or other profit, a department in its business where the practice of Optometry is carried on through individual Optometrists holding licenses?

(9) If it is your opinion that corporations may not practice the profession of Optometry, is it a violation of the Optometry law of Missouri for corporations to establish a department in its business

where the practice of optometry is carried on through optometrists regularly licensed, but who are under the control and supervision of the corporation itself, and who is actually an employee of the corporation?

(10) What is meant in Sub-section C of Section 13509 by the words "gross malpractice"?

(11) Is it necessary, under Sub-section E of Section 13509, Revised Statutes of Missouri 1929, to prove actual knowledge of the deceptive statements on the part of a respondent who is being tried for his license?

(12) Is the Optometry Board, as such, empowered with the authority to administer oath to a witness which would support an indictment for perjury should said witness purposely swear falsely after taking such oath, under the power given it by Section 13509, Revised Statutes of Missouri 1929?

(13) Can the Circuit Court, at the instance of the Board of Optometry, punish witnesses or persons who refuse to obey subpoenas issued by the Board or punish for contempt such witnesses who fail to obey a subpoena duces tecum issued by the Court at the instance of the Board, notwithstanding the apparent authority in Section 13509?

(14) What is meant by Section 13512, wherein the Board seems to be authorized to make and adopt reasonable rules and regulations for the enforcement of the provisions of Article 1, Chapter 101, already referred to?

This is the request of the State Board of Optometry."

In arriving at a correct answer to the questions propounded we are enjoined by the decisions of the appellate courts of this State to keep in mind the purpose and intent of the statute or statutes under construction. On the question of the purpose of the enactment of Chapter 101 Revised Statutes Missouri 1929, we quote from State v. Etzenhouser 16 S. W. (2nd) 656, which case involved the prosecution for practice of Optometry without a license. The Kansas City Court of Appeals at page 659 of the opinion said:

> "The object of the law, in protecting the unwary from being imposed upon with glasses which would not only fail to serve the purpose expected of them, but which may be the cause of actual injury to health and nerves, is a beneficient and proper one. Such statutes should be liberally construed to carry out their purposes. 29 C. J. 243. Price v. State, supra."

The paragraph numbers in this letter will compare to the paragraph numbers in your letter and our answers to the respective questions accordingly.

(1) Section 13497 Revised Statutes Missouri 1929, in part reads:

> "After the 1st day of October, 1921, it shall be unlawful for any person to practice, or attempt to practice optometry without a certificate of registration as registered optometrist issued by the board of optometry.*** "

Section 13499 in part is as follows:

> "It shall be the duty of the board to examine all applications for registration submitted in proper form; to

grant certificates of registration to such persons as may be entitled to the same under the provisions of this chapter; to cause the prosecution of all persons violating its provisions; * * * * * "

Section 13504 provides,

"Every person who desires to obtain a certificate of registration shall apply therefor to the state board of optometry, in writing, on blanks prepared and furnished by the state board of optometry. Each application shall contain proof of the particular qualifications required of the applicant, shall be verified by the applicant under oath and shall be accompanied by the required fee. "

Section 13509 in part is,

"The state board of optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes:

(a) Conviction of a felony, as shown by a certified copy of the record of the court of conviction.

(b) The obtaining of or an attempt to obtain, a certificate of registration, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentation.

(c) Gross malpractice.

(d) Continued practice by a person knowingly having an infectious or contagious disease.

(e) Advertising by means of knowingly false or deceptive statements.

(f) Advertising, practicing or attempting to practice under a name other than one's own.

(g) Habitual drunkenness, or habitual addiction to the use of morphine***".

Section 13511 provides:

"Each of the following acts constitutes a misdemeanor, punishable, upon conviction, by a fine of not less than $25.00 nor more than $200.00; * * * "

Section 13503 states the qualifications that a person must have before he is qualified to receive a certificate of registration as an optometrist, among which is that he shall be at least twenty-one years of age and be possessed of a good moral character and temperate habits.

The use of the word 'person' in the sections above quoted, as well as some of the grounds stated in Section 13509, for which the Board of Optometry may refuse to issue, renew or on which the board may suspend or revoke certificates of registration, as well as the required qualifications of those who desire to register as optometrists, clearly show it was the intention of the Legislature to authorize individuals only to engage in the practice of optometry. For instance a corporation could not very well contract or have an infectious or contagious disease nor could it be the subject of habitual drunkenness or addiction to the use of morphine. It is said in 14 C. J. page 52, Section 5, that a corporation is,

"* * * * entirely distinct from its members and officers * * * * ".

The definition of what constitutes the practice of optometry as set out in Section 13501 clearly shows that such practice involves a certain degree of skill and knowledge of human anatomy that could only be possessed or acquired by an individual. There is no basis or reason for construing the word person, as that word is used in the foregoing quoted sections, to include corporations. From the quotation in the succeeding paragraph from the Laws of Missouri 1931, page 283, as well as subdivision (c) of Section 13511, hereinafter quoted, we think it was not the intention

of the Legislature to grant certificates of registration to corporations for the purpose of engaging in the practice of optometry.

What we have said in this paragraph, in order to avoid re-statement, should be read in connection with what is said in the succeeding paragraphs.

We, therefore, are of the opinion that corporations are not entitled to be issued certificates of registration for the practice of optometry in the State of Missouri.

(2) In answering the question embodied in paragraph (2) of your request we quote Section 13502 as amended by Laws of Missouri 1931 page 283:

> "The following persons, firms and corporations are exempt from the operation of this act:
>
> '(a) Physicians or surgeons of any school lawfully entitled to practice in this state.
>
> '(b) Persons, firms and corporations who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery.
>
> '(c) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses.'
>
> Approved May 4, 1931. "

It will be observed that subdivision (b) of Section 13502, above quoted, specifically exempts corporations who sell eye glasses or spectacles in a store, shop or other perman-

ently established place of business on prescription, when such prescriptions are issued by persons authorized so to do under the laws of this State, from the operation and provisions of Chapter 101 providing for the State Board of Optometry. What is said in this paragraph should also be read in connection with what is said in the foregoing paragraph and in subsequent paragraphs.

It is our opinion that corporations selling eye glasses or spectacles in a store, shop or other permanently established place of business on prescription issued by such persons authorized under the laws of this State to practice either optometry or medicine and surgery, are exempted from all of the provisions of Chapter 101 Revised Statutes Missouri 1929.

(3) We have set out in the foregoing paragraph (2) the amendment to Section 13502 Revised Statutes 1929 as made by Laws of Missouri 1931 at page 283. Subdivision (c) of Section 13502 as it read prior to the amendment made by Laws 1931 was as follows:

> "Persons, firms and corporations who manufacture or deal in eyeglasses or spectacles in a store, shop or other permanently established place of business."

As such subdivision (c) of Section 13502 stood prior to the amendment, the case of State v. Knapp 327 Mo. 24 was tried and finally determined on December 31, 1930. The defendant in that case was at the time of the filing of the charge against him the proprietor of a jewelry shop and store in Kansas City, it being a permanently established place of business at which he kept for sale eye glasses, jewelry and other articles of merchandise. He did not have a license or certificate of registration as an optometrist. He used in his store a device, by the use of which, a customer could determine the kind and character of glasses his eyes required. The customer used this device himself. The defendant was prosecuted for the practicing of optometry without a license or registration therefor. Appellant contended he was exempt under Subdivision (c) of Section 13502. The judgment of conviction was reversed. The court at page 27 of the opinion holding:

> "We think appellant's contention must be sustained. It is and of course must be conceded that 'the statute exempts from the op-

> tometry law persons who deal in eyeglasses in a store, shop or other permanently established place of business. ' That appellant was and is such dealer is also admitted."

Subsequent to the coming down of the decision in the Knapp case, and doubtless as a result thereof, Section 13502 Revised Statutes 1929 was amended by the Laws of 1931, as above set out. You will note that the court in the Knapp case upheld the exception from the operation of the optometry law as to persons who were dealing in eye glasses or spectacles in a permanently established place of business. Subdivision (c) of Section 13502 as amended still exempts from the operation of Chapter 101

> "Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop, or other permanently established place of business,"

If such corporations

> "Neither practice nor attempt to practice optometry, and do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses,"

So that corporations who deal in eye glasses or spectacles at an established place of business or in other words, corporations that merely carry such eye glasses or spectacles in stock and permit the customer to make his own selection of such eye glasses or spectacles, without engaging in the practice of optometry as the same is defined in Section 13501, above set out, and without using any of the prohibited devices mentioned in subdivision (c) of Section 13502, as amended by Laws 1931, are exempted from the provisions of Chapter 101 and may lawfully deal in or sell eye glasses or spectacles, as herein limited and such is our opinion. The sale of such eye glasses is not the practice of optometry. In the case of State v. Etzenhouser, supra, the defendant was prosecuted for a violation of the State

Optometry Law. One ground of defense was that the transaction was a sale in interstate commerce. On that point the court, at page 658 of the opinion said:

> "The defense is made that appellant cannot in any event be prosecuted under this statute, because the transaction was a sale in interstate commerce, not subject to the provisions of the local law. The act for which defendant is being prosecuted is not the sale of the glasses, but the acts which preceded the sale and from which the patient or customer would determine whether or not he should make a purchase at all, and if so determined, what the particular article should be."

In cases of sale of eye glasses or spectacles by corporations the examination and determination as to the kind and character of glasses required, if such examination be made, would be the practice of optometry and would precede the sale made by the corporation.

(4) The sale of eye glasses or spectacles by corporations, under the provisions of Subdivision (b) of Section 13502, as amended, is specifically exempted from the operation of the optometry law and such sale does not constitute the practice of optometry, as the same is defined in Chapter 101.

(5) Section 13503 provides that,

> "A person is qualified to receive a certificate of registration as a registered optometrist;
>
> (a) Who is at least twenty-one years of age.
>
> (b) Who is of good moral character and temperate habits* * * *."

Then follows other requisite qualifications that must be possessed by a person before he is entitled to receive a certificate of registration as a registered optometrist.

There can be no question but what the different subdivisions of this section are used in the conjunctive, and that an applicant for registration as an optometrist must possess each and every qualification and meet all of the requirements set out and provided for in such section.

(6) Since our answer to your question number (1) was in the negative the question propounded in your paragraph (6) drops out.

(7) The matter submitted for answer in paragraph (7) of your letter is so vague and indefinite we are unable to tell what you mean nor is the form of advertisement referred to submitted to us. We suppose you mean that where a department store, for instance, advertises an eye glass or spectacle department, and that a certain person, registered optometrist, is in charge thereof may the license of the optometrist be revoked. A registered optometrist is entitled to sell his services to any person, firm or corporation desiring to use the same, so long as he keeps within the bounds of the Optometry Act. If we understand your question we see no ground on which a license of an optometrist could be revoked upon the premise stated by you.

(8) - (9) The questions embodied in paragraphs (8) and (9) of your letter are similar in essentials and in principles involved, and we answer the same accordingly.

Section 7 of Article XII of the Constitution of Missouri reads:

> "No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized. * * "

In Lewis Publishing Company v. Rural Publishing Company 181 S. W. 103, the Supreme Court of the State of Missouri,

en banc, in its opinion said:

> "The law is well settled, and it might with a considerable degree of precision be stated that it is elementary that a corporation derives its being and life from the state of its creation, through its charter, and that it possesses only such powers and authority as are granted to it by the express provisions thereof, and all such implied powers and authority which are necessary for it to exercise in order to perform the express purposes so granted. (See State ex inf. v. Lincoln Trust Co. 144 Mo. 562, loc.cit. 586, 46 S. W. 593.)
>
> 'Of course, there is a further limitation upon the right of a corporation to exercise powers even though expressly granted by its charter, namely, the laws of the state, should there be a conflict between the powers of the corporation, as expressed in its charter, caused by mistake, ignorance, or by any other means of the officials incorporating the company, and the laws of the state, then the former must yield to the supremacy of the latter- the laws of the state.' "

With reference to corporations and officers and agents 14A C. J. page 347, Section 2209, states:

> "Since a corporation can act, only through its officers and agents, all acts within the powers of a corporation may be performed by agents of its selection; and except in so far as limitations or restrictions may be imposed by special charter, by-law, or statutory provisions, the same general principles of law which govern the relation of agency for a natural person

govern the officer or agent of a corporation, of whatever station or rank, in respect to his power to act for the corporation; and agents, when once appointed, or members acting in their stead, are subject to the same rules, liabilities, and incapacities as are agents of individuals and private persons. But since a corporation has not all the rights and powers of an individual, it cannot delegate its duties to others, with the freedom of an individual. By some authorities a distinction is drawn between a corporate act performed through the intermediation of a person specially empowered to act as its agent or its attorney and an act done immediately by the corporation through its own administrative officers constituting its inherent agencies."

And at page 349, Section 2211, as follows:

"The powers of the officers or agents of a corporation are necessarily limited to such acts or contracts as are within the purposes for which the corporation was organized and the powers conferred upon it, as it cannot be presumed that an agent has authority to transact business which the corporation is not by its charter authorized to engage in; and this rule applies to acts or contracts of the corporate trustees or directors since they are but agents of the corporation. Where the power of the corporation to do a given act ceases, as by its dissolution, the power of an agent of the corporation to bind it or its funds in liquidation by doing the prescribed act necessarily ceases also."

While, as is stated in Corpus Juris, the corporate entity is separate and apart from its members or officers, it is equally true that a corporation can only act by and through its officers, agents, employees and servants. The acts of such officers, agents, employees and servants, within their authority, become the acts of the corporate entity for which it is at all times liable and responsible. The officers, agents, employees or servants, of course, could not engage in a business or practice, beyond the charter or lawful powers of a corporation, so far as the corporation is concerned, because they act, for it, not as individuals but as a corporation. Since a corporation cannot be licensed to practice optometry, it has no authority to engage in such practice by means of employees who act for it. There is another thing that is important to keep in mind. Thompson on Corporations, Vol. 3, Section 2188, page 843 states:

> "It is another statement of the principle to say that corporations may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to the powers expressly granted, provided they do not violate the charter, the public policy of the state, or any statute."

The questions presented by you in paragraphs (8) and (9) of your letter are similar in principle to the situation discussed by the court in Matter of Cooperative Law Company, 198 N. Y. 479, 92 N. E. 15. The court in the course of the opinion said:

> "The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to

> the corporation and the lawyer would be responsible to the corporation. His master would not be the client but the corporation, conducted, it may be, wholly by laymen,organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counsellor-at-law. The corporation might not have a lawyer among its stockholders, directors or officers. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud,or no stimulus to good conduct from the tradition of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the State."

One licensed to practice optometry takes on, to a degree, some of the same responsibilities and obligations to their customers as have been so faithfully borne and kept by physicians and surgeons through all the years. The duty of the optometrist to the customer calls for recognition of the old truism that one should not blow both hot and cold; the command that we cannot worship both God and mammon nor can we faithfully serve two masters, with conflicting interests. We think an optometrist employed by a corporation, whose sales depended on the determination of the necessities by its employee, would be torn between such distractions in serving his employer's financial interest and acting with fidelity to the person whose eyes were being examined that it would come dangerously close to being a violation of public policy on the part of the corporation and, for that reason, a violation of its corporate powers.

We are of the opinion under either hypothesis submitted in your paragraphs (8) and (9), that the corporation would be engaged in the practice of optometry and that such practice is beyond the powers that may be granted to a corporation in this State.

(10) Webster defines the word "malpractice" to be:

> "The treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence, any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties; wrong doing. A question of professional malpractice or negligence is determined by what might be reasonably required under the circumstances of the case."

Webster also defines the word "gross", as we think in the sense in which it is used in the optometry law, as:

> "Out of all measure; beyond allowance; not to be excused; flagrant; shameful; as, a gross dereliction of duty; a gross injustice; gross carelessness."

By the use of the word "gross", in connection with the word "malpractice", the Legislature evidently intended, in providing that the State Board of Optometry might refuse to issue, renew or might suspend or revoke any certificate of registration for the practice of optometry for gross malpractice, to convey the idea that the subject must have committed acts of a more serious nature than that conveyed by the use of the word "malpractice" standing alone. As the definition of the word "gross" states, the malpractice committed by the practitioner must be of an inexcusable, flagrant or shameful character or a gross dereliction of duty or gross carelessness in the performance of services under his certificate of registration.

Not having any particular facts before us, we can only give you an answer to your question in general terms and every case would be determined upon its peculiar facts and a determination of those facts would be for the Board under the rules laid down above.

(11) Section 13509 provides that the State Board of Optometry may refuse to issue, renew or may suspend or revoke a certificate of registration for, among other reasons;

> "(e) Advertising by means of knowingly false or deceptive statements."

We assume the subdivision last set out contemplates advertising by the practitioner himself. If that is done we do not understand on what theory it could be contended that the practitioner would not have actual knowledge of the statements made by him in an advertisement. If you mean advertisements made by another with reference to a practitioner that would doubtless call for proof of knowledge on the part of the practitioner as to the advertisements made and proof of his consent to such advertisement. The latter would be true if advertisement was made with reference to a practitioner where the name of no one was signed to the advertising.

(12) Section 3878 Revised Statutes Missouri 1929 provides:

> "Every person who shall wilfully and corruptly swear, testify or affirm falsely to any material matter, upon any oath or affirmation, or declaration, legally administered, in any cause, matter or proceeding, before any court, tribunal or public body or officer, and whoever shall falsely, by swearing or affirming, take any oath prescribed by the Constitution of

> this state, or any law or ordinance thereof, when such oath shall be legally administered, shall be deemed guilty of perjury."

Subdivision (g) of Section 13509 contains in part the provision following;

> "The state board of optometry may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke, any certificate of registration, however, for any of these causes, unless the person accused has been given at least 20 days' notice in writing of the charge against him and a public hearing by the state board of optometry. Upon the hearing of such proceeding, the state board of optometry may administer oaths, and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers. * * * * "

The last quoted portion of the statute empowers the state board of optometry to hold hearings, upon proper notice given, and provides that at such proceeding or hearing the board may administer oaths to those testifying before it. Section 3878 includes wilful and corrupt swearing or testifying by a person under oath, and as to any material matter at the hearing, in any cause, matter or proceeding before any tribunal or public body. Undoubtedly a hearing before the board, on a matter properly before it, would be a matter or proceeding and the state optometry board is certainly a tribunal or public body within the meaning of Section 3878 and we therefore answer your question number (12) in the affirmative.

(13) Subdivision (g) of Section 13509 contains the further provision,

> "Any circuit court or any judge of a circuit court, either in term time or in vacation, upon application either of the accused or of the state

> board of optometry may, by order duly entered, require the attendance of witnesses and the production of relevant books and papers before the state board of optometry in any hearing relating to the refusal, suspension or revocation of certificate of registration. Upon refusal or neglect to obey the order of the court or judge, the court or judge may compel, by proceedings for contempt of court, obedience of its or his order."

If proper application is made to the circuit court or any judge of a circuit court, either in term time or vacation, in any matter or proceeding properly before the board, and after notice of the filing and hearing on the application is given to the adverse party, we see no reason why the court or judge could not proceed, as for contempt, in case of disobedience of the order of the court. In other words the court or judge may exercise the powers as the same are provided in the last quoted portion of Section 13509.

(14) The rules and regulations that the state board of optometry are authorized to make are only such rules and regulations as will enable the board to carry out the purposes of the act. For instance, the board could provide the forms of applications and all papers required to be filed with the board, it may fix the time and places of its meetings, when not contrary to the statutes, but the board can not, for instance, provide a ground for the refusal to issue or revocation of a license in addition to or different from those grounds provided in the statute. The board can not make law but it can make such reasonable rules and regulations as will make practical the carrying into effect and the operation of Chapter 101.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

IN RE: POWERS AND DUTIES OF LIEUTENANT GOVERNOR IN THE ABSENCE OF THE GOVERNOR.

7-20

July 20, 1933.

FILED
36
33

Comptroller Hale
Federal Reserve Bank
Saint Louis, Missouri

Dear Mr. Comptroller:

This letter answers your oral request on the telephone this afternoon as to the powers, authority and duties of Honorable Frank G. Harris, Lieutenant Governor of the State of Missouri in the absence of Governor Guy B. Park from the State of Missouri.

Governor Guy B. Park at this time is now absent from the State of Missouri on his way to the City of Sacramento in the State of California and will not return for a period of some weeks. Honorable Frank G. Harris is the duly qualified and elected Lieutenant Governor of the State of Missouri and on this date is exercising and performing, and, until the return to the State of Missouri of Governor Guy B. Park, will exercise and perform all of the powers and duties of Governor Guy B. Park as the Governor of the State of Missouri. Honorable Frank G. Harris, Lieutenant Governor, is now occupying the office of the Governor of the State of Missouri at the request of and notification from Governor Guy B. Park.

Section 16 of Article V of the Constitution of the State of Missouri provides as follows:

> "In case of death, conviction or impeachment, absence from the State or other disability of the Governor, the powers, duties and emoluments

of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the Lieutenant Governor."

Under the foregoing provisions of the Constitution and the above state of facts, we are of the opinion that the Honorable Frank G. Harris, Lieutenant Governor of the State of Missouri, has the right, power and authority to perform and discharge all of the powers and the duties of Governor Guy B. Park until the return of the latter to the State of Missouri, which includes the right to receive all moneys due the State of Missouri whether payable by check or otherwise and whether payable to Governor Guy B. Park or otherwise with the right in the said Frank G. Harris, Lieutenant Governor, to endorse the name of Governor Guy B. Park on any paper, check or instrument for the purpose of receiving said moneys.

Respectfully submitted,

GILBERT LAND
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

GL/AJ

DENTAL BOARD: Application of Senate Bill 124 to funds. Laws 33

September 1,1933

9-25

FILED
36
43.

Dr. Geo. E. Haigh
Secretary
Missouri Dental Board
Jefferson City, Missouri

My Dear Dr. Haigh:

Acknowledgment is herewith made of your request for an opinion of this office respecting Senate Bill # 124, on the three following questions:

> "1. What will be the disposition of the funds that are in the treasury of the Dental Board when this law goes into effect July 24th?
>
> 2. The law reads that all funds are to be placed in the State Treasury at stated intervals. Kindly give me an opinion as to the term stated intervals.
>
> 3. The fiscal year of the Dental Board ends September 30th. I should like an opinion as to what effect this law will have on the funds in the State Treasury that is credited to the Dental Board of the biennial period."

Senate Bill # 124, as found at page 414 of the Missouri Laws of 1933, reads as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the

> particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision thereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted hhrefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

In considering your first inquiry, I advise that it has been the opinion of this office that this Act is prospective in its operation. There is certainly nothing in the section which could be interpreted as giving it a retrospective operation. There being no manifest intention of retrospective operation, the Act will be operative prospectively only. This is the settled law of this state. Judge Sherwood, in the case of Leete v. The State Bank of St.Louis, 115 Mo. 184, reviewed the authorities on the subject and stated as follows on page 195:

> "In construing statutes in regard to whether their action is to be prospective or retrospective, all the adjudicated cases and all the text-writers with unbroken uniformity unite in declaring 'that they are to operate prospectively and not otherwise unless the intent that they are to operate in such an unusual way, to-wit, retrospectively, is manifested on the face of the statute in a manner altogether free from ambiguity.' State ex rel. v. Auditor, 41 Mo. 25; State ex rel. v. Ferguson, 62 Mo. 77; Thompson v. Smith, 8 Mo. 723; State ex rel. v. Hays, 52 Mo. 578. In the case last cited the rule is announced by Ewing, J. in words still more emphatic. He says: 'Statutes are not to be construed as having a retrospective effect unless the intention of the legislature is clearly expressed that they shall so operate, and unless the language employed admits of no other construction.' The same rule is stated by Mr. Sedgwick: 'Courts refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction.' Construction of Statutory and Constitutional Law, 166, et seq., and cases cited." " "

The fees collected by the Board prior to July 24, 1933, were collected under the law as existed prior to the enactment of Senate Bill 124. Such fees were collected under the provisions of Section 13573, R. S. Mo. 1929,

> " " "to provide means for carrying out and enforcing the provisions of this chapter (chapter 106)," " "

and under such provisions,

> "All expenses and salary provided for in this chapter (106) shall be paid from the fees received by the Board under the provisions of this chapter and no part of said salaries or expenses shall at any time be paid out of any funds in the state treasury." " "

Accordingly, the Dental Board was and still is self-supporting.

The fees collected prior to July 24th were collected to promote the objects of the Board, free from and unfettered by Legislative Appropriation. To subject such fees to the provisions of Senate Bill 124, would be to place a retrospective construction upon said Act. This should not be done.

From the foregoing, it is the opinion of this office, that the funds on hand on July 24, 1933, are unaffected by the enactment of Senate Bill 124, and can properly be expended by the board under Chapter 106 R. S. Mo. 1929, in meeting the legitimate obligation of the board the same as though Senate Bill 124 had not been enacted, and that on September 30th, your Board should make the reports and pay into the Treasury of the State, any balance of funds collected prior to July 24, 1933 as may remain unexpended on September 30, 1933. It is our further opinion that all fees collected subsequent to July 24, 1933, should be kept in a separate fund by you and paid into the State Treasury to the credit of the Board at stated intervals as provided by Senate Bill 124.

Your second inquiry reads as follows:

> "2. The law reads that all funds are to be placed in the State Treasury at stated intervals. Kindly give me an opinion as to the term stated intervals."

This same question was asked of this office by Eugene Fair, President of the State Teachers College at Kirksville, respecting the application of the term to that institution. In reply thereto, Mr. Lamb of this office wrote Mr. Fair in an opinion dated July 13, 1933, as follows:

> "* * *The official authorized to receive the moneys affected by the above Bill is required at stated intervals to place such money in the state treasury. As to what is meant by the words 'at stated intervals' or as to who shall say what is to be considered stated intervals, the Bill is silent. We think the words, 'at stated intervals' should be construed as meaning with reasonable promptitude and as to what would be reasonable promptitude might depend somewhat on the amount of the collections of the department or institution of the state required to remit same. However, the State Treasurer being in charge of the State finances, is the one best qualified to

> apply this term to the particular institution involved.* * **

It is apparent that the Legislature realized that one rule or one set 'stated interval' would not be conducive to efficiency when applied to all boards, etc., and that the operation of the particular board or institution and the laws governing the fees and income of such institution should all be considered in arriving at the interpretation of the term as applied to such board or institution.

In considering these matters we call attention to portions of Section 13562 R. S. Mo. 1929, reading as follows:

> "Sec. 13562. Licenses--fees--license to be displayed, how.--After a person shall have been registered and shall have received a certificate of registration* * * then upon request of such person and the payment to said board of the sum of one dollar ($1.00) the applicant shall be entitled to a license,* * * All licenses to practice dentistry, * * *so issued shall expire on the 30th day of November of each year; all persons who practice dentistry or dental surgery * * *shall renew their license on or before the 30th day of November of each year for the year beginning on the 30th day of November of each calendar year.* * **

The forgoing license fees constitute 60 % of the income of Board as shown by the annual report of the Board to the Governor. As these licenses are required to be obtained on or before November 30th of each year, this large portion of the Board's income is collected during November and December, and these fees, then collected, must be sufficient to meet the expenses of the board until the next November. It was with knowledge of this situation that the Legislature provided in Section 13574 R. S. Mo. 1929, that the fiscal year of the Board should run from October 1st to September 30th, and that upon September 30th, the funds unexpended should be paid into the general revenue fund of the State. Under Senate Bill 124, any funds unexpended at the end of the biennium are to be transferred to the general revenue fund of the state. Accordingly, unless the stated interval is made to fit the needs of the Board, the Board may find that the income for licenses issued in November, 1934, will be paid into the State Treasury to the credit of the Board prior to December 31, 1934, and on that date, the unexpended balance, which will be a substantial sum, will be transferred to

the General Revenue fund under the provisions of Senate Bill 124. The Board would then be without funds to operate from January 1, 193[illegible] to the following November, for as we have heretofore shown, the Board has no funds upon which to draw except those which it collects. This is true under Senate Bill 124 as well as under the law prior thereto.

As heretofore stated, it has been our opinion that the State Treasurer is the one to deter ine what 'stated intervals' means in reference to your board, but it might be advisable for you to discuss the forgoing with him so that he may be fully advised when making the decision.

Your third inquiry reads as follows:

> "3. The fiscal year of the Dental Board ends September 30th. I should like an opinion as to what effect this law will have on the funds in the State Treasury that is credited to the Dental Board at the biennial period."

In answering your first inquiry, we advised that as to funds collected prior to July 24, 1933, Senate Bill 124 was inoperative. As to such funds, your fiscal year ends September 30, 1933 and upon that date you should remit the unexpended portions of funds collected prior to July 24, 1933, to the State Treasurer and Section 13574 R. S. Mo. 1929. As to funds collected after July 24, 1933, those funds should be kept intact and at the end of the 'stated interval' transmitted to the State Treasurer as provided by Senate Bill 124.

The forgoing is the proper application of the law to your particular Board, as in the opinion of this office, Senate Bill 124 is a general act, applying to all boards, institutions, etc., and prescribes as near a uniform procedure as is possible by means of a general law. Under such circumstances, while the general law (Senate Bill 94) and the special law (Section 13574) are to be construed together so as to give effect to each, if possible, yet

if they are irreconcilably inconsistent in some respect, the later general law prescribing a general, uniform procedure, will take precedence of the earlier special law insofar as they are inconsistent. The two laws are inconsistent in that Section 13574 R. S. Mo. 1929, requires the unexpended balance of the Board's fund to be transferred to the General Revenue Fund of the State on September 30th of each year, while Senate Bill 124 requires the unexpended balance in the Board's fund to be transferred to the General Revenue Fund on December 31st of each beinnium.

The purpose of Senate Bill 124 was to subject the fees, moneys and funds of the various state boards and institutions to legislative appropriation and to keep a check upon and a record of the receipts and disbursements of those bodies. In 1921 the legislature passed an act, found on page 157 of the Laws of 1921, requiring the Board of Barber Examiners to deposit their funds in the State Treasury and subjecting such funds to legislation appropriation. The Court considered the history of the act, which seems appropriate here, and expressive of the legislative intent leading to the passage of Senate Bill 124. We find this statement at page 458 of Volume 304, Missouri Reports, reporting the case of State ex rel. Kessler v. Hackmann:

> "* * *The relators give a history of the legislation relating to the Board of Examiners for Barbers, showing that before the Act of 1921 the moneys collected by the board were not paid into the State Treasury. There was no way to keep track of the money which the board received and disbursed; the reason for having the money paid into the State Treasury was that a check might be kept upon the receipts and disbursements. The relators, no doubt, are correct in that reasoning as to the purpose of the act." * * *"

Having determined that Senate Bill 124 is a general law to establish a uniform system for handling the funds of the boards, institutions, etc., of this state, the statement of Judge Hays in the case of State ex rel. v. Koeln, 61 S. W. (2d) 750, is applicable. In this case, two special laws governing payment of delinquent taxes had been enacted by the 57th General Assembly affecting the City of St.Louis only. Another general act, known as Senate Bill 80, had been enacted by the same assembly laying down a general procedure or system for the collection of delinquent taxes all over the state. In determining which of these laws should control the collection of delinquent taxes in the City of St.Louis, the Court stated on page 755, et seq:

> ** * *The whole purpose of the many and harmonious rules of statutory construction is said to be to aid in arriving at the intention of the Legislature, as ascertained from the enactment itself, by calling in aid such of the rules as appear to have special application to the particular statute under consideration. In furtherance of such purpose we adopt and apply in this case a rule, or combination of rules, expressed in the following quotation: 'While the rule is that a general affirmative act, or the general provisions of an act, without express words of repeal, ordinarily will not repeal or affect a previous special or local act on the same subject, yet it is not a rule of positive law, but one of construction only; a special act may be impliedly repealed by a general one and the question whether it has been so repealed is always one of legislative intention.' Schott v. Continental Auto Ins. Underwriters, 326 Mo. 92, 31 S. W. (2d) 7; 59 C. J. Chap. 536; 'The special act is not repealed unless a different intent is plainly manifested, or <u>where the two acts are irreconcilably inconsistent</u> or repugnant, or where the <u>general act covers the whole subject matter of the special one</u>* * *<u>or is clearly intended to establish a uniform rule or system for the whole state.</u>'* * * **

It is accordingly the opinion of this office that any provisions of Chapter 106 R. S. Mo. 1929, which are irreconcilably inconsistent with Senate Bill 124, are repealed by the latter law insofar as so inconsistent; that all fees, funds and moneys received by the Dental Board subsequent to July 24, 1933 are subject to the provisions of Senate Bill 124; and that the last payment of moneys into the general revenue fund under the provisions of Section 13574 R. S. Mo. 1929, should be made September 30, 1933, transferring to said fund any balance of funds collected by the board prior to July 24, 1933, and remaining unexpended on September 30,1933.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

MISSOURI DENTAL BOARD: Exhibit submitted by Chalres R. Mendlick not sufficient to qualify him to take examination.

11-13 13560 RS Rev 1929

November 4, 1933.

FILED 36 57

Hon. Geo. E. Haigh, Secretary,
Missouri Dental Board,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion on the following set of facts:

> "Please find enclosed copy of a communication I received from Mr. Charles R. Mendlick of Kansas City, Missouri. This party is presenting same to the Dental Board in lieu of a diploma from a reputable Dental College. I will appreciate an opinion from your department as to whether you would consider him eligible to take the Missouri Dental Board examination."

The communication received from Mr. Charles R. Mendlick as attached to your letter is as follows:

> "
> Berlin, N.W. 10
> September 1933
>
> To whom it may concern:
>
> We here undersigned, will varyfy the fact, that Doctor Charles R. Mendlick has studied dental science at the Kaiser Friedrich Wilhelm Universitat in Berlin and as to our memory has finished same school and granted a Degree of M.R. DR. The dates are faint to memory, but will say, that the time of his studies has been at the Universitat four years ending in A.D. 1913. We can say, that he has not missed any schooling from childhood until he graduated.
>
> We are very sorry to lose him from our country and we hope that his wellfare is

is well founded in the new world. We hope this will be sufficient to grant Doctor Charles R. Mendlick all the consideration towards his future as he is well worth the effort.

Signed,

(6 signatures) "

This document is signed by six gentlemen, but there is nothing in the exhibit showing any connection of these gentlemen with the University in Berlin. They have merely signed their names.

I.

Qualifications of applicants necessary to take examination.

Sec. 13560, R.S. Mo. 1929 provides in part as follows:

"Each applicant must be at least twenty-one years of age, of good moral character and reputation, and must show that he or she is a graduate and has a diploma from a reputable dental college, or the dental department of some reputable school or university which maintains a required course of study equal to that required under this chapter and requires for entrance in said dental department a high school diploma from an accredited high school or credits which are approved by the registrar of the state university of Missouri, so that said students could be admitted to the state university as bona fide student and a candidate for a degree without conditions. A graduate from a foreign dental school or dental department of a foreign university shall satisfy the state board of examiners that he is a graduate of an accredited high school or has the equivalent to a number of credits and that he has attended an American dental school for one or two years as the board may deem essential to give them training equivalent to that offered by other applicants who are graduates of American dental schools.

From a consideration of the above statute it is apparent that a graduate from a foreign dental school or the dental department of a foreign university must satisfy the State Board of Examiners (1) that he is a graduate of an accredited high school or has the equivalent to a number of credits; and (2) that he has attended an American Dental School for one or two years, as the Board may deem essential.

CONCLUSION

From a consideration of the foregoing, it is the opinion of this department that the communication received from Mr. Charles R. Mendlick, as set out in this opinion, is not sufficient to qualify him to take the examination given by the State Board of Dental Examiners. This communication is merely a statement signed by six gentlemen that Charles R. Mendlick studied dental science in the Kaiser Friedrich Wilhelm Universitat in Berlin. There is nothing officially connecting the communication with the University.

In addition the applicant has not furnished any evidence that he is a graduate of an accredited high school, nor is there any evidence that he has attended an American Dental School, all of which is required by Sec. 13560, R.S. Mo. 1929.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

JWH:AH

APPROVED:

ROY McKITTRICK,
Attorney General.

TAXATION:--Tax suit may proceed to judgment after December 31, 1933 if filed before July 25, 1933.

November 17, 1933

FILED
36

Hon. Steve Hailey
Collector of Revenue
Barry County
Cassville, Missouri

My Dear Mr. Hailey:

We acknowledge receipt of your letter of November 15, 1933, requesting an opinion of this office as follows:

> "I see from the newspaper that there is a recent opinion from your office in regard to the new tax law being inoperative on Personal Back Taxes and as there are a few tax suits pending in Barry County, Missouri, that were filed in the Circuit Court d ring the year 1932 for delinquent taxes on Real Estate I write to ask the opinion of your office in regard to them. Will it be legal to pursue them on the Judgment? There are no personaltax suits among them.
>
> I see by House Bill No. 44 passed by the GeneralAssembly April 1st, 1933, "If, on the First Day of January of any year, any of said lands or town lots contained in said 'Back Tax Book' remain unredeemed, it shallbe the duty of the Collector to proceed to enforce the payment of the payment of the taxes charged against such tract or lot, by suit in a court of competent jurisdiction of the County where the realestate is situated etc." As our term of court is in session I will be pleased if you will send me your opinion at an early date."

In dealing with your inquiry we shall divide it into the two following subdivisions:

I.

HOUSE BILL NO. 44, PASSED BY THE 57th GENERAL ASSEMBLY INEFFECTIVE AFTER JULY 24, 1933.

This office has heretofore held in an opinion dated August 8, 1933, to the State Tax Commission, that House Bill 44 which was a reenactment of Section 9952 R. S. Mo. 1929, with a proviso added thereto, was intended to transfer the duties of the delinquent tax attorney to the Prosecuting Attorney from the time it was effective until Senate Bill 94 became effective on July 25, 1933. In this opinion we stated as follows:

> "Having concluded that the sole intent of House Bill 44 was to provide that the Prosecuting Attorney of Greene County also act as Delinquent Tax Attorney, we are of the opinion that House Bill 44 is only operative as enacted (subject to Senate Bill 80) up to July 24, 1933."

Having concluded that you are not authorized to proceed at this time under House Bill 44, we shall turn to Senate Bill 94 and determine what course you are permitted to pursue under that Act.

II.

SUITS FOR DELINQUENT TAXES FILED IN 1933 MAY BE LEGALLY REDUCED TO JUDGMENT UNDER SENATE BILL 94 AFTER DECEMBER 31, 1933.

We direct your attention to portions of Section 9962b found on page 444 of the Missouri Laws of 1933, reading as follows:

> "Provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date

> of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to the suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

It is therefore clear that it was the intent of the legislature to permit the Collectors of Revenue to proceed with the collection of taxes through suit if such suits were instituted prior to the affective date of Senate Bill 94, to-wit July 25, 1933.

However, by reason of the passage of Senate Bill 80, found at page 423 Laws 1933, you are not permitted to proceed to judgment in these suits until after the expiration of Senate Bill 80, to-wit, December 31, 1933. This has been expressly held in the case of State ex rel. McKittrick vs. Baer, 63 S. W. (2d) 64. Judge Hays in considering the effect of Senate Bill 80 stated as follows, l.c. 67:

> * * * "All questions necessary to be discussed having been determined, it seems advisable, before closing this opinion, to observe briefly the effect of the change in the law upon the back tax suits that have been filed, or may be filed, subsequently to the date, April 13 of the current year, when this new law became effective. Owing to the alternative options granted the taxpayer, with periodically and increasingly reduced advantage to him in the avoidance of penalties, a question of some difficulty

> is presented pertinent to the effect upon suits pending during any part or all of the entire period covered by the act. Concerning this matter, it is our view (1) that none can proceed to final judgment before the expiration of the act on January 1 next; (2) a taxpayer exercising the first option may pay the original tax without more, and all penalties are thereby discharged, and his pending tax suit, if any, will be abated; * * *"

We trust the foregoing may be of assistance to you in the solving of your problem.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

Attorney General

HGW:MM

ROAD DISTRICT COMMISSIONERS: Have no right to employ themselves. Sections 8031, 8033 and 8038 RSMo 1929.

February 11, 1933.

Filed: #38

FILED
38

Hon. T. J. Harper
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Harper:

Your recent letter directed to the Attorney General, in which you request an opinion relative to the statutory provisions relating to commissioners of special road district, has been handed the undersigned for attention. In connection therewith you state the following:

> "We have a question up before the County Court, in which the commissioners in Special Road districts are interested, on which I would like very much to have an opinion from your office.
>
> Under section, 8031, "Said board shall serve without compension, but actual expenses shall be repaid them, &&&. but the real question is can they when out overseeing the road work or a bunch of men, or at work running tractor or grader or like work, at actual labor draw pay for actual labor done and performed. Now it seems that under section 8033 and 8038, Powers of the Board, are authorized to do and perform all acts within the district for which any authority is given to road overseers under the general road law of the State, I may be wrong, but I hold they should be paid for such labor, but no salary as commissioners."

As we understand your inquiry:- A board of commissioners of a special road district was appointed under the provision of Section 8026 R. S. Mo. 1929, who under the provision of Section 8031 R. S. Mo. 1929, were to serve without pay, except for their actual necessary expenses. Are they, or either of

them, while holding the office of commissioner, entitled to work upon the road in some capacity and draw compensation therefor the same as a road overseer, and at the same time draw the expenses as provided for the board of commissioners, or would they be permitted to draw the road overseer's salary and forego the expenses as so provided?

The adjudged cases upon the validity of appointment to office, made from the membership of the appointing board, hold uniformly that such appointments are illegal, as against public policy and for that reason are generally discountenanced. The reason for declaring such act against public policy is obviously from the fact that the power to fix and regulate the duties and compensation of the appointee, is lodged in the body of which the commissioner is a member. Unless such rule was promulgated and enforced, it might permit the general public to be taken advantage of by the board or commission created as their agent and for their protection.

It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence.

State ex rel, Smith v. Bowman, 184 Appeal 549.

For the reasons as hereinabove stated, it is the opinion of this department that it would be unlawful as against public policy for the member of your special road district board to be employed by the board, or engage themselves as an employee, and draw compensation for working upon the highway of the road district, in which he is serving as commissioner.

Yours very truly,

CARL C. ABINGTON
Assistant General Attorney

Approved:_____
ROY McKITTRICK

IN RE: Power of State Highway Commission to change route of Farm-to-market road after same located by County Highway Commission.

7858-59-60 RS Mo 1929

March 8, 1933.

FILED
38

Hon. T.J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

Your letter states as follows:

"The Stone County Hiway Commission is in doubt as to their powers in laying out and establishing "Farm to market highways from point to point and have it approved.

We would like to have an opinion from your office as to their authority in such matters. They have agreed on a location of a road, and the State Highway Commission comes and changes every thing and map out a different route. Do they have any right to pass on and determine the route or is it left to the State Commission?"

The language of your letter leaves me in doubt as to whether you inquire if County Commission designates a road to be built from Galena to Reed Springs, must the designation thereof be approved by the State Commission before the road can be built - or - whether you inquire if County Commission locates a route for a road to be built between Galena and Reed Springs, can the State Commission locate another route and refuse to approve the route selected by the County Commission. I will therefore answer both questions.

I assume the road proposed is a "Farm-to-market" road to be built only by county funds raised by taxation under Section 7890 R.S Mo., 1929, and that neither Federal Government funds nor state aid will be used in building same. Section 7858 R.S. of Mo. of 1929, same being part of the Farm-to-market Road Statute of 1927, provides as follows:

"POWER AND DUTY OF COUNTY HIGHWAY COMMISSION--It shall be the duty of the county highway commission and said commission shall have the powers to locate, lay out, designate, construct and maintain, subject to approval of the state highway commission, a system of county highways not exceeding in the aggregate

one hundred miles in any county, by connecting by the most practical route the several centers of population in the county, in such manner as to afford a connection with such of said centers of population as are not now located on any state highway with such state highway, and so as to afford, as nearly as may be done, a connection with county highways connecting the centers of population of adjoining counties, to the end that all parts of the county shall be connected with the state highway system as now laid out and designated, and that the inhabitants of the county generally shall have and enjoy a system of highly improved farm-to-market roads"

Section 7859 R.S. Mo. 1929 provides as follows:

"LOCATION OF COUNTY HIGHWAY TO BE SUBMITTED TO STATE HIGHWAY COMMISSION FOR APPROVAL--Before construction of any county highway located, laid out, and designated as in this article authorized and provided, or any money, in excess of the cost of such location and designation shall be expended thereon, it shall be the duty of county highway commission to submit such location to the state highway commission for its approval, and, upon approval of such location by the state highway commission, the county highway commission shall proceed to procure the right-of-way for said county highways, said right-of-way to be of the standard width required by the state highway commission for secondary highways, not less, however, than sixty feet wide, and secure title in fee to such right-of-way by deed of conveyance, or by judgment of a court of competent jurisdiction through condemnation. ***"

It is contemplated these farm-to-market roads shall eventually be a part of the state highway system of hard surfaced roads, and to that end Section 7860 R. S. Mo. 1929 provides that roads built as farm-to-market roads shall be of such type and on such grade as to permit improvement thereof ultimately into hard surfaced roads.

Section 7866, R.S. Mo. 1929, provides:

"If, and when, the state highway commission is authorized by law so to do, and may so desire it may take over all or any part of the highways of the county highway system and make refund therefor in such manner as may now or hereafter be provided by law for making refund to the several counties of this state, and road districts thereof, for highways heretofore designated and taken over by said state highway department, whereupon it shall be the duty of the county ~~highway commission,~~ by proper deed of conveyance, to ~~transfer~~ to ~~state~~ Highway department that part of county highway system so taken over."

The first question is: If county commission designates a road to be built from Galena to Reed Springs must the designation thereof be approved by the state commission before the road can be built?

Section 7858 of the Farm-to-market Road Statute provides specifically the county commission "shall have the power to locate, lay out, designate, construct and maintain subject to approval of the state highway commission a system of county highways. The power of the county commission is to locate, construct and maintain a system of farm-to-market roads subject to the approval of the state highway commission.

Here is a particular specific method laid out to be followed by the county highway commission in locating, designating, constructing and maintaining the system of farm-to-market roads. In my opinion Section 7858 provides first, for a system of county farm-to-market roads to be laid out, designated and located by the county commission subject to the approval of the state commission, and the word "system" as here used means an organized plan or scheme of county roads connected and combined into a harmonious whole, adapted and designed to best and most conveniently serve the public using same;

Second, that such system when approved by the state commission, the county commission is empowered to construct and maintain subject to the limitation as to location of a particular road contained in Section 7859;

Third; that the system should be planned so as to as far as is practicable afford a connection with centers of population not now located on any state highway, and planned so as to afford, within practicable limits, connection with county highways connecting the centers of population of adjoining counties.

This construction contemplates the county commissioners will cooperate with state commission and state commission cooperate with the county commission in working out a system of county roads for the farm-to-market roads of the county, and necessarily in doing this work the county commission will incur some expenses in designating and locating proposed roads, and submitting same to state commission as part of the system of county roads; and in the creating of the plan or system of roads, neither the state commission nor the county commission will be allowed to arbitrarily exercise its rights to the manifest injury of the other.

C & O Ry. Co. vs. Thompson, 176 S.W., l.c. 24

In this situation our Supreme Court said, in State ex rel Barlow vs. Holtkamp, 14 S.W. (2d) l.c. 650:

> "Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely: that the thing shall not be done otherwise."

Applying this rule of construction to Section 7858, it is my opinion

the county commission cannot locate, lay out and designate a system of farm-to-market roads and build same or any part thereof without first having the system and the particular road thereof approved by the state commission, and therefore if county commission designate a road to be built from Galena to Reed Springs, before it can be legally built, the state commission must approve same.

The second question is: if county commission has designated a road to be built between Galena and Reed Springs as part of the farm-to-market roads of the county and such designation meets the approval of the state commission and then the county commission locates the route of road between Galena and Reed Springs, can the state commission refuse to approve the route selected by the county commission and locate another route for said road?

This brings us to a construction of Section 7859 of the Farm-to-market Road Act. The language of Section 7859 is:

> "Before construction of any county highway located *** as in this article authorized and provided *** it shall be the duty of the county highway commission to submit such location to the state high commission for its approval ***"

It will be observed that the language of Section 7859 is:

> "Before construction of any county highway, located, laid out, and designated as in this article authorized and provided *** it shall be the duty of the county highway commission to submit such location to the state highway commission for its approval, and, upon approval of such location by the state highway commission, the county highway commission shall ***"

The language in the section "Any county highway, located, laid out, and designated as in this article authorized and provided" evidently refers to the locating, laying-out and designating of county highways as a part of county farm-to-market road system established in compliance with Section 7858.

That this construction of the language quoted from Section 7859 is correct, is borne out fully by the following language contained in Section 7859:

> "Before construction of any county highway located, laid out, and designated as in this article authorized and provided, or any money, in excess of the cost of such location and designation shall be expended thereon, it shall be the duty of the county highway commission to submit such location to the state highway commission for its approval ***"

This Section, 7859, recognizes that a system of farm-to-market roads is to be laid out by the county highway commission and approved by the state commission and that some costs must be incurred therein. But Section 7859 in my opinion also forbids the building of a farm-to-market

road between two points after state commission has approved a road between the points as a part of the county system until the location of the route of the road has been approved by the state commission.

Also if county highway commission does not locate a route for a road between two points the selection of which road as part of county highway system has been approved by state commission, or if county commission and state commission cannot agree on route or location for such road, the state commission can locate it. This answers the second question.

Section 7860 of Farm-to-market Act requires the county commission to build the road of a type and with a grade so that it can be ultimately made into a surfaced state highway, and Section 7866 of the same Act authorizes the state commission when authorized by law to take over the roads the county highway commission builds and pay the county therefor.

In this provision for taking over the farm-to-market roads is disclosed the reason why the Legislature intended this system of farm roads to be located and constructed only with the approval of the state commission, to-wit: the Farm-to-market roads are intended by the Legislature to become a part of the state highway system and therefore should be so located and built that they can readily be hard surfaced and made an integral part of the state wide hard surfaced road system.

Very truly yours,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AH

Food and drugs, patent and proprietary medicines may be sold in places other than pharmacies and drug stores.

13140 RS Mo 1929

April 11,1933

FILED
38

Honorable T. J. Harper
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

We are in receipt of your letter of April 8,1933 requesting an opinion, and same being as follows:

> "Relative to the question asked by this office of March 29th /33. I will again try to make myself plainer.
>
> "Can amanafcturer of thormarcutrical preperations-through agents, sell remedies in this state-out side of drug stores-in places where there are no druggists, if the labels are given the names of the drugs, and amounts of the ingredients it is composed of, and the ailments it is reccommended for. according to accepted medical and pharamaceutical practice."
>
> In other words are there any legal restrictions, or any registration the statutes refered to in your letter covers the law as to misbraded or adulteraded medicine. but does not cover the rights of the manafactur of permited remidies."

Section 13140 R. S. Mo. 1929, regulates the sale of drugs, medicines, chemicals and poisons. Said section provides among other things as follows:

> "It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, ***or for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician or otherwise,****

This section also has the following exception:

> "Provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines,***"

It will be seen that the above section makes it unlawful to compound, dispense or sell at retail any form of pharmaceutical preparations upon the prescription of a physician or otherwise. However, if preparations and remedies are patent and proprietary medicines then same may be sold in places other than in drug stores.

We assume from the context of your letter that you have used the words "pharmaceutical preparations" in the wrong sense and that you mean patent or proprietary medicines, and this opinion is given with that assumed premise.

Sections 13007 and 13008 R. S. Mo. 1929, confers upon the Food and Drug Commissioner authority to condemn any drug which he might find is adulterated or misbranded or is a substitute or imitation.

Section 13017 R. S. Mo. 1929 defines the word drug as follows:

> "The term 'drug' as used in this article, shall include all medicines and preparations recognized in the United States pharmacopoeia or national formulary for external or internal use, and any substance or mixture of substance intended to be used for the cure, mitigation or prevention of disease in man or animals."

Section 13012 provides:

> "It shall be the duty of the food and drug commissioner to inspect all places where food products or drugs are manufactured or are kept for sale, and prescribe rules and regulations for the sanitary conditions of such factories and places where food products and drugs are kept for sale,***"

It is our opinion that patent and proprietary medicines may be sold in places other than drug stores, but "said medicines" are regulated by the food and drug commissioner for adulteration, misbranding, substitution or imitation and sanitation. If the preparations are prepared for immediate use by the public, put up in

packages or bottles, properly labeled with the name, and accompanied with wrappers containing directions for use, and the conditions for which it is a specific then they may be sold in places other than in drug stores, provided the place where sold is in a sanitary condition.

State v. Donaldson et al, 42 N.W. l.c. 783-784.

Trusting that this answers your inquiry. We are

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

JLH:MM

COUNTY CLERK'S FEES:

County Clerk must account for fees received in his official capacity in making his return and settlement with the county.

May 22, 1933.

11810-11-7108
RSMo 1929

FILED
38
23

Mr. T. J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of May 13, 1933, as follows:

"Will you please give me opinion on the Law governing the following questions:

No. 1. Is making the Tax Books of Incorporated Towns a duty conferred on the County Clerk and a fee of the office of the County Clerk?

No. 2. Is clerking for the Equalization Board a duty of the County Clerk, and a fee of the office of County Clerk.

No. 3. Is making out Financial Statement a duty of the County Clerk, and a fee of the office of County Clerk? Does the County Clerk have to set these fees related above, making Tax Books Inc. Towns, making Financial Statement, Clerking for the Equalization Board out in his settlement to deduct his salary from & Deputy Hire?

Does he have to account for these fees, the same as any other fee of his office?

No. 4. Is the Circuit Clerk's salary computed by multiplying by 3½ the same as the County Clerk's salary?"

Section 11810 R. S. Mo. 1929, provides that the Clerk of Courts of Record shall make quarterly returns, etc. Among other things, the Section provides,

"Every clerk of a court of record in every county in this state shall make return quarterly to the county court of all fees by him received to date of return, from whom received and for what services, giving the amount of each fee received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit. Such statement shall include all fees for all services of whatever character done in his official capacity, giving the name of

of each deputy or assistant, the length of time each was employed, and the amount of money paid to each."

Section 11811 R. S. Mo. 1929, provides, among other things, as follows:

"The aggregate amount of fees that any clerk under articles 2 and 3 of this chapter shall be allowed to retain for any one year's services shall not in any case exceed the amount hereinafter set out."

Then follows in that Section the amount of salary clerks shall receive in certain counties, according to the population.

In State ex rel Hickory County v. Dent, 121 Mo. 162, it was held that the County Clerks are chargeable for all fees received by them in their official capacity under the Statutes, and that they had to include the amount allowed them by the Court for the keeping of the county's accounts with its officers. The court held that all fees received by the County Clerk in his official capacity had to be returned and accounted for under the Sections above cited.

In the case of Callaway County v. Henderson, 119 Mo. 32, the County Clerk contended that he had a right to retain a $400.00 allowance made by the County Court for keeping the county's account with the Treasurer, and other services in addition to the $1800.00 specifically provided for by the Statute for counties of that size. The court, however, in construing what is now Section 11810 and Section 11811, held that the amount set forth in Section 11811 was the maximum amount which the clerk would be allowed to retain for any year's services, and that all other fees or compensations in addition thereto must be surrendered to the county.

Section 7108, R. S. Mo. 1929, makes it the duty of the county clerk to furnish a certified abstract of his assessment books to the trustees of the town. The county clerk, therefore, in his official capacity, is required to furnish the list, and his fees received therefor must be accounted for by him.

In answer to your second inquiry, we beg to advise that fees received by the county clerk resulting from adjusting the assessment books, according to the order of the County Board of Equalization, must be accounted for by the county clerk in his quarterly return, the same as other fees. While the county clerk is a member of the County Board of Equalization, yet the clerical work resulting from the action of the Board, is performed by him in his official capacity as county clerk, and not as secretary to the County Board of Equalization. This particular point has been passed upon by our Supreme Court in the case of State ex rel v. Adams, 172 Mo. 1, in which the court decided that fees

accruing as a result of adjusting the assessment books were received by the county clerk in his official capacity, and, therefore, must be accounted for by him in his settlement with the county.

In answering your third inquiry, we are of the opinion that the preparation of the financial statement is a duty imposed by law upon the county clerk in his official capacity, and that any fee must be accounted for by the clerk in his return and settlement.

In answering your fourth question, it is our opinion that in determining the population of a county in arriving at the amount of salary to be paid the circuit clerk, that the total number of votes cast in such county at the last presidential election shall be multiplied by three and one-half, as provided in Section 11811 R. S. Mo. 1929.

In summarizing, therefore, it is the opinion of this Department that the county clerk must account in his statement and in his settlement with the county of all fees received by him in his official capacity in the instances above mentioned. We believe these fees are on the same basis as other fees which he is authorized to receive as county clerk. If he fails to account for them in his return and settlement he will be liable upon his bond.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

Right of witness and stenographer to be paid legal fees from fund appropriated to pay election contest expenses.

FILED
38

May 26, 1933

Honorable T. J. Harper
Prosecuting Attorney Stone County
Galena, Missouri

Dear Sir:

Your letter reads as follows:

"RESOLUTION.
WHEREAS, from the report of the Election Committee in the case of H. J. Warren, contestant vs Lee Hurst, contestee, it appears that the said Lee Hurst as contestee is not chargeable with any fraud or knowledge of any fraud or any conspiracy to defraud the said H. J. Warren, but that the said Lee Hurst acted in good faith in accepting the certificate of election, therefore,

BE IT RESOLVED that, in full compensation for the expense of his attorney and the expense of securing witnesses and taking depositions, the sum of $250.00 be allowed and that, upon the adoption of this resolution, the Chief Clerk of the House be authorized and directed to certify this item of expense to the State Auditor and the State Treasurer to be paid out of the contingent funds of the House; and a warrant for the same to be drawn in favor of G. FURD HAYES and RUFE SCOTT.

Will you please give me your opinion as to the intent of the Legislature when adopting this resolution, did they intend for

this $250.00 to take care of the expenses of the Justices of the Peace the stenographer, witness fees and attorney fee, or did they intend for this entire amount to be solely attorney fees?***"

It is the opinion of this Department the intention of the Legislature was to appropriate the two hundred and fifty dollars to pay attorney's fees, witness fees and if a stenographer was necessary, the stenographer fees and the fees of officer before whom any deposition may have been taken.

Very respectfully,

EDWARD C. CROW.

APPROVED:

Attorney General.

ECC:LC

CIRCUIT CLERK: Salary of Circuit Clerk, Section 11786, R. S. Mo. 1929.

COUNTY CLERK: Salary of County Clerk, Section 11811, R. S. Mo. 1929.

June 16, 1933.

6-20

FILED

38

29

Mr. T. J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

We are acknowledging receipt of your inquiry of June 1, 1933, in which you inquire as follows:

"Thanks for your opinion in answer to my last inquiry with relation to salaries of the County Clerk, and Circuit Clerk of this County.

There is quite a controversy here over the matter, and I would like to further bother you with another proposition and that is,

First. It seems that the laws of 1921 were held unconstitutional in the 312 Mo. supra, page 157, as not being uniform for salaries of County officers, and that section 11786 R. S. 1929 is the law, which allowes the vote to be multiplied by 5 to determine the basis of the salary of Circuit Clerks. Section 11811 is, therefore, the same section as in the 1921 act and was declared unconstitutional as above refered to in said 312 report; so does not the laws in force before that time become operative to-wit; section, 11019 R. S. 1919?

Awaiting your further opinion on this one question."

The Supreme Court of Missouri in the case of State ex rel Chaney v. Grinstead, 314 Mo. 55, and again in State ex reb O'Connor v. Reidel, 46 S. W. (2d), 131, holds that section 13, article 9 of the Missouri Constitution which provides:

"The General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population."

It is not violated so long as the method of calculating the population is uniform as to all counties and as to each class of officers.

The court in the Grinstead case above on page 88 of

the opinion says,

> "The law-makers can adopt any measure not prohibited by the Constitution; our Constitution being one of limitations, rather than one of grants. It cannot be said that an estimated population, where the same basis of estimate is used in all counties, would render the law bad because of lack of uniformity as to the several classes, or as to all classes."

It would thus appear from each of the above cases that each county officer may be considered as constituting a single class and so long as the basis for determining the population for that class or office is uniform throughout the several counties of the State, then such Statute would be Constitutional and valid. While the salaries of the Prosecuting Attorneys were involved in the two above cases, the conclusion of law reached therein affects all County Officers, including the Clerk of the Circuit Court and the Clerk of the County Court.

Section 11808 R. S. Mo. 1929, provides a method for ascertaining the population of counties for the purpose of fixing the salaries of County Officers, but being a general Statute, it should be resorted to only where no other method has been provided by the Legislature to ascertain the population of counties for the purpose of fixing the salary of a particular county official.

It is, therefore, the opinion of this Department that the proper way of ascertaining the population and thereby fixing the salaries of the officials of which you make inquiry is as follows:

Clerk of the Circuit Court should be paid on the basis of five times the vote of the last presidential election, as is provided in Section 11783 R. S. Mo. 1929.

Clerk of the County Court should be paid on the basis of three and one-half times the vote of the last presidential election, as provided in Section 11811 R. S. Mo. 1929.

The salary of the Circuit Clerk and the County Clerk, as ascertained from a calculation of the vote inthe presidential election of 1932, would become effective January 1, 1933.

"The highest vote of the last presidential election" means the highest vote cast for any office in that election. If, from calculation of the votes as above described, it should result in an increase of salary, such increase during the term of said official, under authority of State ex rel Harvey v. Linville, 300 S. W. 1066, would not be in violation of Section 8, article 14 of the Constitution of Missouri.

You state in your inquiry that Section 11811 R. S. Mo. 1929, as amended in 1921 was declared unconstitutional. We believe, however, that you are in error in this respect. Section 10995 R. S. Mo. 1919, was amended in Laws of 1921, page 606. In State v. Hamilton, 279 S. W. 273, the court held that that amendment was void and held that the salary of the Circuit Clerk was to be fixed under Section 10995 R. S. Mo. 1919, which is Section 11788 R. S. Mo. 1929.

Section 11019 R. S. Mo. 1919, was amended in Laws of Missouri, 1921, page 608, and that amendment has not been declared unconstitutional. Section 11019, as amended in 1921, now appears as Section 11811 R. S. Mo. 1929.

From the foregoing it is, therefore, the opinion of this Department that the salary of the Circuit Clerk shall be determined according to Section 11788 R. S. Mo. 1929, and the salary of the Clerk of the County Court shall be determined according to Section 11811 R. S. Mo. 1929.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

PROSECUTING ATTORNEYS:

Prosecuting Attorney not entitled to a compensation in addition to salary for work done in connection with case in which County was party.

11314-15-16-18-11783
R.S.Mo 1929

June 20, 1933.

FILED
38

Mr. T. J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

We are acknowledging receipt of your inquiry of June 9, 1933, as follows:

"As Prosecuting Attorney for Stone County, Missouri, I ask your opinion of the questions based on following facts:

Statement.

J. William Cook was Prosecuting Attorney for Stone County during the years 1931 and 1932. He represented Stone County in the case of State Highway Commission vs Vasa Lockhart Dorris et. al. in a condemnation case involving land located in Crane, Missouri, desired by the plaintiff on Highway 13. The case was tried in Springfield in 1932 on a change of venue from Stone County. It developed before the trial that plaintiff had been furnished the following witnesses: Bill Baker, age about 75 years, a retired carpenter, living in Crane; Bud Rea, age about 75 years, a farmer living about 4 miles from Crane with no equity in his farm and Wade Hilton, an operator of a curb filling station, age about 45, living in Crane; that the defendants had six or eight of the most substantial farmers and business men in the community, who each would testify and did that the damage exceeded benefits by approximately $3000.00; that two of the plaintiff's witnesses could not qualify and one would and did testify that the damages exceeded benefits by $800.00. Popular feeling was with the defendants, who were raised on the land sought to be condemned, were widows, well liked and very active in their own interests. Under such circumstances, Cook states that he realized that defendants would obtain a very substantial judgment on their exceptions, if plaintiff could not get more suitable testimony. Without any order from the County Court or from the plaintiff, Cook spent the major portion of two weeks trying to get evidence, but was handicapped by local feeling and by the fear of local people to participate as witnesses. He finally obtained three witnesses, one of whom testified unwillingly, of substantial standing who could qualify. Defendants recovered judgment for $1000.00,

less than the amount allowed by the commissioners appointed in the case.

Questions.

1st. Is J. William Cook entitled to reasonable compensation for his work and time in obtaining needed witnesses as outlined above?

2nd. If so, is the bill for $100.00 reasonable?

3rd. Has the Stone County Court the legal right to approve the attached bill, or allow same out of general revenue?"

Section 11314 R. S. Mo. 1929, provides the amount of salary Prosecuting Attorneys of the various Counties shall receive in payment for their services and how the population of the various counties is ascertained for the purpose of fixing salaries.

Section 11783 R. S. Mo. 1929, provides that certain fees shall be allowed to the Prosecuting Attorneys.

Section 11315 R. S. Mo. 1929, provides that it shall be the duty of the Prosecuting Attorneys to charge upon behalf of the county every fee that accrues to his office, and requires him at the end of each month to pay in to the County Treasury all such money collected by him as fees.

It is obvious from the foregoing Statutes that the Prosecuting Attorney no longer receives fees, but is now on a salary basis. Fees that are collected by him are required to be turned over by him to the County Treasury. However, if there could be any doubt about this proposition, Section 11783 R. S. Mo. 1929, makes no provision for the payment of any fee under the circumstances covered by your inquiry. If the work performed by the Prosecuting Attorney, about which you inquire, is a duty imposed upon him as a Prosecuting Attorney, then the salary which he receives as Prosecuting Attorney is his full compensation for his duties as Prosecuting Attorney, except where provided otherwise.

In Hill v. Butler County, 195 Mo. 511, the Prosecuting Attorney sought to recover a fee for attending and representing the State in a preliminary examination before a justice of the Peace of his county in a felony case. He presented his bill for $80.00. The court held that there was no question of quantum meruit in the case; if the officer is entitled to the fee claimed he would have to point it out in the Statutes. At that time the Statute provided for a prescribed salary graded according to population and contained the additional provision, to-wit: "And said Prosecuting Attorney shall also receive for his services in the Circuit Court and other Courts, such fees as allowed by law." The Court, at page 515, says:

"Thus the Legislature has provided that the officer is to

> be compensated for his services in two ways, by salary and by fees, both as, and only as, expressly prescribed by Statute. If the law imposes on him a certain duty, but prescribes no particular fee for its performance, he cannot say that it imposes on him a duty for which he receives no compensation, because the statute says that his salary is given him in payment of his services. We do not mean that the salary is given as compensation for only such services as for which no particular fee is prescribed, for that is not the meaning of the statute; the salary is in payment of all his services, with the addition that for certain services particular fees are also given, and there may be other services for which no particular fee is given, but which are fully compensated by the salary."

In that case it was held that he was not entitled to recover on the basis of quantum meruit; that the statute prescribes certain fees in addition to his salary and unless the service performed was such as was to be compensated by a specific fee, that his compensation, therefor would be the salary which he receives. Now the Prosecuting Attorneys are on salaries and the fees collected go to the County. The services which they perform now under the statute are compensated by the salary they receive.

The general rule is that when an officer seeks to collect a fee for services he has performed as such officer, before such fee will be allowed he must be able to place his finger upon the section of the Statute authorizing the fee as claimed.

In Gammon v. Lafayette County, 76 Mo. 675, 676, the court says:

> "The right of a public officer to fees is derived from the Statutes. He is entitled to no fees for services he may perform, as such officer, unless the Statute gives it. When the Statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services."

In State v. Wofford, 116 Mo. 330, 333, the court again said:

> "It is a well settled law that no officer is entitled to fees of any kind unless provided for by Statute, and that the law conferring such right must be strictly construed because of statutory origin and right. (Citations omitted)."

Again in State ex rel. v. Brown, 146 Mo. 401, 406, the court, in speaking on the same subject, says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by Statute, and being

solely of statutory right, the statute allowing the same must be strictly construed."

Section 11316 R. S. Mo. 1929, among other things, provides that:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses.* * *"

Section 11318 R. S. Mo. 1929, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties where there may be a county counselor. * * * "

It is our opinion that the prosecuting attorney in prosecuting a suit for and on behalf of the county was performing a duty which the statute placed upon him as prosecuting attorney. The proper presentation of evidence in the case which he was handling is as much the duty of the prosecuting attorney as the proper presentation of the law. If he had not provided sufficient evidence his salary would not have been reduced. Since he did produce additional evidence, that is no basis for additional compensation. The failure to produce competent testimony might have subjected him to criticism, and the fact that he did produce competent testimony would indicate that he was conscientiously trying to discharge the duties of his office. Neither circumstance, however, in our opinion, would tend to increase or decrease his compensation because the statutes do not make provision for such a contingency. at he did was done without an order of the County Court and was done in his official capacity as a prosecuting attorney of Stone County in carrying out the duties imposed upon him by statute.

From the foregoing it is, therefore, our opinion that the former prosecuting attorney was not entitled to additional compensation over and above what he received as salary of prosecuting

attorney for the services outlined in your inquiry. However, he is entitled to reimbursement for actual expenses in following the change of venue.

Having decided that the prosecuting attorney is not entitled to additional compensation, it is not necessary to discuss the other two inquiries.

Very truly yours,

Frank W. Hayes.

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

BOARD OF BARBER EXAMINERS: Allowed expense accounts - under what circumstances.

July 24, 1933.

FILED
38

Mr. J.D. Hawkins,
Board of Barber Examiners,
Webb City, Missouri.

Dear Sir:

We hereby acknowledge your request for an opinion dated July 16, 1933, which is in words and figures as follows, to-wit:

> "We believe it would be of very great importance to our profession to be represented at this National Convention, and would very much like to have you rule that we be allowed expenses to this meeting. As it is in another state our expenses would not be allowed unless you so rule. These expenses were allowed last year."

The session laws for Missouri of 1933, page 92, provide:

> "Sec. 4. BOARD OF BARBER EXAMINERS. -- There is hereby appropriated out of the state treasury, eighteen thousand dollars ($18,000.00) chargeable to the state board of barber examiners fund, the following amounts for the purposes herein expressed:
>
> * * * * * *
>
> D. For Operation. General expense: including communication, printing and binding, traveling expenses and other general expense. And Material and supplies consisting of stationery and office supplies...$9,450."

Literally construed, that phrase "traveling expenses" might be said to mean that this money so appropriated can be spent by a member of the Board of Barber Examiners as traveling expenses so long as he be going from place to place--traveling. Such is

a literal construction of the phrase in the Appropriation Act, not taking into consideration the Constitution of the State of Missouri nor the law creating the Board of Barber Examiners under which they act.

It will be noted in said appropriation bill that the Legislature did not say in so many words "necessary traveling expenses" or "traveling expenses incurred in performance of public duty", nor did they say "traveling expenses within and without the State of Missouri", all of which phrases have been used in appropriations which were made by the Legislature for the use of other departments of said government in times past.

We must determine what is a legitimate object of expenditure for said money appropriated to the Board of Barber Examiners to be used for "traveling expenses", and since the appropriation act itself recognizes that some traveling expenses are legitimate under the law, we must proceed to examine our State Constitution and the act creating the Barber Board, known as Chapter 103, R.S. of Mo. 1929, which chapter prescribes the duties of the Barber Board. The Legislature under our State Constitution (Article IV, Sec. 48) could not appropriate public money to pay such expenses as described in your request in the absence of a statute authorizing either actually or by implication such attendance of the convention by members of the Board. I quote Article IV, Sec. 48 of the Missouri Constitution:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Sec. 13525, Chapter 103, R.S. of Mo. 1929 provides in part as follows:

> "The remuneration of each member shall not exceed the sum of five dollars per day while engaged in their duties as such, exclusive of the necessary traveling and other expenses, to which they shall also be entitled: *****The State Auditor is hereby directed to issue his warrants monthly, upon the State Treasurer out of this fund only for the payment of the salaries, office and all other necessary expenses of said board. *****"

Sec. 13526 of Chapter 103 provides in part as follows:

> "Such board shall hold public examinations at least four times in each year, at such times and places as it may deem advisable. ****"

Sec. 13534 of Chapter 103 provides in part as follows:

> "Any person practicing the occupation of barber without having obtained a certificate of registration or permit as provided in this chapter, or willfully employing a barber who has not such certificate or permit managing or conducting a barber school or college, without first securing a permit from such board, or falsely pretending to be qualified to practice as a barber or instructor or teacher of such occupation under this chapter, or failing to keep the certificate, card or permit mentioned in this chapter properly displayed, or for any extortion or overcharge practiced, and any barber college, firm corporation or person operating or conducting a barber college without first having secured the permit provided for by this chapter, or failing to comply with such sanitary rules as the board, in conjunction with the state board of health, prescribes, or for the violation of any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and the board shall proceed against all such persons, *****"

The authority to travel at the expense of the state must be found in some statute, otherwise, there is a constitutional prohibition on the state forbidding payment of the expense incurred thereby. Do the portions of Chapter 103 above quoted prescribe such statutory duties on the Board of Barber Examiners as they may in the fulfillment thereof necessitate incurring expenses in attending the National Convention of State Boards of Barber Examiners? We must take the law as we find it.

It will be observed after a careful reading of Chapter 103 that there is nowhere conferred upon members of said Board by any provision of the Act, at least so far as we have been able to discover, any authority to incur expense for travel in the performance of any other duty than those duties above recited; manifestly, none of those duties require the attendance at said

convention, and none of those duties, either express or by implication, require any travel except in the State of Missouri.

It is the opinion of this office that such a charge for traveling expenses is not a proper charge against the State of Missouri because it could not be interpreted under a most strained construction of the law to be a necessary traveling expense within the State of Missouri made in line of any official duty prescribed in the statutes.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General

APPROVED:

Attorney General

NEPOTISM: Official, offending provisions of Section 13 of Article 14, unless he voluntarily resigns, must be removed by quo warranto; the fact that related appointe afterwards resigns does not prevent forfeiture of office under Section 13 of Article 14.

September 23, 1933.

FILED
38

10-2

Mr. T. J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "The School Board in a certain district in our County is tied up on a proposition, so I am asking your opinion upon the following questions:
>
> A School board member helps to employ a relative within the prohibited degree to act as treasurer for the district with compensation. Does this director automatically go out, or should he resign?
>
> If this relative resigns can the board member continue to hold his office, or what effect would it have?
>
> Thanking you in advance for an early reply, as they are tied up until your reply is received. Would like to hear this week if possible."

Section 13 of Article 14 of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Section 7 of Article 15 of the Constitution of Missouri provides as follows:

> "The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town or township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the

> removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Under Section 13 of Article 14 of the Constitution a director who names or appoints any person within the prohibited degree shall forfeit his office. Under Section 7, Article 14, the Legislature was authorized to provide for the removal of public officers. Section 1618 R. S. Mo. 1929, among other things, provides:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; * * *."

By Section 13, Article 14 above, the Constitution declares that the appointment of any person within the prohibited degree shall cause a forfeiture of his office. That provision of the constitution meaning that the appointment of a person within the prohibited degree shall be cause for forfeiture of office, and when such fact is proven, it will result in a forfeiture of office. The Section does not mean that the person who is accused of violating the provision of the constitution shall not have an opportunity to be heard in a court of competent jurisdiction as to whether or not Section 13, Article 14 has in fact been violated. In Merchants' Laclede Nat. Bank v. Schramm, 190 S. W. 889, the court in considering the power of removing officers says at page 891:

> "In this state the rules governing the removal of appointive officers have been discussed by the appellate courts in a series of cases in all of which, by the terms of implications of the statutory power given, the removal could only be for cause after notice and trial."

The right of a person to hold an office to which he has been elected is a right of which he cannot be deprived except by his day in court. In other words, the accused officer is entitled to notice and hearing before the right to hold office can be taken from him. While Section 13, Article 14 declares that an officer who names or appoints relatives in the prohibited degree shall forfeit his office, such constitutional provision does not mean that the accused official shall not have an opportunity to be heard in a court of competent jurisdiction as to whether or not, as a matter of fact, he is guilty of violating said Section.

Section 1618, R. S. Mo. 1929, referred to above, provides

that the right to hold office shall be tested by the writ of quo warranto. In such proceedings the accused official would be entitled to show that he did not name or appoint the relative or that the person appointed was not related within the prohibited degree.

Section 13, Article 14, does not make the office of the accused official vacant automatically, but under said Section the accused official is entitled to notice and hearing as to whether or not he is guilty of violating the mandates of said Section. Under the facts outlined in your inquiry the accused official should resign without putting the state to the expense of having him removed. If, however, the official refuses to relinquish the duties of his office, it will be necessary for you as Prosecuting Attorney to start proceedings for his removal.

It is therefore our opinion, in answer to this inquiry, that the accused official should resign and cause the district no further difficulty. However, upon his failure to so do, we believe it would be necessary to file an information in the nature of a quo warranto to declare his forfeiture of office.

Your next inquiry that if the relative should resign, can the Board member continue to hold office? Under Section 13, Article 14 above, any public officer "who shall name of appoint to such service any relative within the fourth degree either by consanguinity of affinity, shall thereby forfeit his or her office or employment." The injunction of the Constitution, therefore, is that no officer shall "name or appoint." It is the act of naming or appointing the relative which is a violation of the mandate of the Constitution, and when such naming or appointing takes place the constitution has been violated. It is the violation of the constitution that is the basis of the forfeiture of his office, and the cause or basis of forfeiture exists at the time of the naming and the appointing. At such time the officials' office could be forfeited by a proper proceeding. The constitution having been violated at the time of the naming and appointing of the relative and the cause of forfeiture coming into existence at that time, the relative could not restore the accused official to the emoluments of his office by afterwards resigning. The reason for this rule is obvious. If a relative appointed by such an official could receive the benefits of the office until such time as the violation of the constitution is discovered and then by resigning protect the offending official from the injunction of the constitution, it would make the constitutional provision a farce. Under such a theory the related teacher might even complete the term for which she was elected before the violation of the constitution was discovered, and yet, under such circumstances, the official could not be removed.

Therefore, in answer to your second inquiry, it is the

opinion of this Department that under Section 13 of Article 14 the director forfeits his office by naming and appointing the relative within the prohibited degree. After the naming and appointment, as prohibited by the constitution, nothing can be done by the related appointee to mitigate or change the offense already committed, and if the related appointee should afterwards resign, that fact cannot restore the director in good standing because the offense under the constitution was already complete without any action on the part of the related appointee.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

FWH:S

APPROVED:

_____

Attorney General.

NEPOTISM:

Treasurer of school district comes within the prohibition of Section 13, Article 14 of the Constitution of Missouri.

September 30, 1933.

FILED
38

10-4

Mr. T. J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

We are acknowledging receipt of a letter from Mr. J. T. Sisk in which he directs the answer to his inquiry to be addressed to you. He inquires as follows:

> "In regard to the Nepotism law, would it not apply to the district treasurer who was hired and has been acting in that capacity since July 1st?
>
> I have written to T. J. Harper, our old democratic friend, Galena, Missouri, in regard to this matter, and would like for you to make your reply to him."

Section 13, Article 14 of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The officers of school districts are public officers and fully fit the definition announced in State v. Hackmann, 254 S. W. 53, 55 where it is said as follows:

> "Stated more definitely, a 'public office' is a charge or trust conferred by public authority for a public purpose; the duties of which involve in their performance, the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office

assigned to him by law."

A school district is a political subdivision of the State. The treasurer of the district is a public officer of a political subdivision. Such being true, the district treasurer would come within the prohibition contained in Section 13, Article 14 of the Constitution.

Very truly yours,

Frank M Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FMH:S

TAXATION: Accounts receivable identified as personal property subject to assessment for purposes of taxation.

9756-59-9777 RS Mo 1929

Supplementary Opinion attached.

October 2, 1933

10-9

FILED 38

Honorable T. J. Harper
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

Your request for an opinion dated September 25, 1933, was referred to me by General McKittrick. I find that your request is in the following form:

> "I would like an opinion for the benefit of the Assessor and County Judges, and that is
>
> 'Does the outstanding accounts-book accounts of a merchant come under, and are they taxable as merchant stock' or do they represent personal property."

Section 9756 Revised Statutes Missouri 1929, provides in part as follows:

> "The assessor or his ddputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property in the county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge

or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain;**********

eleventh, all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 10081 and 10111 R. S. 1929,) and its value;******

and every other species of property not exempt by law from taxation."

Section 9759 provides as follows:

"The oath to be signed and sworn to by each person making the statement of property required by this chapter shall be as follows: I,_____, do solemnly swear or affirm that the foregoing list contains a true and correct statement of all the property taxable by the laws of the State of Missouri, including**********and all other property, and its value, which I owned on the first day of June, 19___, or which I had under my charge or management, or any money or

property due me on said day from solvent persons or companies, on notes, accounts or otherwise**********"

Section 9795 Revised Statutes Missouri 1929, provides as follows:

"No person shall be required to list a greater portion of any credits than he believes will be received or can be collected.**********"

Section 9977:

"**********The term 'credits', wherever used in the chapter, shall be held to mean and include********* every claim or demand for money, interest, or other valuable thing due or to become due.**********"

Our Supreme Court in the case of State ex rel. v. Gehner, 316 Mo. 694, l. c. 696, said:

"Accounts receivable are amounts owing to a creditor on open account. They are in the nature of credits which, under the statute (Sec.12967, R.S.1919), include 'every claim or demand for money, interest or other valuable thing, due or to become due.' Thus defined they are declared by the statute above cited to be personal property. As such they are proper subjects of taxation within the limitations stated."

In the case of State ex rel. v. Tobacco Company, 140 Mo. 218, l. c. 222, our Supreme Court said:

"Defendant company insists that it is a manufactuser and that it should have been licensed and taxed on all raw material, finished products, and tools, machinery, and appliances, as is provided by section 6821, Revised Statutes 1889, and page 217, Laws of 1893, for

taxing and licensing merchants, and that as the defendant was not thus assessed that the assessment is void and also the tax.

The assessment was not, we think, void because the property was assessed as ordinary personal property, even though defendant may have been at the time a manufacturer.**********

Defendant's personal property was properly taxed in Montgomery county for the tax sued for.**********"

I am assuming that in your request when you used the phrase 'accounting book of accounts' you are referring to accounts receivable as shown by the merchants' open account books, and starting with this assumption our Supreme Court has ruled in the Gehner case that accounts receivable are personal property and subject to assessment as such. There is no doubt that accounts receivable shall be turned in on the personal assessment list, for the property owner takes oath that his assessment list contains all money or property due him on June first from solvent persons on account. Then too, under the law the assessor is charged with assessing all personal property not specifically exempted by law and accounts receivable are not exempted but in fact the assessor is specifically required to make a return on all other personal property not specifically enumerated and accounts receivable fall within this classification.

It is true that under the eleventh enumeration of taxable property as set out in Section 9756 as revised in 1929, our Legislature is shown to have excepted merchandise, bills and accounts receivable and other credits of a merchant arising out of the sale of goods which has been returned for taxation under the provisions of Section 10081 Revised Statutes Missouri 1929, but this exception as shown in the Session Acts of 1923, page 375, provides that when this law was passed only merchandise was excepted and this purported exception of accounts receivable as it appears in the revised statutes is not a true copy of the law as passed, and is an error which should be charged against those who revised the statutes.

If accounts receivable are not assessable as personal property then our Supreme Court was wrong in the Gehner case above decided

in 1927 by the court en banc, construing this very section of law passed in 1923 and decided this very point in issue.

It is to be noted further that Section 10081 R. S. Mo. 1929 as amended in the Laws of 1931, page 360, which provides a fair method for determining the reasonable amount due the State of Missouri as a merchant's license tax, is based on the amount of merchandise said merchant carries in stock and none of its provisions take into consideration the merchant's accounts receivable as a basis for determining the merchant's license tax. It is true that the merchant's license tax is a property tax and as such his merchandise should not be doubly assessed, hence the exception in the statute. The Tobacco case, supra, holds that even merchandise is subject to a property tax under the provisions of Section 9756, and the right to contest an unjust assessment must be in the method provided by law. It is true that no person is required to list any credit or accounts receivable for taxation when the same is believed by him to be not collectible.

It follows that the opinion of this office is that under the Missouri law relating to taxation, accounts receivable are not merchandise but are personal property and should be returned and assessed as such for the purpose of taxation.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

NEPOTISM: Recorder receiving personal services from wife does not violate Section 13 of Article XIV of the Constitution of Missouri, as she does not render service to the State in an official capacity.

October 4, 1933.

#38

Mr. T. J. Harper
Prosecuting Attorney
Galena, Missouri

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"At the request of Mr. Jones, Recorder of Deeds in this county, I am writing you for an opinion on the anti-nepotism law as applied to the office which he holds.

Mr. Jones' wife has been assisting him with his work, but for fear of violating the anti-nepotism law he has suspended her services until I can hear from you.

Mr. Jones's office is of course operated on the fee basis, and the fees taken in in this County do not nearly pay for the work he does, as he has a great deal of necessary work to do that nets him nothing. For instance, running records for the information of his clients, etc.

Mr. Jones' salary will run from $1600.00 to $1700.00 per year in this County, and no other pay is given him other than his fees. Therefore, his question is, shall he be allowed to retain his wife to assist him in his office, or shall he be required to hire an assistant or deputy, which will no doubt cost him from $800.00 to $900.00, and will therefore only leave him about $800.00 per year for his own salary. His wife doesn't draw any salary and she is not a deputy.

I will greatly appreciate your advices, and while on the face of a recent ruling by one of your assistants, it appears that this ruling affects Mr. Jones, it should not do so, as he will hardly have a living fee left after being forced to hire an assistant. Former Attorney General, Shartel, ruled in answer to Mr. Jones' query, that Mr. Jones was not affected by this law. Copy of Hon. Shartel's letter to Mr. Jones enclosed."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The above constitutional provision makes no distinction between officers whose compensation results from fees collected and officers who draw a specified salary. They are both compensated, though differently, for the services they render to the State, and are paid out of public funds. The Legislature could as well have required that the fees of this office, as many others, be paid into the treasury, and that the officer be paid a salary. The fact that some offices are fee offices and others salary offices does not relieve either class from the prohibition contained in the above constitutional provision. We, therefore, hold that even though the office in question be a fee office, the provision of Section 13 of Article XIV above applies to such office-holder.

However, upon the facts given in your letter, we conclude that Mr. Jones does not violate the provisions of Section 13 of Article XIV by having his wife assist him.

Under the above section of the constitution any officer who names or appoints any person within the fourth degree to render service to the State, makes himself liable to forfeiture of office. We believe, however, that the proper construction to be placed upon that constitutional provision is that such person must be appointed to hold an official position existing under the laws or constitution of the State. We believe that there is a distinction between a person holding an office and rendering service to the State in an official capacity and a person having no official position and rendering gratuitous personal service to the office-holder. The test as to whether or not Mr. Jones violated the constitution, in our opinion, is not whether or not his office be a fee or salary office, but is whether or not his wife is occupying an official position and is rendering service to the State in such official capacity, or whether the services rendered by her are personal services to Mr. Jones.

You state that the wife occupies no official position; receives no compensation for her services and is rendering

gratuitous service to Mr. Jones on account of the relationship. We conclude that she is rendering personal service to Mr. Jones and is not, in an official capacity, rendering service to the State of Missouri.

It is therefore the opinion of this Department that Mr. Jones is not violating Section 13 of Article XIV of the Constitution; not because his office is a fee office, but because the wife is rendering personal service to him and is not, in an official capacity, rendering service to the State of Missouri.

Very truly yours,

FRANK W. HAYES
Assistant Attorney General

APPROVED:

_____
Attorney General.

EWH:S

MARRIAGE: Authority of a alien to perform.

2976 RS Mo 1929

11-13

November 3, 1933.

FILED
38

47

Mr. George W. Hartman
Marriage License Clerk
129 City Hall
St. Louis, Missouri

Dear Sir:

Your request for an opinion dated October 16th, was in the following form:

> "Can a person who is an ordained minister, but not a citizen of the United States, but is a resident of the State of Missouri, and a pastor of the Ethical Society in St. Louis, perform marriages in the State of Missouri."

Section 2976 R. S. Mo. 1929 provides as follows:

> "Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

Section 2977 R. S. Mo. 1929 provides as follows:

> "Previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages. Common-law marriages hereafter contracted shall be null and void. Provided, however, that no marriage shall be deemed or adjudged invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person so solemnizing the same under the next preceding section, if consummated with the full belief on the part of the persons, so married, or either of them, that they were lawfully joined in marriage."

Section 4364 R. S. Mo. 1929 provides as follows:

> "Every person who shall solemnize any marriage, having knowledge of any fact which renders such marriage unlawful or criminal in either of the parties under any law of this state, or, having knowledge or reasonable cause to believe that either of the parties shall be under the age of legal consent, or is insane, mentally imbecile, feebleminded or epileptic, or where to his knowledge, any other legal impediment exists to such marriage, and every person not authorized by law to solemnize marriages who shall falsely represent that he is so authorized, and who, by any pretended marriage ceremony which he may perform, shall deceive any innocent person or persons into the belief that they have been legally married, shall, on conviction be adjudged guilty of a misdemeanor, and be punished by imprisonment in the county jail not exceeding one year, or by a fine not less than five hundred dollars, or both such fine and imprisonment."

The qualification of citizenship is a conditional legal limitation upon all clergy in Missouri who hold themselves out as qualified to solemnize a marriage contract.

It is the opinion of this office that an ordained minister of any creed, not a citizen of the United States, is not legally qualified to solemnize a marriage contract in this State. It is our further opinion that one who falsely represents authority to solemnize the marriage contract, being legally disqualified, and pretends a marriage ceremony, he can be prosecuted for a misdemeanor as above set out.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK.
Attorney General.
WOS:H

PROSECUTING ATTORNEY - Special prosecutor not entitled to compensation.

11-21

November 17th, 1933

11323-24-15 R S Mo 1929
1004-1005 R S Mo 1909

FILED
38

Hon. Robert W. Hawkins
Attorney at Law
Caruthersville, Mo.

Dear Sir:

Your request of November 10, 1933, for an opinion is as follows:

> "Sec. 11323 R. S. Mo. 1929 provides that in the event the regular prosecuting attorney is sick or absent the court may appoint some person to discharge the duties of the office, and the next section provides that the person so appointed shall receive the same fees as the proper officers would if he were present.
>
> Please advise if a person is appointed to serve as prosecuting attorney during the sickness or absence of the regular prosecuting attorney should be paid out of the salary of the regular prosecuting attorney or if he should receive the fee provided by the statute over and above the salary of the regular prosecuting attorney?"

Your request for an opinion involves the construction of Section 11323 R. S. Mo. 1929, and in particular the meaning of the term "fees" used therein.

I.

A SPECIAL PROSECUTING ATTORNEY IS ENTITLED TO "FEES" BUT NOT TO THE SALARY OF THE REGULAR PROSECUTING ATTORNEY.

Section 11323 R. S. Mo. 1929 provides:

> "If he be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resume the discharge of his duties."

Section 11324 R. S. Mo. 1929 provides:

> "The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

The above statutes originated at a time when the prosecuting attorney received as compensation certain "fees" for his services. Since that time, recent legislation has placed the prosecuting attorney upon a salary basis. At the present time, it is made the duty of the prosecuting attorney, under Section 11315 R. S. Mo. 1929

> "to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees,*".

Section 11317 provides that any prosecuting attorney who fails to pay over such fees to the county "shall forfeit his salary for that quarter of the year and shall be deemed guilty of a misdemeanor,*".

The prosecuting attorneys at the present time are therefore not allowed to retain any fees collected.

This matter has been directly passed upon by the Kansas City Court of Appeals in 1910. In State ex rel. vs. Patterson et al, 152 Mo. App. 264, the question was raised by virtue of an appoint-

ment by the circuit court of a special prosecuting attorney, after the legally elected prosecuting attorney refused to recognize a grand jury summoned to investigate violations of particular laws. At that time the prosecuting attorney of Jackson county was paid a salary and was required, by Article 5, Chapter 104, R. S. Mo. 1909, to turn over all fees collected by him to the county treasurer upon completion of the duties for which the special prosecuting attorney was appointed, and upon being denied compensation, he instituted an action to compel payment under the provisions of Section 1014 R. S. Mo. 1909 which reads as follows:

> "The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

This case was defended on the theory that the prosecuting attorney of Jackson county did not receive any fees, and since there was no provision in the statute for the special prosecuting attorney to draw a salary, he was not entitled by law to any compensation. In sustaining this defense in an opinion by Judge Johnson, the Kansas City Court of Appeals said, l.c. 267:

> "The thing that embarrasses relator in maintaining his demand is that he performed his services in a county where the prosecuting attorney receives no other compensation than a fixed salary of five thousand dollars per annum and is compelled by law to account for and pay to the county treasurer all the fees collected by his office.
>
> The statutes grade the compensation of prosecuting attorneys according to the population of the respective counties. In nearly all counties, a salary ranging from three hundred to one thousand dollars per annum is paid, and in addition thereto, the attorney is allowed to "receive for his services in the circuit

> court such fees as are allowed by law." (Section 1005, R. S. 1909.) Had relator rendered his services in one of such counties he would have been entitled to receive all the fees his services brought to the office but there is no warrant in the provisions of section 1014, for saying that he would have been entitled in such case to receive any part of the prosecuting attorney's fixed salary."

The prosecuting attorney receives no fees as compensation for his services, and it is clear that a special prosecuting attorney can receive none, since it is a positive mandate of the statute that all fees must be paid into the public treasury and in the absence of express statutory warrant, they cannot be diverted to any other use or purpose.

It may be urged that the term "fees" includes the term "salary". Such a construction was placed upon the term "fees" used in Article 9, Section 12 of the Missouri Constitution in State v. Heidel, 46 S. W. 131. In this connection it must be borne in mind that constitutional terms are to be liberally construed, gathering the intent of the framers thereof from the four corners of the instrument, while statutory terms with reference to compensation are to be strictly construed, as was found in the Patterson case, supra, l.c. 268:

> "The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be liberally construed."

Furthermore, an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. King vs. Riverland Levy District, 279 S.W. 195, l.c. 196 (1926).

It is, therefore, the opinion of this office that the special prosecuting attorney cannot, by law, collect compensation for services rendered as such.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER:FE

TAXATION: Accounts receivable indentified as personal property suject to assessment for purposes of taxation.

11-23

November 21, 1933

FILED
38

60

Honorable T. H. Harper
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

On September 25, 1933 you requested an opinion from this office and on October 2, 1933 an opinion was rendered in response to that request. Since rendering the opinion it has been brought to our attention that the laws of 1927, pages 472 and 473 should be considered in determining the question presented in your request. We are by this writing supplementing this original opinion as follows, and are asking you to strike out and hold for naught that portion of the next to the last paragraph on page 4, which reads as follows:

> "And this purported exception of accounts receivable as it appears in the Revised Statutes is not a true copy of the law as passed, and is an error which should be charged against those who revised the Statutes."

SUPPLEMENTAL OPINION.

In the laws of 1927, pages 472 and 473, we find that the law upon which the Gehner case was decided was amended by adding to existing exceptions of assessible personal property other items of exception. By the existing law "merchandise" was already excepted from assessment as personal property, but by the amendment of 1927 the assessor was allowed to except from his assessment lists the following, "merchandise, bills and accounts receivable and other credits of a merchant arising out of the sale of goods which have been returned for taxation under the provisions of Sec. 10081 and Sec. 10111 R. S. Mo. 1929."

The Gehner case settled the law before this amendment to mean that "acounts receivable" were properly assessible as personal property are yet assessible as personal property then, their assessability now depends on what the Legislature intended by the provisions of the amendment.

It is true that the merchants' and manufacturers' license tax is a property tax and as such his goods, wares and merchandise should not be doublyassessed, hence the limitations in the eleventh enumeration of taxable property in Sec. 9759 and the further provision of the law that the County Board of Equalization is authorized by these sections providing for the merchants' and manufacturers' license tax to equalize the tax when ocassion demands. There was a disposition on the part of the Legislature to see to it that no unreasonable burden be placed on the merchant taxpayer.

The present law, Sec. 9756, as amended in 1927 makes it the assessors' duty, in a prescribed manner, to make his list of the personal property in his county and township and assess its value. As before the amendment the prescribed manner requires him to make a correct list of all taxable property except "merchandise which may be required to pay a license tax". As before the amendment, this section provides that the person listing his taxable property make a correct statement of such property, and that he sign and swear to the same "as elsewhere provided in the chapter". The section as amended does not render meaningless the oath of the taxpayer to which the section in controversy refers, nor does it expressly or by implication repeal all other sections not consistent with its provisions. As before the amendment, the taxpayer under the provisions of section 9759 takes oath under pain of punishment by a treble assessment for delivering to the assessor a false list of his property under the provisions of section 9762, that his tax return contains a true and correct statement of all taxable property and all other property including money or property due "on notes, accounts or otherwise". Then too, the law provides in Sec. 9795 that the taxpayer list that portion of his credits which he believes will be"received or can be collected", which means that he must list his accounts receivable if he complies with the law, By excepting accounts receivable in provision eleven of Sec. 9756, what did the Legislature have in mind? In the light of the provisions of this chapter can it be reasoned that it was their intention to exempt accounts receivable by the merchant as a proper subject of his personal property tax? We think not. If they meant such they would have said so, and would have expressely repealed all inconsistent law. If they meant to exempt they would not have used the word except, which has a different legal meaning.

It is our aim to give meaning to all of the provisions of the law relating to taxation and revenue, and hence the opinion of this department is that accounts receivable are personal property and should be returned to the assessor as such under the provisions of Sec. 9756 for the purpose of taxation. That duty

is on the party making the return, and the exception of Sec. 9756 was not intended to apply to him. Upon a careful reading of this section it is apparent that what the Legislature were excepting when they amended the law was the duty of the assessor of including in his assessment list a duplicative assessment. That is to say, that when he discovers while making an assessment that the taxpayer is a merchant or manufacturer who has fully complied with Secs. 10081 as amended, and 10111 R. S. Mo., and has subjected his accounts receivable to a merchant's license tax, then the law excepts the assessor from the duty of listing all property, so that since the amendment he can strike from his list accounts receivable as a subject of personal property assessment under such circumstances, and in so doing not be subject to ouster under the provisions of Sec. 9755 R. S. Mo., 1929. It is our opinion that accounts receivable are not exempt from taxation as personal property, but merely excepted from the required list of personalty, when they are shown to be already assessed in a manner provided by law. The assessor had this privilege, in dealing with articles of exception, before the recent amendment when "merchandise" alone was subject to exception on his personal property list, within the limitations stated. Where the merchant or manufacturer has not complied with the license tax law the assessor is not privileged to make exception to his personal property list either as to accounts receivable or to any other item of exception.

These exceptions in the law were intended to provide a means of assisting the assessor in legally avoiding a double taxation in cases brought to his attention. Exception to the law did not begin in 1927, but have been on the books for sometime, and when presented to the Supreme Court as a means of avoiding the personal property assessment our court has consistently treated them as exceptions made to avoid a duplicative tax and never have they been treated as exemptions because one happens to be liable for a merchant's license.

Respectfully submitted

WM. OTTO SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

OFFICERS: Secretary of Optometry Board serves at pleasure of Board.

November 22, 1933.

FILED
31

Mr. Charles C. Hayward
Member of Legislature
Jefferson City, Missouri

Dear Mr. Hayward:

In compliance with your oral request of this date that we render an opinion relative to the term of employment of the Secretary of the Optometry Board, it is our opinion that said secretary serves at the pleasure of the Board.

The facts as we understand them are: (1) That the present Secretary was requested by the President of the State Board of Optometry to resign and (2) his refusal to comply with said request. The questions being: (1) Must the secretary resign? and (2) upon his failure to do so what steps are necessary to remove him?

Section 13498 R. S. Mo. 1929, provides in part:

> "The members of said board shall within thirty (30) days after appointment, and annually thereafter in the month of July, meet and organize by electing a president from among the members thereof, and a secretary who shall also be the treasurer of said board, who shall not be a member of said board, but who shall 'be a reputable practicing optometrist.' The said secretary and treasurer, before entering upon his duties, shall file a bond with the secretary of state in the penal sum of $5,000.00 payable to the State of Missouri to insure the faithful discharge of his duties in said office."

And further,

> "; and also shall adopt a seal; and the secretary shall have the care and custody thereof, and he shall keep the record of all the proceedings of said board, which shall be open at all times for public scrutiny etc."

Section 13500, R. S. Mo. 1929, provides, among other things, the following:

> "The board shall hold meetings for the examination of applicants for registration and the transaction of such other business as shall pertain to its duties at least once in three months."

Thus, if the board meets for the purpose of employing a new secretary or to discharge the present secretary, it may do so. The secretary appointed by the State Board of Optometry serves at the pleasure of said board and may be removed by it when said board desires. Thus, if the secretary refuses to resign, further compensation to him should be disallowed; possession of the board's records and seal be taken from him; or court order of ouster obtained.

Even the members of the board are subject to removal by the Governor. We quote from Laws of Missouri, 1933, page 326, Section 1:

> "The Governor shall have power and he is hereby authorized to remove from office, without assigning any other reason therefor, any appointive state official required by law to be appointed by the Governor, whenever in his opinion such removal is necessary for the betterment of the public service, but the Governor may, at his discretion, in any order of removal which he may make under authority of this act, assign additional and more specific reasons for such removal."

Section 2:

> "All laws and parts of laws in conflict with the provisions of this act are hereby repealed insofar as such laws and parts of laws are so in conflict."

Trusting this answers your questions, and if we have not, kindly tell us and we shall further advise you in the premises.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

CHILDREN: Duties of State Home relative to returning and committing children. Guardianship.

8-23

14015-14101-04-41 RSMo 1929.

August 8, 1933.

FILED
39
38

Mrs. W. W. Henderson
Director
State Home for Children
Carrollton, Missouri

Dear Mrs. Henderson:

This is to acknowledge your letter of August 3rd, 1933, which is as follows:

> "I am writing for an opinion concerning the Children's Home at Carrollton:
>
> Sec. 14104, Chap. 125, under which we now operate following the repeal of Chapter 90, says:
>
> 'A child admitted to said home shall remain therein and be subject to the guardianship of the board until a proper home is procured for the child. The board shall return or discharge such child when satisfied that it is unsound in mind or diseased or for other cause is not a proper inmate of said home. Upon such return or discharge, the guardianship of the board shall cease and the child shall again be under the custody of his or her parent, guardian or custodian. ########"
>
> Q.1. Who is the guardian or custodian to whom a child can be returned after having been committed by a juvenile court under Sec. 14101? A parent? or the County Court?
>
> Q. 2. What constitutes 'bona fide residence'? Sec. 14101 says: 'All committments to said home shall be made by the juvenile court of the county of such child's bona fide residence?"

Q. 3. If a county has erred and has accepted jurisdiction over a child that is not actually a bona fide resident, does that county, by its committment of the child to this home thereby accept the position of custodian of the child?

Q. 4. Can a county refuse to accept the return of a child it has committed to the Home, if the child is shown, under Sec. 14104, not to be a proper inmate of the Home?"

Must the juvenile judge give consent for the return of the child to his county and the dissolution of the state guardianship, according to Sec. 14104 and 14103?

Thank you for an early decision."

Section 14095 R. S. 1929, creates and establishes an institution so as to provide neglected and dependent children a temporary home pending placement in permanent family homes, proper care and instructions. Neglected and dependent children, under seventeen years of age, only may be admitted to the State Home. (Secs. 14100 and 14101 R. S. 1929).

"Neglected" and "dependent" children are those defined by Section 14101, we quote in part:

"(a) Dependent upon the public for support, or (b) in a state of habitual vagrancy or mendicity, or is (c) ill-treated, and that his or her life, health or morals are endangered by continued cruel treatment, neglect, immorality, or gross misconduct of its parents, guardians or custodians."

Such children (neglected and dependent) are given to the guardianship of the State Home by formal commitment after citation and hearing.

Section 14101 R. S. 1929, provides in part:

"All commitments to said home shall be made by the juvenile court of the county of such child's bona fide residence. Etc. * * * *."

Section 14102 R. S. 1929, provides in part as follows:

> "The judge shall thereupon cite the parents, guardians or custodians of such child, if within the county, to show cause before the court, at a time and place named, why such child should not be committed."

Section 14103 R. S. 1929, provides in part:

> "Said judge shall examine into the facts alleged, and if he finds the allegations of the complaint to be true, etc * * * *, the judge shall enter an order committing the child to the guardianship of said board."

What is the relationship of the State Home to such child after their commitment? Section 14103, supra, also provides:

> "* * * * , whereupon all rights of the parents, guardian or custodian to the custody, control, service or earnings of the child shall be suspended."

Section 14104 provides in part:

> "A child admitted to said home shall remain therein and be subject to the guardianship of the board until a proper home is procured for the child. Etc. * * * * * * * * * * *."

Thus, the statute places an exclusive guardianship in the State Home over children committed to them. After the State Home acquires guardianship over children, how may (or does) it divest itself therefrom, if possible? We again quote from Section 14102, supra:

> "* * * * until such child is returned to their (parents, guardians, or custodian) custody by order of said board; ** **"

We quote also from Section 14104, supra, namely:

> "* * * * The board shall <u>return</u> or <u>discharge</u> each child when satisfied that it is unsound in mind or diseased or for other cause is not a proper inmate of said home. Upon such return or discharge the guardianship

> of the board shall cease and the child shall again be under the custody of his or her parent, guardian, or custodian.
> * * * * "

We quote from Section 14107 R. S. 1929, which provides as follows:

> "Whenever any such child has become self-supporting or his parents, guardian or custodian have become able to provide for him and are otherwise suitable, the board may discharge him; whereupon the guardianship of the board shall cease, and he shall be entitled to his earnings, with power to contract for his services, or shall be returned to the custody of his parents, guardian or custodian as the board may direct."

The statute provides in no uncertain language that the board shall return or discharge such child (1) when it (State Home) is satisfied the child is unsound in mind or diseased; (2) or for other cause is not a proper inmate of said home; (3) when the child, or children, have become self-supporting; (4) When the parents, guardians, or custodian of such child become able to provide for them; (5) by operation of law, (a) adoption by other parties, (b) becoming of age, (c) and perhaps, if such children are adjudged delinquent by juvenile court and senteneed to reformatory.

Thus, the guardianship of the State Home continues until such contingency occurs. The statute gives some latitude to the State Home when it provides said home may return or discharge such children for other cause but this does not permit "wholesale" returning or discharging, but must be for substantial cause depending upon the facts in each case.

This brings us to your first question. The statutes hereinbefore quoted from provide in each instance when the child is returned that it shall be to the parents, guardian, or custodian whence taken from. (Sections 14103, 14104 and 14107)

It is our opinion that when the guardianship of the board ceases, for the reasons hereinbefore given, that the children shall be returned to the custody of the person, or persons, they were taken from by the juvenile court. If it be the parents, then such child shall be returned to them, and, if it be the guardian or custodian, then such returning shall be to them.

However, assume that the parents, guardian, or custodian, prior to the State Home's guardianship, become afterwards insane or die or cannot be located when the State Home desires to return the child - then to whom shall they re returned? The answer to this question disposes of your forth and fifth inquires.

Bearing in mind the premises established above, relative to a child's commitment and guardianship to and by the State Home, we quote from Section 14101, to-wit:

> "* * * * Any two citizens of the county may make complaint in writing to the judge of said juvenile court stating that in their opinion such a child is; * * * * * * *"

In this manner the juvenile courts acquire jurisdiction. And, pending disposition of the matter, the child would be under the direction of the judge of the juvenile court. After citation and hearing the court makes its order committing the guardianship of the child to the State Home or dismisses the matter, which action restores the custody to the parent, guardian, or custodian. Thus, the child is under the court's direction only until the matter is determined. When the juvenile court awards the State Home guardianship of a child the court's direction, authority and jurisdiction over the matter ceases. Of course, juvenile courts may acquire jurisdiction in cases of delinquency. We are of the opinion that because a child is awarded to the State Home by the juvenile court that fact does not give the court the right to dissolve the guardianship, neither is the court's consent necessary when the State Home returns or discharges the child. This disposes of your fifth question.

In answer to your fourth question it is our opinion that the county from which the child is committed could refuse in some instances to accept the return of the child. For example, the statute says the board shall return the child to his parents, guardian, or custodian, and if the county is not such why return said child to it. But if the county was the custodian of the child before his commitment, then such child should be returned to the county. We believe the question that is bothering the board is when the child has no parents and the county was providing for the child and such committed to the State Home at the instigation of the county.

Section 14100 provides in part:

> "* * * *, and the children received shall be divided among the several counties as justly

> as possible, taking into consideration the number of such children in each county and its population. * * * * *"

After a child is a charge of the county and was committed by request of such, then, in our opinion, the child should be returned to the county. If the parents, guardian, or custodian are dead, insane, or cannot be found, then the child should in our opinion be returned to the county where committed from. If the county will not accept the child or children returned, then they should be delivered to the custody of the juvenile court or juvenile officer of the county whence committed.

Section 14101, supra, in part provides:

> "All commitments to said home shall be made by the juvenile court of the county of such child's bona fide residence. * * "

You desire to know what is meant by "bona fide residence". C. J., Vol. 8, page 1145, defines "bona fide" as follows:

> "In good faith, without fraud or deception."

Residence is a matter of intention, in Trigg v. Trigg, 41 S. W. (2d) 583 l. c. 589, the Kansas City Court of Appeals in its opinion held:

> "We hold in accord with the general expression of the law that residence is largely a matter of intention evidenced by some act or acts in conformity with such intention, etc. * * *"

The residence of a child is determined by the domicile of his parents. We quote from Lacy v. Williams, 27 Mo. 280:

> "Regularly, the domicile of the parents is that of their children. * * * * * * * * *"

Also quoting from Smith v. Young, 136 Mo. App. 65 l. c. 77:

> "Now under the circumstances of this case, the father having died without revoking his promise as to the future of the child, and it residing at the time with the grandparents, next of kin, we believe that instantly upon the death of the father, the grandfather assumed the position of parent and that his domicile became the domicile of the child."

We therefore draw the conclusion that as a general proposition when the child is under the custody of a guardian or custodian that the domicile of such is the domicile of the child. This answers your second question.

The statutes require the judge of the juvenile court to examine into the facts, and one fact being whether or not the child is a bona fide resident. Therefore, before the court may commit a child the court by its judgment finds such child a bona fide resident of the county from whence committed. We are of the opinion the judgment (of the facts) by the court precludes the county from taking an opposite position. This answers your third inquiry.

You have asked hypothetical questions and we have devoted as much space to the answers thereof we thought sufficient. However, such answers may not cover a particular case (our answers dealing in the main on general conclusions), so we request that if we have not answered to your satisfaction a particular question please state facts and we will render our opinion upon them. Opinions should be predicated on the facts and the law applying thereto and not deal in generalities or as abstract propositions of law. If we may serve you further we will be pleased to do so.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

ITIES AND TOWNS: Authority of cities and towns to license insurance agents.

6840 Laws 31
8.23 7046 RS 1929

August 11, 1933.

FILED
39
38

Mr. Frank C. Hendrix
Attorney at Law
New London, Missouri

Dear Sir:

This Department is in receipt of your letter of July 28th, with the request for an opinion, which letter of request is as follows:

> "I have a friend who writes life insurance and when goes into a little town they want him to pay license. He has State license. Can they make him pay when has no office there? Or if he does have an office?"

According to your letter, you seem to be particularly interested in "a little town" and as this is a hypothetical case, of course, we do not know what particular town, or towns, you may have in mind and what classification they belong to.

However, we find that by Section 6840 R. S. 1929, as amended by Laws of 1931, at page 277, under "Cities of the Third Class", that,

> "The council shall have power and authority to levy and collect a license tax on, * * * insurance companies, insurance agents, * * * * * etc."

Also, in Section 7046 R. S. 1929, under "Cities of the Fourth Class", it is said:

> "The mayor and board of aldermen shall have power and authority to regulate and

> to license and to levy and collect a license tax on * * * *, insurance companies, insurance agents, * * * * etc. "

Of course, the statutes above only give the power to the cities in the above classes to pass such ordinances imposing the licenses therein mentioned and until an ordinance is duly and regularly passed by the cities of the above classes they have no power to impose the license.

In the case of City of Lamar v. Adams, 90 Mo. App. 35, a city of the fourth class, an ordinance concerning a license taxing and legalizing occupations, trades and business, was held valid; in this particular case a license tax had been levied against fire insurance agencies.

Under Section 7097 R. S. 1929, Art. IX, is set forth the powers of the board of trustees of towns and villages, which is below the classification of towns of the fourth class, to pass by-laws and ordinances, but we do not find that they have such power to regulate and license insurance agencies and insurance companies as in cities of the third and fourth class.

Section 7287 R. S. 1929, provides as follows:

> "BUSINESS NOT TAXABLE, WHEN.--No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

Since you have not given us the particular town you have in mind, or the particular class to which it belongs, we are unable to be more definite in this opinion than we have been. We hope that this, however, covers the matter inquired about.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

APPROPRIATIONS: CONSTRUCTION OF APPROPRIATION ACT NOT IN CONFORMITY WITH A GENERAL STATUTE - STATE CHILDREN'S BUREAU AND CHILDREN'S HOME

H B 649 Sec 25A. Laws 33

FILED 39 52

October 14, 1933.

10-17

Mrs. W. Z. Henderson, Director,
Missouri State Children's Bureau and
State Home for Children,
Carrollton, Missouri.

Dear Mrs. Henderson:

Your letter of August 8, 1933 has been received containing a request for an opinion as follows:

"A question has arisen as to the right we would have, under our appropriation, to allot a monthly portion for the maintenance of the Trachoma Hospital at Rolla, which has been requested in the sum of $175.00 per month. In your decision on that matter, please also consider whether we can allot our funds as follows: (Page 79, 25-a, H. B. 649).

A. Personal Service:
Salary of Director (superintendent) of Children's Home and Child Welfare (Children's Bureau) @ $2500 annually under R. S. 1929, Sec. 14099 (17 months) - - - - $ 3,541.61

Salaries of office and field force, Home employees, Home physician; allotment for support of Trachoma Hospital ($175.00); allotment for support of Eleemosynary Board headquarters ($50.00);

Expenses in supervision and placing of children and other necessary Child Welfare work of the Children's Bureau (as set up by the Eleemosynary Board under Sec. 8565;)

Extra help; boarding special children outside the Home
For 17 months - - - - - - - $25,183.39
Total appropriation (A) $28,725.00

D. Operation:
All necessary operating expenses

Unless we can allot the field service travel expenses from the Personal Service schedule, we shall have a terribly over-heavy salary schedule with nothing for personnel to work with."

The 1933 appropriation act for the children's home and child welfare work is found at Laws of Missouri 1933 page 78 and is as follows:

"Section 25-A. Children's Home and Child Welfare Work.--
There is hereby appropriated out of the State Treasury, charge-

able to the state revenue fund, to the Board of Managers for the State Eleemosynary Institutions of the state, the sum of forty-five thousand dollars ($45,000) for the pay of the officers and employees and for the support of the Children's Home, also for child welfare work, as follows:

A. Personal Service:	
Salaries of Director of Children's Home - - - - - -	$21,700
Other necessary employees (who shall also perform Necessary Child Welfare work) and for additional employees at Children's Home - - - - - - - - - -	7,025
D. Operation:	
All necessary operating expenses - - - - - - - - -	16,275
Total - - - - - - - - - - - - - - - - - -	$45,000"

Of the three monthly allotments under this appropriation act no question arises about the second, i. e. the sum of $7,025.00, or about the third, i. e. the sum of $16,275.00, because under Revised Statutes of Missouri, 1929, Section 14099 relating to the State Home for Children it is provided that "the said board (which in this statute refers to the state board of charities and corrections by reference to Section 14096 which by Laws of 1933 page 189 was repealed and changed so that it now means the Board of Managers of the State Eleemosynary Institutions) shall determine the number of employees and the salary for each one, which shall not exceed the sum of $1,500.00 per annum" and because under Revised Statutes of Missouri, Section 12931 it is provided that such board "shall in connection with this bureau (the bureau for children) appoint whatever agents are necessary for carrying out the provisions of this section, paying their salaries from funds at its disposal". Thus the sum of $7,025.00 is to be used for paying employees and the sum of $16,275 is to be used for operating expenses, and the only item in the appropriation act causing any difficulty is the first item, i. e. $21,700.00. Furthermore, of this last mentioned item so much of it as is necessary to pay the salary of the director of the Children's Home at the rate of $2,500.00 per year as provided for in Revised Statutes of Missouri Section 14099 can cause no question, so that the only part of the entire appropriation in question will be that part of the first item of $21,700 which represents the difference between the amount necessary to pay the salary of the director at the rate of $2,500.00 per year and the full amount of this first item of $21,700.00. This difference hereinafter in this opinion will be called the surplus, and it is with this surplus that the rest of this opinion will deal.

I. SURPLUS CANNOT GO TO DIRECTOR.

(A) Under Section 14099 as above pointed out the salary of the director of the Children's Home is definitely fixed as a matter of substantive law.

(B) Such statutory salary could, of course, be changed by the Legislature but it was not changed by the appropriation act because such

appropriation act as a matter of law is not held to amend a general statute unless by very explicit words it is provided that it shall be such an amendment. Thus it was said by Mr. Justice Story of the United States Supreme Court in dealing with this problem in Minis v. United States, 15 Peters 423, 10 L. ed. 791 (1841):

> "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to have a general and permanent appli-tion to all future appropriations. Nor ought such an intention on the part of the Legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." 15 Peters 445, 10 L. ed. 799.

To the same effect is United States v. Jarvis, Davies, Federal Case No. 15,468, 26 Fed. Cas. 587 (1846). So also in Sutherland on Statutory Construction, second edition, Section 347 it is said:

> "Thus in the construction of a temporary appropriation act the presumption is that any special provisions of a general character therein contained are intended to be restricted in their operation to the subject matter of the act and are not permanent regulations, unless the intention of making them so is clearly expressed."

For these reasons the appropriation act did not change the salary of the director of the Children's Home and under such appropriation only a salary at the rate of $2,500.00 per year could be paid to such director.

II. SURPLUS CANNOT BE USED FOR OTHER PURPOSES.

(A) The surplus would be prevented from being paid out for any other purpose than that for which appropriated by the Constitution of Missouri Article X, Section 19, which provides in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law;" * * * * *
> "and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied;"

(B) Under the Revised Statutes of Missouri of 1929, Section 8674, it is provided as follows:

> "The board of managers shall not use any money appropriated by the state for any other purpose than that for which the same was appropriated. * * * *"

This statute relates to the board of managers of the State Eleemosynary Insti-

tutions under the jurisdiction of which the Children's Home and Children's Bureau now are by virtue of the laws of 1933, page 189 as set out above, and by the terms of the appropriation act the money appropriated therein is appropriated to such board of managers so that Section 8674 is a specific prohibition against using the surplus for any other purpose than that for which appropriated.

(C) The courts of this state have announced a doctrine that appropriation acts are to be construed strictly so that there would be no room for a judicial construction of this appropriation act so as to allow the surplus to be used for any other purpose than that named. The Supreme Court of Missouri in the case of State ex rel Murray v. Brown, 141 Mo. 21, 41 S. W. 911 (1897) had before it a provision of the charter of the City of St. Louis providing as follows:

> "No money shall be expended, nor shall any improvement be ordered involving an expenditure of money, except by ordinance, the provisions of which shall be specific and definite." (R. S. 1889, p. 2114, sec. 14).

An appropriation had been made in a fixed sum for "salaries of chief, captains, sergeants, patrolmen and detectives, namely, for chief, eight captains, seventy-one sergeants, six hundred and eighty-five patrolmen and sixteen detectives," and relator, a retired policeman, was not of a class specifically named in such appropriation although he was entitled by law to a pension. Any surplus that might exist under such appropriation was taken care of by the following proviso of the ordinance:

> "provided, that the surplus, if any, may be used in the payment of probationary specials, employed to fill the place of absent patrolmen."

From these quotations it is clear that the municipal appropriation in that case is analogous to the state appropriation in the case under consideration because St. Louis was under approximately the same statutory restrictions as the state in appropriating money. In such case the court in discussing the appropriation said:

> "The funds set apart for the objects named in the ordinance are not exhausted. Relator's learned counsel argues that by the proviso quoted above the Board is invested with a discretion as to the mode of expending any surplus of funds beyond those needed for salaries of the active force. True! But only within the scope of the proviso! Relator's claim is not shown to fall within its terms. His claim is simply for salary as sergeant on the retired list, under the pension Acts. The pay-roll itself shows that on its face. The city has refused (or at least omitted) to make any appropriation for such claims, and hence the city auditor can not by mandamus be compelled to audit the claim."

Likewise announcing the same rule that appropriations are to be strictly con-

strued are the cases of State ex rel Gevigen v. Dierkes, 214 Mo. 578, 113 S. W. 1077 (1908) and Myers v. Kansas City, 18 S. W. 2d, 900 (Supreme 1932).

Our conclusion is that the surplus as above defined in the item of $21,700 of the appropriation act is not and cannot be available to the Board of Managers of the State Eleemosynary Institutions for any purpose and that the appropriation act is inoperative insofar as such surplus is concerned.

Because of our conclusions just set out it is our opinion that the sum of $175.00 per month could not go to the Trachoma Hospital at Rolla from your appropriation and that the proposed allotment of your appropriation as set out in your request for opinion could not be made except insofar as it conforms to an allotment for salary of the director at $2,500.00 per year, other compensation of employees in the amount of $7,025.00 and operating expenses in the amount of $16,275.00.

Yours very truly,

EDWARD H. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

AUTO LICENSE PLATES - Required on automobiles of Government agents.
FEDERAL LAND BANKS - Required to procure license tags for automobiles.

1-22

December 30, 1933.

FILED
39

Hon. G. V. Head
General Counsel
Farm Credit Administration
St. Louis, Missouri

Dear Sir:

We have your request of December 19th, 1933, for an opinion upon the following state of facts:

> "The united States government owns sixty-two and three-tenths percent of the capital stock of the Federal Land Bank of St. Louis and one hundred percent of the capital stock of the Federal Intermediate Credit Bank of St. Louis, the St. Louis Bank for Cooperatives and the Production Credit Corporation of St. Louis.
>
> I should like a ruling from you as to whether these four institutions should be required to purchase Missouri State licenses for the cars owned by them. The Federal Land Bank of St. Louis owns forty-five cars, the Federal Intermediate Credit Bank of St. Louis three cars, and the St. Louis Bank for Cooperatives and the Production Credit Corporation of St. Louis one each.
>
> In the past these organizations have been purchasing state license tags, but I am informed that in certain other land bank districts the cars bear the ordinary United States license plates.

These four loan agencies are all organizaed under Acts of Congress. The interest on their bonds is guaranteed by the United States government. They are under the direct supervision and control of the Governor of the Farm Credit Administration in Washington. The St. Louis Bank for Cooperatives and Production Credit Corporation of St. Louis are operating exclusively with government funds. The Federal Land Bank and the Intermediate Credit Bank issue and sell to the investing public their debentures, but a very large part of the money which they loan is obtained from the government. The employees of the four banks are treated as government employees for the purpose of the United States Economy Act under which the pay of government employees is at present reduced fifteen percent.

The term "farm credit administration", we understand, has been substituted for "federal farm loan board", and the two terms are used interchangeably in this opinion. It appears that certain property, except real estate, of federal land banks and loan associations are exempted from federal, state, municipal, and local taxation. These exemptions are specifically set out in Section 931 U. S. C. A. Title 12, 1933, Cumulative Annual Pocket Part. No mention is made of motor vehicles therein.

The epoc making case of McCulloch v. Maryland, 4 L. E. 579, (1819) denied the state the right to levy a tax upon the business of a corporation created by the federal government as an instrumentality of the government, but the authority of the state to levy a tax upon property belonging to that instrumentality of government was therein recognized. We quote from the opinion of Chief Justice Marshall, l.c. 609:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government *of the Union to carry its powers into execution. Such a tax must be unconstitutional."

There is a well defined distinction between a tax on the operation of a government agency and a tax on the property of the agent. In the McCulloch case, supra, the tax attempted to be levied by the state of Maryland was held to be unconstitutional. The effect of the tax was to prevent the issuing of notes by the bank without paying a certain tax on each note, in proportion to the size of the note, to the state of Maryland. The Supreme Court said, in the Union Pacific Railroad Company v. Peniston, 21 L. Ed. 787 (1873) l.c. 793:

> "The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank."

In the Union Pacific case, supra, the corporation was an agent of the general government designed to be employed in both military and postal service for the government. In that case the court said, l. c. 792:

> "It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent."

The state has the right to impose taxes upon an agent of the federal government so long as that tax does not impair the agent's efficiency in the discharge of his duties to the government. At page 793 of the Union Pacific case, supra, the court said:

> "It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they *have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

The above principles are fully recognized in Johnson v. Maryland (1920), 65 L. Ed. 126, wherein the court held that a

post office employee could not be required to take out a driver's license as a condition precedent to his performance of his duties as mail carrier. The court held that to sustain such a law would be to allow the state to set up qualifications for a mail carrier in excess of the qualifications required by the federal government for the performance of his official duties, and that such a state law interferred with and impeded the mail carrier's attempt to obey orders of the federal government.

It is now well settled that agents of the federal government, such as mail carriers, are required to comply with this police regulation, levying an annual license tax on all motor vehicles and that this license for an automobile of a mail carrier must be obtained, even though the automobile is used exclusively for government purposes. State v. Wiles (1921), 199 Pac. (Wash.) 749; Commonwealth v. Closson (1918), 118 N. E. 653 Mass.; Ex Parte Marshall (1918) 75 Fla. 97.

We have found no federal or state provision specifically exempting automobiles used by a federal agency from the state auto license tax. It is apparent from the absence of any such legislation that Congress had no intention of exempting such automobiles from the payment of this tax, and any exemption would have to be specifically provided. Such seems to be the reasoning in Croson v. District of Columbia, 2 Fed. (2d) 924, l. c. 925, expressed in the following language:

> "In view of the necessarily large number of these public vehicles in the District, the reason for bringing them within the purview of this act becomes apparent. One evident purpose of the act was to make it possible to identify traffic law violators, and it is clear, we think, that to have excluded this large class of vehicles would have frustrated to a considerable degree the purpose indicated. Moreover, it evidently was the view of Congress that a special provision was necessary to effect the exemption of this class of vehicles from the payment of fees for registration and tags."

It is, therefore, the opinion of this office that since the banks and associations referred to in your letter are agencies of the federal government and the title to the automobiles in question are vested in that agency, that absent specific exemption, each of these agency automobiles must carry a state automobile license tag.

Respectfully submitted,

FRANKLIN K. REAGAN
Assistant Attorney General

Approved:

ROY McKITTRICK
Attorney General

FKR:FE

MOTOR VEHICLES: Rule as to determining capacity of trucks.

Sec 5280 Laws 31

7-14

July 13, 1933.

FILED
40
32

Hon. Walter M. Hilbert
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Mr. Hilbert:

This is to acknowledge your letter of June 14th, which is as follows:

> "Under the proviso in Sec. 5280, Laws of 1931, page 316 which reads as follows ("PROVIDED, the provision of this act shall not apply to trucks of one and one-half ton capacity and less.") what is the rule by which the capacity of a truck shall be determined?"

The section that you cite in your letter is the last section of Article VIII, Chapter 33, Laws of Missouri, 1931, page 304 et seq., which act repealed the same article and chapter of the 1929 Statutes. This act conferred jurisdiction upon the Public Service Commission to license, regulate and supervise transportation of persons or property for hire over the public highways of the State of Missouri.

If you will look at Section 5272, Laws of Missouri, 1931, page 311-13 incl., subdivision "c", you will find that the annual license fees are therein set out and same distributed according to the tonnage of the truck. In said subdivision and section this is found:

> "* * *, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued. * * *."

Section 5280 has this provision, as quoted in your letter,

> "Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

Therefore, in arriving at what the capacity of a truck shall be, we would state and are of the opinion that the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle. In other words, you may take both rules and determine if the truck exceeds the one and one-half ton capacity. The truck shall not exceed one and one-half ton capacity, both as to the manufacturer's rated load capacity or the actual weight carrying capacity. If the manufacturer's rated load capacity is one and one-half tons or less but the weight carrying capacity of such vehicle is greater, then such truck is not within the exception, and vice versa.

We also call your attention to Section 7788 R. S. 1929, as to the regulations of the weight, which in part reads as follows:

> " * * *, and no motor vehicle having a load of over 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway * * * * * *, shall be operated on the highways of this state: Etc. * * *"

In other words, no matter what the ton capacity of the truck is, the weight on the highway shall not be more than 600 pounds per inch width of tire upon any wheel.

Trusting that this answers your inquiry, we are,

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
(Acting) Attorney-General.

JLH:EG

ACCOUNTING OFFICER: County clerk is accounting officer under Laws of Mo. 1933, p. 340.

SB 154 Sec 21 Laws 1933

7-26

July 25, 1933

FILED
40

35

Hon. William Hicks
Kansas City, Missouri
2814 Prospect Ave.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "* * *I am dropping you these few lines in regard to Senate Bill #154, Section 21, with regards to the County Clerk.
>
> Please give me your opinion in regards to Section 21. Does this mean the County Clerk of Jackson County to be the Accounting Officer?
>
> The County Clerk has always kept the Official records and always recognized by the State Auditor." * * *

Section 21, Laws of Mo. 1933, p. 360, provides as follows:

> "Wherever in this act the term 'budget officer' shall appear, it shall be deemed to mean the presiding judge of the county court, unless the county court shall have by order designated the county clerk as budget officer. Wherever the term 'accounting officer' shall appear, it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county."

Section 12161 R. S. Mo. 1929, provides as follows:

> "It shall be the duty of the clerk of the county court: First, to keep regular accounts between the treasurer and the county, charging him therein with all moneys paid into the treasury, and crediting him with the amount he may have disbursed between the periods of his respective settlements with the court; second, to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; third, to file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted in evidence in all courts of law and elsewhere; fourth, to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keeps his books and papers at all times ready for the inspection of the same, or any judge thereof."

It is the opinion of this department that the county clerk of Jackson County is the 'accounting officer' as provided in Laws of Mo. 1933, p. 340.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED_____
Attorney General.

JWH:MM

CIRCUIT CLERK -- SALARY -- Section 11786, R.S. Mo. 1929.
COUNTY CLERK --- SALARY -- Section 11811, R.S. Mo. 1929.
COUNTY SUPERINTENDENT OF SCHOOLS -- SALARY -- Section 9465, R.S. Mo. 1929.

January 26, 1933

FILED
41

Hon. Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

Your letter of January 10, 1933 addressed to the Attorney General has been handed to the undersigned for attention. In your letter, you make the following request:

> "I would like to have your opinion as to the salaries of the circuit clerk, county clerk and the county superintendent of schools."

Our Supreme Court in the case of State ex rel Chaney v. Grinstead, 314 Mo. 55, and again in State ex rel O'Connor v. Riedel et al, 46 S.W.(2d) 131, holds, as we construe the opinion, that Section 12, Article 9 of the Missouri Constitution, which provides:

> "The General Assembly shall by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose, may classify the counties by population."

is not violated, so long as the method of calculating the population is uniform as to all counties, and as to each class of officers.

The Court, in the first mentioned case, in the course of the opinion, saying on page 68:

> "The lawmakers can adopt any measure not prohibited by the Constitution. Our Constitution, being one of limitations, rather than one of grants, cannot be said that an estimated population, where the same basis of estimating is used in all counties, would render the law bad, because of lack of uniformity as to several classes, or as to all classes."

It would thus appear from each of the above quoted cases, that each county officer may be considered as constituting a single class, and so long as the basis for determining the population for that class or office is uniform, throughout the several counties of the state, then such statute would be Constitutional and valid. While the cases hereinabove cited are dealing with the office and officers not contained in your inquiry, the conclusion of law reached therein, does effect all county officers, including clerk of the circuit court, clerk of the county court, and superintendent of public schools.

Section 11808, R.S. Mo. 1929, provides a method for ascertaining the population of counties for the purpose of fixing the salary of county officers, but being a general statute, it should be resorted to only where no other method has been provided by the Legislature to ascertain the population of counties, for the purpose of fixing the salary of a particular county official.

It is therefore, the opinion of this department that the proper way of ascertaining the population, and thereby fixing the salary of the officials of which you make inquiry, are as follows:

The clerk of the circuit court should be paid on the basis of five times the vote of the last presidential election as is provided in Section 11786, R.S. Mo. 1929.

The clerk of the county court should be paid on a basis of three and one-half times the vote of the last presidential election, as provided in Section 11811, R.S. Mo. 1929.

The county superintendent of schools should be paid on the basis of three and one-half times the vote of the last presidential election as provided in Section 9465, R.S. Mo. 1929.

The salary of the circuit clerk and county clerk as ascertained from a calculation of the vote in the presidential election of 1932 would become effective January 1, 1933.

The school superintendent, being elected in April for a term of four years, beginning on July 1, 1931, the 1932 vote would not become effective as to his salary until July 1, 1933, the end of a year of his employment, according to our interpretation of the Court's opinion in the case of State ex rel Harvey v. Linville, et al, 300 S.W. 1066.

It is the further opinion of this department that "highest vote at the last presidential election", means the highest vote cast for any office at that election. If from a calculation of the vote as above indicated, it should result in an increase of salary. Such increase, during the term of said official, under the authority of State ex rel Harvey v. Linville, supra, would not be violative of Section 8, Article 14 of the Constitution of Missouri.

Yours very truly,

CCA:ER

CARL C. ABINGTON
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney General

SPECIAL ROAD DISTRICT COMMISSIONERS - Mayor and city aldermen members' rights of vote selecting commissioners. Section 8026, R.S.Mo. 1929.

February 21, 1933

FILED
41

Hon. Lawrence Holman
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Mr. Holman:

Your letter addressed to the Attorney-General has been handed the undersigned for attention:

You ask for a construction of Section 8026, R.S. Mo. 1929, and in connection therewith state the following:

> "The question has come up several times in this County, relative to the interpretation of the provision on the end of Section 8026, Revised Statutes, 1929, relative to appointment of special road district commissioners. The statute provides that the Mayor and City Council of the City within the district, and the Judges of the County Court, may elect this commissioner and it is further provided that where the city is located further than ten miles from the meeting of the County Court the Mayor and City Council may make a written certificate of their choice of the commissioners and mail the same to the County Clerk and that said certificate shall be given the same consideration as though the Board and Mayor were present at the meeting of the Court.
>
> In the case that has arisen here, there are four members of the City Council, and, at their meeting, two voted for "A" and two for "B", and the Mayor cast his vote for "A",

giving him three votes and "B" two, and they certified "A's" name as their choice. Now the question I have in mind is: Should they certify two votes for "B" and three votes for "A", or, should they certify that "A" was the choice of the five? The only case I find construing that section is in 12 SW(2nd) 489, and the reading of that case gives the impression that they should certify the way they voted, so that the votes may be counted when the County Court meets, just as if all five were present at said meeting. That is the more reasonable interpretation in my opinion, because, in the case I have in mind, if "B" should receive as many as two votes from the County Court , he would be elected the road commissioner. It seems to me that he should not be handicapped because the votes are submitted by mail rather than voted personally by the Council and Mayor."

After reading the above section, together with the case cited in your letter, be advised that this department coincides with your construction as set forth in your letter.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney General

ROADS AND BRIDGES, power and pipe line taxes apportionment to road districts, special and general.

7867-90 RSMo 1939

April 19, 1933

FILED
41

Hon. W. H. Holmes
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Sir:

This is to acknowledge your recent letter which reads as follows:

> "I would like your opinion on the following proposition, to-wit: The State Tax commission assesses public service corporations, such as pipe lines and power lines running through this county; the County Court fixes the tax rate for road purposes on said valuations and when the tax is paid should the same be divided between all the road districts of the county, both general and special districts or only among the general districts of the county, giving nothing to the special districts?
>
> Your prompt answer to this inquiry will be appreciated by me."

Section 10068 R. S. Mo. 1929 provides among other things, that all property, real and personal, owned by "electric power and light companies" and "oil pipe lines", shall be subject to taxation the same as property of private persons, and the taxes shall be levied and collected as provided for the taxation of railroad property.

Sections 10032, 10034 and 10038 R. S. Mo. 1929, pertain to county railroad property, its taxation, apportionment and assessment.

Section 7890 R. S. Mo. 1929 provides:

> "The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhab-

> itants, at the May term thereof in each year, shall levy upon real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the "county road and bridge fund."

Section 7891 R. S. Mo. 1929 pertains to a special tax, how it is levied, collected and disbursed.

Section 8042 R. S. Mo. 1929 provides in part the following:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district or districts, * * * the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district or districts, * * * so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, * * *."

The Supreme Court in the case of State ex rel. Special Road

District v. Barry County, 302 Mo. l.c. 291, construed the three preceding sections as follows:

> "The three sections (10682, 10683 and 10818) as they now stand do not indicate any change of the legislative purpose with respect to the distribution of road and bridge taxes collected upon property within Special Road Districts.
>
> Section 10683 (7891 R. S. Mo. 1929) provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within any road district shall when paid into the county treasury be placed to the credit of the district from which it arose.
>
> Section 10682 (7890 R. S. Mo. 1929) which directs the levy of a road and bridge tax in connection with the general levy for county purposes makes no provision for its distribution. But
>
> Section 10818 (8042 R. S. Mo. 1929) voicing the legislative purpose with respect to special road districts, provides that all money collected "as county taxes for road purposes, or for road and bridge purposes, by virtue of any * * * law," upon property within a special road district, shall be set aside to the credit of such special road district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable. * * **.

Section 7867 R. S. Mo. 1929 provides:

> "All taxes derived from the levy authorized by section 7890 R. S. 1929, are hereby appropriated to the use of the county court in each county where levied, to be used at the discretion of said court for the construction and maintenance of roads and bridges located within the confines of the county highway system herein provided for as well as all other roads and bridges in such county."

It is our opinion that Section 7867 R. S. Mo. 1929, gives the county court the power of discretion to divide and use funds derived under the provisions of Section 7890, except those funds derived on property within a special road district. In other words, funds raised on property within a special road district must be apportioned and distributed by the county court to said special road district if application is made therefor.

Very truly yours,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

JLH:MM

TAXATION AND REVENUE: Bonds issued by state and municipality are not exempt from taxation.

9743 - 9747 R S Mo 1929

June 30, 1933.

41

FILED

Mr. Lawrence Holman,
Prosecuting Attorney,
Moberly, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 24, 1933, in which you inquire as follows:

> "The County Assessor has asked me for an opinion as to whether or not State and municipal bonds are exempt from assessment and taxation. I have always been under the impression that they were. But in looking into the matter I do not find any statute making such bonds exempt, nor do I find any cases on the question. So in order to be sure that I am right on this proposition I would appreciate an opinion from your department.
>
> Because of the fact that the Assessor is now at work I would like to have this opinion as soon as conveniently possible."

Article 10, section 6 of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real of personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Article 10, section 7 of the Constitution of Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Section 9742 R. S. Mo. 1929, provides as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743 R. S. Mo. 1929, provides as follows:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

Under the foregoing constitutional and statutory provisions taxes must be levied on all property within the territorial jurisdiction of the state, except that expressly enumerated as exempt.

State ex rel. Union Electric Light & Power Co., v. Baker, 293 S. W. 399; 316 Mo. 853.
State ex rel. Globe Democrat v. Gehner, 294 S. W. 1017.

It is apparent, therefore, from the above that bonds issued by the State of Missouri or any municipality thereof are subject to taxation unless they be expressly exempted. Such bonds are no where exempted from taxation either in the Constitution or in the Statutes.

In State ex rel. Tompkins v. Shipman, 234 S. W. 60, it was held that the Legislature could not increase the list of tax exemptions contained in sections 6 and 7 of article 10 of the Constitution.

In Vice v. City of Kirksville, 217 S. W. 77, the court was construing an act which permitted the issuing of bonds by municipalities for waterworks systems and provided that the bonds so issued should be exempt from taxation. The court, however, held that under section 6 of article 10 of our Constitution, such

bonds could not be exempted from taxation.

In State ex rel. St. Louis County v. Gordon, 188 S. W. 160, the court had for consideration an act authorizing county courts to issue bonds for building of roads, etc. The act also provided that such bonds should be exempt from taxation for any purpose. The court, however, held that such provision was in conflict with sections 6 and 7 of article 10 of the Constitution.

In view of the foregoing, therefore, it is the opinion of this Department that sections 6 and 7 of Article 10 of the Constitution do not exempt from taxation state or municipal bonds. The Legislature has not passed any statute exempting such bonds and if it had, in view of the foregoing cases, it is doubtful whether such exemption would be constitutional.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

NEWSPAPERS, Sec. 13775--Must be published regularly and consecutively one year before legal notices are valid.

13775 Laws of 31

September 15, 1933.

See Conflicts Ops Sept 28, 1943 Mason
May 18, 1949 Long
Oct 29, 1937 Carlson

9-25

FILED
41
45

Hon. W. H. Holmes
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Mr. Holmes:

This is to acknowledge your letter of July 27th, 1933, which reads as follows:

> "I would like your opinion on Section 13775 Revised Statutes of Missouri, 1929, as amended in Laws of 1931, page 303, under the following state of facts, towit:--
>
> The Maries County Gazette has been a regularly published weekly newspaper here in this County, of general circulation, for 35 years to my personal knowledge and for how much longer I do not know, but about 2 months ago ceased issuing its weekly edition, due, at that time, as I understood to some break in the machinery. The matter stood thus until about 10 days ago, when the owner and publisher sold the paper, plant and equipment to another who is issuing the regular weekly edition today and proposes to so continue under the same name, with same subscription list, etc.
>
> What I wish to know is, whether or not public advertisements, orders of publications and in fact all legal publications can properly and legally be run in this paper or will it be necessary for it to publish regularly and consecutively for at least one year more before they will be regular."

Section 13775, Laws of Missouri, 1931, page 303, reads as follows:

> "PUBLIC ADVERTISEMENTS AND ORDER OF PUBLICATION TO BE PUBLISHED IN NEWSPAPER OF COUNTY.--All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county were located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided that when a public notice required by law to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777, 13778, 13779, 7631, 7632 and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

In your letter you state that the paper therein named was a weekly newspaper and published in your County for many years, but, about two months prior to July 27th, 1933, it ceased issuing its paper, due probably to a breakdown. Such paper was not published for about fifty days, or eight weeks. You desire to know whether or not, due to non-publishing of same, it comes within the provisions of Section 13775, supra,

in particular, that part which provides that all public advertisements required by law to be made, shall be published in some newspaper that "shall have been regularly and consecutively published for a period of one year." We invite your attention to the words "shall have been" and also "regularly and consecutively".

We look to a definition of the words "regularly" and "consecutively". Words & Phrases, Vol. 7, first series, page 6040, defines "regularly" as follows:

> "Webster defines 'regularly' to mean a uniform order at certain intervals or periods, as by day and night. Zulich v. Bowman, 42 Pa. (6 Wright) 83, 87.
>
> *
>
> The word 'regularly' is defined as meaning in a regular manner; in a way or method accordant to rule or established mode; in uniform order; methodically; in due order. Such is its signification in an ordinance requiring a railroad company to operate the road regularly, etc. City of Belleville v. Citizens' Horse Ry. Co., 38 N. E. 584, 587, 152 Ill. 171, 26 L. R. A. 681."

Words & Phrases, Vol. 2, first series, page 1437, defines "consecutive" as follows:

> "'Consecutive' is synonymous with 'successive,' and these words are often used interchangeably; so that a decision that a publication for 3 successive weeks must be made for a period of 21 days authorizes such holding as to a publication required to be made for 3 consecutive weeks. Dever v. Cornwell, 86 N. W. 227, 230, 10 N. D. 123.
>
> *
>
> While the term 'consecutive days' primarily means that many days directly following

> one another, it is also defined as meaning successive; but in cases of contracts that significance should be given it which the parties evidently intended it should have. A contract providing for publication in a paper for 10 consecutive days must mean publication in consecutive numbers as such paper was published. We do not regard the word 'consecutive' as any more forcible than the word 'continuous.' Both signify 'unbroken,' and the fact that the newspaper published no issue on Sunday did not render the publication other than consecutive. City of El Paso v. Ft. Dearborn Nat. Bank (Tex) 71 S. W. 799, 802."

A reading of Section 13775, supra, with the definitions of the words "regularly" and "consecutively" borne in mind, shows that the Legislature intended that public advertisements, etc., should be published in a daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and that such newspaper whether daily, tri-weekly, semi-weekly or weekly shall have been published regularly and consecutively, respectively, for a period of one year before such advertisements etc., be published in such newspaper. And further evidenced such intention by providing public advertisements, if published once a week for a given number of weeks, to be published in the newspaper on the same day of each week. In order to make public advertisements legal all the requirements of this section must be complied with.

In the instant case, at least eight weeks elapsed during which time no edition of this newspaper was published, and we believe that by said lapse of time said newspaper lost its identity as being one regularly and consecutively published for a period of one year. We further invite your attention to the affidavit to be made by the publisher that he has complied with the provisions of this section.

It is our opinion that public notices relating to the county or state, which we only pass on in this opinion, may not legally be published in the newspaper named in your letter, because it is not one that has been regularly and consecutively published for a period of one year.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

(2)

MUNICIPAL CORPORATIONS: FRANCHISE TO ELECTRIC LIGHT COMPANY IN CITY OF THE FOURTH CLASS AS REQUIRING VOTE OF INHABITANTS.

7028-6815 RS Mo 1929

October 13, 1933.

Honorable William Hirth,
Editor, Missouri Farmer,
Columbia, Missouri.

Dear Sir:

Your letter of September 30th has been received containing a request for an opinion as follows:

> "While our State Advisory Board was listening to the plea of the city of Sullivan the other day for a municipal light and power plant, the city Attorney stated that the franchise under which the private utility company is now operating at that point had never been ratified by a vote of the people, and he therefore contended that these franchises are of no legal effect. I will appreciate it if you will have someone in your Department to advise me as to what the law is in a premise of this kind, that is whether ratification by the people is imperative."

I. NECESSITY OF RATIFICATION OF FRANCHISE BY VOTERS.

Revised Statutes of Missouri of 1929, Section 7028, provides as follows:

> "The board of aldermen may provide for and regulate the lighting of streets and the erection of lamp posts, poles and lights therefor, and shall have power to make contracts with any person, association or corporation, either private or municipal, for the lighting of the streets and other public places of the city with gas, electricity or otherwise: Provided, that no such contract shall be made for a longer time than ten years: and provided further, that no such contract shall have any legal force until the same shall have been ratified by a two-thirds majority of the
>
> (1) (2) (3) (4)

qualified voters of said city voting at an election to be held for that purpose. The board of aldermen shall have the right, also, to erect, maintain and operate gas works, electric light works, or light works of any other kind or name, and to erect lamp posts, electric light poles, or any other apparatus or appliances necessary to light the streets, avenues, alleys or other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and to regulate the same, and to prescribe and regulate the rates to be paid by the consumers thereof, and to acquire by purchase, donation or condemnation suitable grounds within or without the city upon which to erect such works, and the right of way to and from such works, and also the right of way for laying gas pipes, electric wires under or above the ground, and erecting posts and poles and such other apparatus and appliances, as may be necessary for the efficient operation of such works; Provided, that the board of (6)
alderman may, in its discretion, grant the right to any person, persons or corporation, to erect such works and lay the pipe, wires, and erect the posts, poles and other necessary apparatus and appliances therefor, upon such terms as may be prescribed by ordinance: Pro- (7)
vided, further, that such rights to any such person, persons or corporation shall not extend for a longer time than twenty years, and shall not be granted nor renewed, unless by consent of a majority of the qualified voters of the city, voting at an election held for such purpose; Provided still further, that nothing herein (8)
contained shall be construed as to prevent the board of aldermen from contracting with any person, persons or corporation for furnishing the city with gas or electric lights in cities where franchises have already been granted, and where gas or electric light plants already exist, without a vote of the people. (R.S. 1919, Sec. 8479."

This statute applies to cities of the fourth class. For the purpose of convenient reference to its various parts numbers have been set out above opposite various parts of this statute. It will be observed that parts 1, 2, 3 and 4 govern the regulation and lighting of public places, i. e. the light which the city as a municipal corporation requires for its own use, these parts making up one distinct unit of the statute, and that parts 5, 6 and 7 relate to the franchise to supply light not only to the city but to the inhabitants thereof as is evident from part 5 in the phrase "and to supply private lights for the use of the inhabitants * * * ". As we understand it your question relates to the franchise so it is with that section of the statute beginning with part 5 that this opinion will mainly deal. Part 7 expressly provides that a franchise "shall not be granted nore renewed, unless by consent of a majority of the qualified voters of the city, voting at an election held for such purposes:" The statute under discussion was enacted in 1895 (Laws of 1895, page 65, approved April 11, 1895) and has not since been amended.

No decisions have been discovered dealing with or construing the above Section 7028 but Section 6815 relating to cities of the third class is practically identical to Section 7028 except that in Section 6815 the last proviso of Section 7028 (part 8 above) is left out. Consequently decisions construing Section 6815 should be applicable to Section 7028.

In the case of City of Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936 (1902) it was held that an ordinance enacted by a city of the third class at a time when what is now Section 6815 was in force, which ordinance granted a light franchise which was not voted upon by the inhabitants of the city was invalid because of the absence of such vote. The court said that the provisions required a vote of the people:

> "The second and fourth proviso above referred to render a doncession by the council, like that of Fitch, nugatory unless consented to by the qualified voters of the city. No such consent to the Fitch concession was ever obtained."
> * * * * * *
> "This ordinance not having been consented to by the qualified voters of the city, as required by the statute, which was the charter of plaintiff, was without legal validity in so far as it authorized the grantee therein to erect posts and wires in the streets of the city to light the same; " 97 Mo. App. 26.

and in Lawrence v. Hennessy, 165 Mo. 659, 65 S. W. 717 (1901) the same result was reached, and the court said:

> "The defendants' contention that ordinance 307 was void, because not authorized by a vote of the people as required by the Act of 1893, is well founded, for that act expressly prohibits the granting of a franchise of that character to any person, by any city of the third class, 'unless by consent of a majority of the qualified voters of the city, voting at an election held for such purpose.' " 165 Mo. 668.

From the above remarks and quotations it is clear that (1) the statute which has been in force since 1895 requires a vote of a majority of the qualified voters voting at an election held for that purpose to grant a franchise for lighting a city and (2) unless such vote is taken no franchise can be valid.

In your request for an opinion you did not state when the present private light and power plant received its franchise and began supplying the city of Sullivan with electricity. If such plant began its operation before 1895 it likewise would not have a valid franchise from the city for a city of the fourth class in 1895 could not have granted such a franchise. Before the enactment in 1895 of what is now Section 7028 no statute existed authorizing cities of the fourth class to grant franchises to electric light companies, and in the absence of express statutory authority to such a city to grant such a franchise no power would exist to do so. See City of St. Louis v. Kaime Real Estate Company, 180 Mo. 309, 79 S. W. 140 (1904) wherein the court at page 322 said:

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words: (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

At first glance it might seem that the last proviso of Section 7028 (part 8 above) might contradict the conclusion of the preceding paragraph of this opinion, but a careful analysis of the language of

such proviso shows that it relates solely to contracts to supply the city with light for municipal purposes and not to a general franchise, and the Supreme Court of Missouri by Ragland, P. J. has pointed out the difference between these two functions in construing Section 6815 in the case of State ex inf. Chaney v. West Mo. Power Co., 313 Mo. 283, 281 S. W. 709 (1926) in the following language:

> "In this connection it should be noted that what we have designated as specification '(3)' of the statute merely authorized the making of a contract for city lighting for a period not exceeding twenty years and had nothing to do with the duration of the franchise contemplated." 313 Mo. 298.

II. ESTOPEL

It has been demonstrated above that the franchise of the present utility company could not be valid if the people have not voted for it but it is possible that although the franchise is not valid the city would not be in a position to attack its validity because of acquiescence under which the company has spent a considerable sum of money relying on the failure of the city to object to its existence and operation. In City of Mountain View v. Farmers' Telephone Exchange Co., 294 Mo. 623, 243 S. W. 153 (1922) a telephone company had been operating for approximately ten years in the city of Mountain View and had expended considerable sums on its plant, lines and equipment. The only municipal authority fr such existence and operations was the written permission of the chairman of the board of trustees of the town whereas under the statute applicable the company could not exist and operate without the sanction of the entire board of trustees, so that for the purpose of analogy to the case under consideration the telephone company was operating as the utility company in the instant case without having secured the authorization which was by statute a condition precedent to such existence and operation. In that case it was held that the city was estopped from setting up the absence of the statutory authority and the judgment of ouster which had been rendered by the lower court was reversed by the Supreme Court. In that case the court said:

> "Plaintiff city is proceeding on the theory that since the defendant company had no legal right in the first instance to enter the town, it has no more rights now than it had then, and that it, the city, can enjoin the defendant now, as well as the town might have done ten years ago. But this threory proceeds on another theory, that the plea of estoppel under the facts here is not available or will not lie against the city." 294 Mo. 631, 632. * * * *

> "We do not deem it necessary to discuss further the point under consideration. It is certain that the principle of equitable estoppel may, in certain cases, be invoked in this State against municipal corporations in matter pertaining to governmental functions. And we are equally certain that the facts in the case at bar make it one of the exceptional cases where this principle should be applied. To say that the plaintiff city can restrain the defendant company from reconstructing or readjusting its lines in the city in order to avoid the trouble caused by the light plant, and in order to give service, would be equivalent to ousting defendant from the city. No community would indefinitely patronize a telephone system that failed to give substantial service. Defendant could not give substantial service without in some way eliminating the trouble caused by the lighting system. We are not ruling that plaintiff city cannot regulate the manner in which defendant shall construct its telephone system. This right the city has, and defendant does not contend otherwise. Ofcourse, regulate means what the word ordinarily implies, and does not mean to oust or destroy." 294 M o. 633, 634.

Neither City of Carthage v. Carthage Light Company nor Lawrence v. Hennessy both cited and discussed above are in conflict with City of Mountain View v. Farmers' Telephon Exchange Company because in the Carthage case the court pointed out that it could not consider the estoppel element because it had not been pleaded, and in Lawrence v. Hennessy the suit was between two private companies so that the estoppel of the city, which was not a party, could not have been in question. It is entirely possbile, therefore, that the city of Sullivan would be estopped to deny the validity of the franchise in question. Whether or not such estoppel would be held would be entirely within the judgent of the tribunal before which any litigation attacking such franchise would be heard because estoppel depends entirely upon the circumstances of each particular case, and since these circumstances are not set out in detail in your letter requesting this opinion it would be impossible to give an answer on this point. It might be mentioned, however, that the element of time is usually an important element in estoppel and in the Mountain View case it was held that approximately ten years was sufficient time.

In conclusion, it is our opinion that the law of Missouri requires a franchise to an electric light company to operate in a city of the fourth class to be granted by a vote of the people, and that a purported franchise without such vote would be void but that the city might by acquiescence to such purported franchise, especially if under it any considerable sums of money were expended, forfeit its rights to attack or question the right of such company to operate, and that whether or not such city would be so estopped is a matter which would depend upon the judgment of the tribunal before which such attack would be made.

Very truly yours,

EDWARD H. MILLER
ASSISTANT ATTORNEY GENERAL

APPROVED:

_____
ATTORNEY GENERAL

TAXATION: Interest on delinquent taxes determined by section 9952 page 429, Laws of Missouri 1933.

December 5, 1933

FILED

Hon. John Hogan
City Clerk
Maplewood, Missouri

My Dear Mr. Hogan:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

> "* * *For some reason or other I have been unable to secure a clear concise explanation of how interest should be figured on delinquent taxes.
>
> Section 9945 of the Revised Statutes of Missouri 1929, states interest shall be figured at 1% per month on delinquent taxes.
>
> Section 9949 states all taxes, interest and clerks fees contained in the back tax book shall bear interest at 10% per annum until paid.
>
> The fiscal year of the City of Maplewood ends on March 31st. Each year it has been the custom to prepare a 'delinquent tax book' for all unpaid taxes as of that date.
>
> My understanding is this--In preparing that 'delinquent tax book' interest should be figured at 1% per month but if the taxes are paid after March 31st then interest on the aggregate should be figured at 10% per annum from March 31st until paid.
>
> In other words 1931 taxes would bear interest at 1% per month until March 31st 1933 or 15%, and if paid on Aug. 15th 1933 the total unpaid taxes, interest, and clerk fees shown by the delinquent tax book would bear interest for five months at 10% per annum.

Won't you therefor please advise me what the correct procedure is."

In dealing with your problem we direct your attention to the fact that the 57th General Assembly, by an act known as Senate Bill 94, repealed Sections 9945 and 9949 R. S. Mo. 1929 and enacted two new Sections in lieu thereof. These new sections are found at page 426 and 427 Laws of Missouri 1933. The following quotations are found in these two sections, respecting interest on delinquent taxes:

"Section 9945.* * *All taxes hereafter becoming delinquent shall bear interest until paid as provided by Section 9952,* * *"

Section 9949.* * *Together with interest on the same from the day upon which said tax first became delinquent at the rate specified in Section 9952."

Section 9952, also contained in this act, is found on page 429 Laws of Missouri 1933, and provides as follows, respecting the question of interest:

"* * *charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceeding year and an additional annual ten per centum on taxes for each year prior to the preceeding year, and shall certify to the correctness thereof, with the date when the same was reported, and sign the same by himself, or deputy, officially; Provided, however, that if taxes are paid on land or lots delinquent for the preceeding year at any time prior to sale thereof as in this act provided the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually."

CONCLUSION.

It is therefore the opinion of this office that interest to be charged on delinquent and back taxes is determined by Section 9952, page 429, Laws of Missouri 1933, and that such penalty interest shall be calculated at the rate of one per centum per month, but in no case shall such penalty interest exceed the sum of ten per cent per annum.

Respectfully submitted,

HARRY G. WALTHER, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

HGW:MM

HOUSE BILL NO. 664: A. Druggists required to have permit only for selling ethyl alcohol or wine.

B. Doctors not required to have permit.

4485-86 Laws 33

July 26, 1933

Hon. Robert L. Hood,
County Clerk
Jackson County
Kansas City, Missouri

Dear Sir:

This department acknowledges receipt of your request for an opinion which is as follows:

"Will you please render an opinion on House Bill No. 664 relative to Doctors and Druggists.

Heretofore the Doctors have been paying the sum of $2.00 per years for a permit granted them by the County Court. The Druggists have been paying the sum of $10.00 for a permit granted by the County Court. Under this Bill No. 664 are they compelled to pay as they have been doing?

A decision at once will be appreciated."

Section 4483 R. S. Mo. 1929, provides as follows:

"It shall be unlawful for any person, firm, association, or corporation to manufacture or sell ethyl alcohol or wine within the State of Missouri for non-beverage purposes without a permit therefor as herein provided.* * * * * Applicants shall pay to the county clerk for permits issued as above set out, the following fees, to-wit: For each manufacturing permit the sum of fifty dollars ($50.00); for each selling permit the sum of ten dollars ($10.00)***"

Section 4483 further provides for certain monthly reports to be made by the holders of permits.

Section 4485 R. S. Mo. 1929, provides as follows:

> "It shall be unlawful for any physician, or pretended physician, in the state of Missouri, to make or issue any prescription to any person for ethyl alcohol or wine in any quantity, or for any compound of which such liquors shall form a part without a permit therefor secured as herein provided.**** Applicants shall pay the county clerk for each permit issued as above set out, the sum of two dollars ($2.00).***"

Section 4486 R. S. Mo. 1929, provides as follows:

> "That nothing in this chapter contained shall be so construed as to prevent or prohibit any reputable licensed physician, having authority or permit to prescribe ethyl alcohol, or wine, from prescribing, in lieu thereof, any intoxicating liquor susceptible of use as a beverage, or to prevent or prohibit any druggist from possessing such intoxicating liquors and in all such cases the physician writing such prescription, the person for whom such prescription is written, and the druggist filling same, shall be subject to the same rules, and regulations, and to the same penalties and restrictions as provided in this chapter for the prescription and sale of ethyl alcohol or wine.*****"

House Bill No. 664, as passed by the 57th General Assembly, specifically repeals Section 4485 and 4486 R. S. Mo. 1929, and provides for two new sections in lieu thereof as follows:

"Section 4485. It shall be lawful for any reputable physician licensed to practice medicine and surgery in this state to prescribe any distilled, spirituous, vinous, fermented or alcoholic liquor in such quantities and with such frequency and dosage as in his judgment the needs of his patient may require.

Section 4486. It shall be lawful for any registered pharmacist engaged in the retail drug business or employed as a pharmacist in any retail drug store in this state to fill any prescription of any reputable physician licensed to practice medicine and surgery in this state, prescribing for the person named in such prescription any distilled, spiritous, vinous, fermented or other alcoholic liquor."

Therefore it is the opinion of this department that physicians are not required to obtain permits from the county court in order to prescribe any distilled, spiritous, vinous, fermented or other alcoholic liquor in such quantities and with such frequency and dosage as in his judgment the needs of his patient may require, since Section 4485 R. S. Mo. 1929, has been repealed by House Bill No. 664. A druggist under House Bill No. 664, is not required to have a permit from the county court in order to fill any prescriptions of any reputable physicians licensed to practice medicine and surgery in this State, nor are any reports required to be filed by said druggist in the county court.

However, Section 4483 R. S. Mo. 1929, was not repealed by House Bill No. 664, and it is unlawful for any person

firm, association, or corporation to manufacture or sell ethyl alcohol or wine within the state of Missouri for non-beverage purposes without a permit therefor as provided by said section of the statute.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JWH:MM

IN RE: DOES THE PRESIDENT'S EMPLOYMENT AGREEMENT OF JULY 27, 1933 APPLY TO EMPLOYEES OF STATE WAREHOUSE DEPARTMENT.

8-2

August 2, 1933.

FILED
42

Mr. J. B. Hopper,
State Warehouse Commissioner
Kansas City, Missouri

Dear Sir:

Your letter of July 27th reads as follows:

"I would like an opinion from your office as to whether or not I should abide by the President's Reemployment Agreement in full, dated July 27, 1933, or does this agreement apply to state employees?

"Does it mean that I should increase the number of employees, and reduce the number of working hours? Our Samplers and Weighers are employed on an eight hour day basis, but, in reality, work but four or five hours?"

The employees of the State Warehouse Commission's Department are not, in the opinion of this department, within the terms of the National Industrial Recovery Act.

Very respectfully yours,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

ECC/Aj

PUBLIC FUNDS OF COUNTY:**County court may require collector to give new bond or additional security; it is the duty of the Prosecuting Attorney, upon request of the county court, to take such legal action as may be necessary for the preservation and protection of public funds of the county.

11318-9885 RSMo 1929

FILED 42

October 18, 1933.

10-23

53

Mr. H. B. Hord,
Weston, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am writing you as to the school funds of Platte County which are held in a 5% bank at Platte City in the account of the Collector of the said county. This money so held and upon which the school districts depend for operating expense has so been held since March with no endeavor being made to obtain it either from the bank or the Collector's bondsmen.

It is very important that something should be done about this, and so far as anybody can say, it has been a matter of passing the 'buck' and that is the reason that I am writing you think it is your duty to assist the districts in the county when they can not get anything done by those which should attend to it here. It would be greatly appreciated by the districts in this county if you would send in a special attorney for that purpose or better yet, do this yourself.

One matter I want to call your attention to, is that if the bondsmen now who are obligated for this fund that is tied up are not good for the sum involved, wouldn't it be absurd to let this Collector continue on the same which is now proving so worthless.

Please advise me as to the steps necessary to get your office to handle this matter so that the school of the district will not be closed."

Section 9885, R. S. Mo. 1929, dealing with Collector's bonds, provides as follows:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts,

> and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any two months of the year preceding his election or appointment, plus ten per cent of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, 1909, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties."

Under the foregoing section the security of the bond is to be passed upon by the county court and they are the judges as to whether or not the security is adequate. We are of the opinion that whether or not the security of the bond continues to be sufficient is a matter to be passed upon by the county court, and that whenever by reason of changed conditions the sureties of the bond do not afford adequate protection for the county funds, they may require a new bond to be given. It is said in State ex rel. v. Lafayette County, 41 Mo. l. c. 561:

> "There is nothing in the statute that prohibits the county court from requiring the collector at anytime when the protection of the public interest would seem to demand it, to give an additional bond and security. In all cases, however, he would be entitled to a reasonable time to comply with the order of the court."

In answer to your first inquiry, therefore, it is the opinion of this Department that if the sureties on the bond of the collector have ceased to be adequate, that the county court should require additional security for the protection of the county funds.

This Department, under date of September 19, 1933, rendered an opinion to the effect that public moneys deposited in a bank, which afterwards placed a restriction upon the withdrawal of their deposits, could be withdrawn without regard to such restriction. In other words, we held that the restriction placed upon deposits by banks did not apply to public moneys on deposit within said bank at the time the restrictions were made. On the basis of that opinion we believe the county court may require the bank, which is the depository for public funds of the county, to pay out demand deposits of the county upon demand without regard to any restriction placed thereon by the bank.

In answer to your next inquiry we beg to advise you that it is the duty of the Prosecuting Attorney of your county to take

whatever steps that are necessary for the protection or the recovery of the public funds of the county. Section 11318, R. S. Mo. 1929, dealing with Prosecuting Attorneys, provides as follows:

> "He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. * * *"

Section 11316, R. S. Mo. 1929, provides as follows:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state, or county, * * *."

In view of the foregoing sections, it is the duty of the prosecuting attorney of your county, when requested by the county court, to take such legal action as is necessary to protect the legal funds of the county. It is the duty of the county court to protect and preserve the county funds, and the matter to which you refer is a matter in which the county is directly interested in a financial way, so as to bring it absolutely within the duty of the prosecuting attorney to take such action as the situation requires, when requested by the county court.

This office is swamped with legal matters pertaining to the state's affairs, which the prosecuting attorneys and other officials have no authority to handle. We cannot undertake, in view of such fact, to perform the duties of every prosecuting attorney in the state. If, however, the prosecuting attorney, upon request from the county court, fails to take the necessary action, we should be glad to advise you further in this respect.

Very truly yours,

Frank W. Hayes
Assistant Attorney General.

APPROVED:

_____
Attorney General.

FWH:S

[illegible] The civil rule should be used in computing the relationship under Section 13 of Article XV of the Constitution.

FILED
42

11-3

October 31, 1933.

Miss Marjorie Neff Hoy,
County Superintendent of Schools,
Marshall, Missouri.

Dear Miss Hoy:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I have been asked how to figure the degree of kinship. In talking with some of our lawyers I find they have not had occasion to look into this matter. In order that I will make no mistake in advising people on the question I would like for you to tell me."

There are two rules which are used in computing the degrees of relationship. These rules are laid down in 12 C. J. 511, as follows:

> "One by the canon law, which has been adopted into the common law of descents in England, and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestory and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.' By the civil law the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

We do not find that the courts of this state have laid down any rule as to how the relationship under Section 13 of Article XIV of the Constitution is to be computed. In other states where anti-nepotism provisions are in force, the courts have generally applied the civil rule. We believe that the courts of this state, when the matter is presented for consideration, will adopt the civil rule in computing the degree of relationship under our Constitution. As there is no decision by our courts on this matter, this Department has applied the civil rule in figuring relationship. Under the civil rule, persons who are related as first cousins, or closer, would be within the fourth degree, as prohibited by the Constitution.

Persons who are related as second cousins and less relationship than second cousins would not come within the prohibition of the Constitution.

In determining the relationship of persons, relationship by affinity must be considered as well as that of consanguinity. Affinity is defined in 2 C. J. 378 as follows:

> "The connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband."

In 2 C. J. 378, it is said:

> "Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include a person related to the spouse simply by affinity."

In Encyclopaedia Brittanica, 11th Ed. Vol I, page 301, the author has the following to say about affinity:

> "The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

In applying the foregoing principles we advise you that under the civil rule, which we adopt, any persons related as closely as first cousins, either by blood or marriage, would come within the prohibition of the Constitution. Persons related by blood or marriage as second cousins, or more distantly than second cousins, do not come within the prohibition of the Constitution. We hope that by these suggestions you may be able to compute the relationship of persons seeking your opinion, and if any particular situation should arise we shall be glad to advise you upon that proposition should you request it.

Very truly yours,

Frank M. Hayes

Assistant Attorney General.

FMH:S

APPROVED:

Attorney General.

COSTS AND FEES:-In appeal to Supreme Court, fees of clerk for making out transcript shall be paid by the state or county if defendant is unable to pay the same, but clerk cannot require payment in advance.

1757 RS Mo 1929

December 27, 1933. 1-5-34

FILED
42

Mr. Jesse House,
Circuit Clerk of Polk County,
Bolivar, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I am writing in regard to fees due the Circuit Clerk for cost of appeal in a criminal case. What cost is due the Clerk for Transcript of record and copy of Bill of Exceptions when a case is appealed and the defendant is not taking appeal as a poor person? If the defendant appeals as a poor person does the State pay the cost of appeal? If not, is the defendant liable for the cost of appeal at the time that the appeal is taken?"

Section 3756, R. S. Mo. 1929, provides as follows:

> "When any appeal shall be taken or writ of error issued, which shall operate as a stay of proceedings it shall be the duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record in the cause including the bill of exceptions, judgment and sentence, and certify and transmit same to the office of the clerk of the proper appellate court without delay: Provided, however, that any abbreviated or partial transcript of the evidence and oral proceedings, in narrative form or otherwise which the defendant or his attorney for the state may agree upon in writing as sufficiently presenting to the appellate court the issues involved on such appeal, shall be deemed and taken as sufficient on such appeal and shall by the clerk be incorporated in the transcript of the record certified and transmitted by him to the appellate court, instead of the bill of exceptions mentioned above."

In State ex rel. v. Daily, 45 Mo. 153, 156, it is said:

> "The duty, then, of sending up a proper transcript, upon supersedeas in a criminal prosecution,

is imperative, and is personal to the clerk, without the application of the accused. It becomes essential to the further prosecution of the case, and to the execution of the judgment, in which the accused may have no interest; is a duty imposed after an order of supersedeas by the court or a judge, and is essential to the object of the order; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees."

Section 3757, R. S. Mo. 1929, provides as follows:

"When the appeal or writ of error does not operate as a stay of proceedings, such transcript shall be made out, certified and returned, on the application of the appellant or plaintiff in error, as in civil cases, except that the costs of the transcript shall not be required in advance."

In The State v. McCarver, 113 Mo. 602, 605, the Court says;

"Under the provisions of section 4294 Revised Statutes, 1889, the clerk was required on the application of the defendant to make out, certify and return a full transcript of the record, etc., in the cause, and he had no authority to require the costs of the transcript in advance."

Section 11787 R. S. Mo. 1929, provides what fee the clerk shall charge for various services rendered, and provides "for transcripts to the Supreme Court, for each 100 words, 10¢." The section further provides:

"Provided that when any defendant in a criminal case shall be granted an appeal to the Supreme Court the fees of the clerk for making out and certifying transcript shall be paid by the state or county if the defendant shall be unable to pay the same."

It is therefore our opinion that a clerk is entitled to charge 10¢ for every one hundred words for transcript, and if the defendant is unable to pay the same the fees, for making out and certifying the transcript shall be paid by the state or county, and that the clerk cannot require the costs of the transcript to be paid in advance.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

APPROVED:

Attorney General.

ELECTIONS: SPECIAL ELECTIONS CAN ONLY BE HELD WHEN PROVIDED FOR BY LAW.

June 2, 1933

Honorable Fred B. Hulse
Hannibal, Missouri

Dear Mr. Hulse:

We acknowledge receipt of your opinion to the Mayor of the City of Hannibal with reference to whether a vacancy in the office of Marshal or Chief of Police of the City of Hannibal should be filled by appointment, according to the ordinances of the city, or by a special election, together with your verbal request for an expression of an opinion from this office as to your opinion to the mayor.

We have carefully gone into the question and reached the conclusion that your opinion to the mayor fully and clearly states the law on the question presented and that such vacancy, when the same occurs, should be filled by appointment under the provisions of the ordinances of the City of Hannibal.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

GAME AND FISH DEPARTMENT: What and when fish may be gigged or speared.

8270-71 RS Mo 1929

FILED
43
6-14
28

June 13, 1933

Honorable Peter M. Huck
Prosecuting Attorney
Ste. Genevieve, Missouri

Dear Mr. Huck:

This Department acknowledges receipt of your letter dated June 7, 1933, as follows:

> "We are having some trouble with persons gigging fish in the night time, they generally use carbide lights fastened to their heads, as miners use while working underground, our game warden called up the Game and Fish Department a few days ago and he was referred to me as prosecuting attorney for information.
>
> I find no law prohibiting the use of Carbide Lights in connection with catching fish, unless in the phrase of section 8270 R. S. 1929 "device or any other means than by ordinary hook and line etc. in the 4th. line of said section in the Missouri Statutes Annotated, at page 4097.
>
> Will you be kind enough to give us your opinion on the above and oblige."

Section 8270 Revised Statutes Missouri 1929, reads in part as follows:

"It shall be unlawful for any person or persons to take, catch, or kill, any fish in any of the waters of this state, by means of any trammel net, gill net, fish trap, firearm, rifle or gun or any other kind of net, trap, firearm, device or any other means other than by ordinary hook and line, gig, spear, trot line, artificial bait, or seine, of the kind and at the time, and in the manner permitted by law* * * ".

Then follows certain designated species of fish which can not be taken, caught or killed or possessed by any means whatsoever between certain specified dates, except that artificially propagated trout may be held in captivity and sold during the above designated and prohibited periods.

The foregoing section expressly recognizes the right to take, catch or kill fish with gig or spear.

Section 8271 as amended by Laws 1931, page 226, makes it unlawful for any person to take, catch or kill, or attempt to take, catch or kill, in the waters of this state, or to have in possession when so taken, caught or killed, any game fish with a gig, spear, snare, snag line or grab hooks. It being further provided in the amended Section 8271 that non-game fish shall not be so taken, caught or killed during the months of February, March, April and May of any year nor shall any one person so take, catch or kill to exceed twenty-five pounds of non-game fish in any one day allowing, however, for the weight of one fish not to be counted when calculating the permitted twenty-five pounds. It being further provided in the amended Section 8271 that gar may be lawfully killed at any time. It being further provided in the amended Section 8271 that it is unlawful for any person, firm or corporation to catch, kill, take, ship, convey or transport or cause to be so done, any species of game fish taken from the waters of this state for commercial purposes. The term "game fish" is defined by Section 8275.

By amended Section 8271, under no circumstances, and at no time can game fish, as defined in Section 8275, be taken, caught or killed in the waters of this state with a gig, spear, snare, snag line or grab hooks nor can game fish be possessed after having been so taken, caught or killed. Non-game fish may be taken, caught or killed with a gig, spear, snare, snag line or grab hook during

the months of January, June, July, August, September, October, November and December. No person is permitted to take, catch or kill non-game fish with a gig, spear, snare, snag line or grab hooks in excess of twenty-five pounds in one day, except that the weight of one fish may be excluded from the aggregate in making the permitted twenty-five pounds. Game fish can not be caught, killed, taken, shipped, conveyed or transported, nor may the same be caused to be done, by any manner or means from the waters of this state when such fish are used or are to be used for commercial purposes. The term commercial purposes as used in amended Section 8271 meaning, generally, for sale or barter in any manner or form.

Answering your letter then we are of the opinion that at no time and under no circumstances can what is known as "game fish", be taken, caught or killed in the waters of this state with a gig, spear, snare, snag line or grab hooks and it is unlawful to possess such fish when so taken, caught or killed; that non-game fish may be taken, caught or killed in the waters of this state with a gig, spear, snare, snag line or grab hook, whether in the night time or daytime and with or without the use of carbide lights, during the months of January, June, July, August, September, October, November and December of any year, up to and including twenty-five pounds of non-game fish in any one day, allowing for one fish the weight of which is not to be included in ascertaining the permitted twenty-five pounds and except that it is lawful to kill gar at any time.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

ROADS AND BRIDGES: Vacating of roads for non use.

7-26

July 13,1933

FILED
43

Hon. Peter H. Huck
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

Your letter of July 7th addressed to General McKittrick relating to a certain public road in your county has been handed to me for answer. You desire an opinion based on the following facts:

> "We have a legal proposition pending before our County Court that we cannot decide with satisfaction. The Court asked me to obtain an opinion from your department.
>
> In the year of 1892 a county road was legally established in our county, from six to eight miles in length; the road was opened, and both ends of said road have been open and in use ever since, but for some reason or other about two miles of said road near the middle thereof was neglected and fenced some twenty or more years ago, and said two miles had been put to other uses by the farmers over whose lands the road was located. The two ends of said road however were continuedly used as a road to the present time.
>
> About two years ago some of the farms changed hands on which said unused road is located and the new owners with some others filed a petition in 1932, with our County Court, praying the Court for an order that said unused part of said road be opened.

Said petition is still pending in the County Court and the Court would like to know what action it has a right to take at its next regular term of Court which convenes on the First Monday in August next.

The pending petition, as I understand, is not a petition to establish a new road or for the change of a road as provided by law, but simply a petition praying the Court to order the unused part of said road opened as established in the year of 1892.

The petitioners seem to insist that it is the duty of the County Court to order the unused part of said road opened where the road was originally located and established.

The County Court seems to take the position that at this time it has no right to order the unused part of said road opened, simply at the request of petitioners.

If you require additional information concerning the facts let me hear from you at once and I will try to supply the same.

Kindly advise us as to the above and oblige."

In the beginning it would appear that Section 7839 R.S. Mo. 1929, should decide the matter. Said section being as follows:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads, that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be

> deemed legally established roads; and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

But upon further examination we find that in a situation such as you outlined in your letter such a portion of the road which has not been used for more than twenty years would not be automatically abandoned because of non use.

In the case of Lottie Baughman v. Charles Faulwell, 156 Mo. A. l.c. 239, the court decided the matter in the following language:

> "It is not claimed that the description of the road as laid out is defective, so we see then no application for the rule stated. We are of the opinion that when a public road is located by proper authority and is accepted and used by the public within its boundaries as established, the fact that some part thereof is not used for actual travel is no evidence whatever of abandonment. We know that there is scarcely a public road in this state where a part of its boundary has ever been actually used by the public or worked by the road overseer. And because the part of the road upon which plaintiffs fence had been erected was unoccupied and unused for so many years did not cease to be a part of such road by reason of nonuser. If such was the law, at least one-half the roads in the state which have been located and fenced for many years by adjoining landowners, would be subject to reductions to within the actual parts traveled, if the owners chose to move their fences so as to include that part not used. And in that case the highways would be reduced to narrow alleys."

This case is further upheld in the case of Proctor et al v. Proctor, 232 Mo. A. l.c. 37.

In 2 Elliott on Roads and Streets, 3rd Edition, Section 1172, we find the following language:

> "Once a highway always a highway is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxmin still holds good."

In the case of Johnson v. Rasmus, 237 Mo. l.c. 590, the court adopted the following rule:

> "It is a very ancient rule of law that vacations of highways are not favored, and that the presumption will always be in favor of their continuance."

The petition on the part of those desiring the road to be opened are not asking for an establishment of the road, the vacating or abandonment or a change in the road, they simply desire that the unused portion of the road be opened.

From the foregoing authorities it would appear that the road has never been abandoned or vacated and that the county court has the authority to open the road if it so desires and that the petitioners are within their rights in so asking.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

(Acting)
Attorney General.

OWN:MM

PENAL INSTITUTIONS: Salaries of Director and Commissioners; effective date of reduction of salaries.

8319 Laws 33

8-2

August 1, 1933.

FILED
43

Hon. Stephen B. Hunter
Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Hunter:

This Department is in receipt of your letter of July 29th, with request for an opinion as to the salaries of members of the Commissioners of the Department of Penal Institutions, which letter is as follows:

> "The laws of Missouri of 1933, Section 8319, relating to the compensation of members of the Penal Board, provide that the salary of the Director shall be $3600 and the salary of each of the other members shall be not more than $3200. This is less than the salaries provided for in the section repealed.
>
> Please advise us if this section is now in force and if the compensation of the present Board shall be as indicated in Section 8319 of the laws passed by the recent Legislature.
>
> The present Board has five members. Section 8319 of the Laws of 1933 provides a Board of three members. Up to this time, so far as we are advised, the Governor has not reorganized the Board. Therefore, the old members are continuing to function until their successors are appointed and qualified, and the point we want to know is: Do the salaries of the old members reduce in accordance with Section 8319 from the time the new laws take effect, or do they continue at the old figure until the Governor reorganizes the Board? "

Replying thereto will say that Sections 8316, R. S. 1929, provided for the creating of the Department of Penal Institutions, 8317 provided for the appointment of five commissioners by the Governor, 8318 designated where the permanent office of the board should be, and 8319 provided for the salaries of the director and commissioners. These four sections were repealed by Laws of Missouri, 1933, at pages 327 and 328 and four new sections were enacted in lieu thereof to be known as 8316, 8317, 8318 and 8319.

The section, according to your letter, in which you are particularly interested at this time is 8319, shown at page 328, Laws of Missouri, 1933, which section is as follows:

> "COMPENSATION OF MEMBERS.--The director of penal institutions shall receive an annual salary of not more than thirty-six hundred dollars, and such railroad fare and other traveling expenses as may be incurred while traveling in the discharge of official duty. Each member of the commission of the department of penal institutions, other than the chairman thereof, shall have and receive an annual salary of not more than thirty-two hundred dollars, and in addition thereto shall be reimbursed for all railroad fare and other expenses incurred while traveling in the discharge of official duty."

The answer to your question asked in the second paragraph of your letter is: That new Section 8319, pertaining to salaries, became effective July 24th, 1933, or ninety days after the adjournment of the General Assembly.

It is, therefore, the opinion of this Department that from and after July 24th, 1933, the effective date of the last above named section, the Director and Commissioners of the Department of Penal Institutions should receive their salaries under new Section 8319 and not under Section 8319 R. S. 1929.

We hope that the above sufficiently answers your question.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

MUNICIPAL ELECTIONS: Vacancy in office of Assessor of Warrensburg, Missouri.

6748 RS Mo 1929

FILED 43

September 23, 1933.

9-25

Hon. Leslie F. Hutchens, Mayor,
Warrensburg, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 29, 1933 wherein you request an opinion as to the office of City Assessor of Warrensburg. We quote your letter as follows:

> "I am asking your opinion as to whether I am compelled to have a special election or not, after the work is of said office has been completed.
>
> Our City Assessor died recently: In fact he was sick when elected, he was never able to do his work; he appointed a Deputy, and the Council approved the appointment; now the work is almost completed, almost ninety eight per cent of it is done, and after that is done there will be nothing for the Assessor to do until next spring.
>
> It will cost close to $300.00 to hold an election and at the suggestion of Judge Bradley I am asking you this opinion. My City Attorney is out of town and could not render his opinion to me. I would be very grateful to you if you could enlighten me on the matter."

Warrensburg is a city of the third class, and the manner of election of officers is governed by Sec. 6721 R.S. Mo. 1929, which is as follows:

> "A general election for the elective officers of each city of the third class shall be held on the first Tuesday in April after the organization of such city under the provisions of this article, and every two years thereafter, and all city elections

> shall be held under the provisions of the general election laws of the state: Provided, that all certificates of nomination and petitions therefor, as provided by the state election laws, shall be filed with the city clerk and not with any other officer, and all duties specified to be performed by the constable or sheriff in the state election laws shall be performed by the marshall in city elections; and all tickets for city elections shall be printed by the city and at the city's expense; and all duties heretofore performed by the county clerk with reference to city elections shall be performed by the city clerk. The polling places for all elections in such cities, and the judges therefor, shall be selected and specified by the respective city councils of such cities by resolution, ordinance or otherwise. The manner of making returns of such elections shall be prescribed by ordinance. Any city organizing under the provisions of this article may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until the second Tuesday in April thereafter, and until their successors are elected and qualified."

The following officers are designated as elective officers under Sec. 6723, R.S. Mo. 1929, said section reading as follows:

> "The following officers shall be elected by the qualified voters of the city, and shall hold their offices for two years, and until their successors are duly elected and qualified, to-wit: A mayor, marshall, attorney, police judge, assessor, collector, and treasurer. The attorney shall be a person learned in the law."

You now have a vacancy, caused by a death in the office of City Assessor. It is therefore necessary to consider Sec. 6748, R.S. Mo. 1929, which is as follows:

> "If a vacancy occur in any elective office, the mayor, or the person exercising the office of mayor, shall cause a special election to be held to fill such vacancy

> giving ten days' notice thereof by proclamation published in some newspaper published in the city: Provided, however, when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the office of mayor by appointment: Provided further, that any vacancy in the office of councilman which may occur within said six months shall be filled by election, in such manner as may be provided by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of the same until the first regular meeting of the council thereafter, at which time such vacancy shall be permanently filled."

Under the provisions of Sec. 6721, supra, the elective officers, which include the office of Assessor, are to be elected every two years on the first Tuesday in April. We therefore assume that your next election will be in April 1934, but under the provisions of Sec. 6748, supra, we find that if the vacancy occurs within six months of the general municipal election, the Mayor has the power to fill the same by appointment. At the present time the vacancy in question exists just a few days more than six months. By a strict interpretation of the section, you would be compelled to call a special election. However, bearing in mind the cost of such an election, as mentioned in your letter (and you state you desire to avoid the same), we make the suggestion to you, since within a few days you would have the power to make the appointment yourself, that you await the elapse of the proper number of days, then be in a position to fill the appointment without a special election.

If we are incorrect in assuming that your next general municipal election will be held in April 1934, it is the opinion of this department that you would be compelled to cause a special election to be held to fill the vacancy.

Very truly yours,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

FEDERAL TAXATION:-- Missouri Training School at Boonville, being an
EXEMPTION OF AGENCY instrumentality or agency of the state in carry-
OF THE STATE: ing on a governmental function, cannot be required to pay the Federal Process tax.

12-11

November 10, 1933.

FILED
43
62

Mr. Stephen B. Hunder,
Director, Penal Institutions,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "The Collector of Internal Revenue at Kansas City says that the Missouri Training School at Boonville must pay processing tax on wheat raised by the Institution. All work done in producing this wheat was done by inmates, is my understanding, but the Revenue Collector says that sinceall the boys in the institution were not used in producing this wheat therefore we are compelled to pay the tax. It might be held that all the boys did participate in producing the wheat, as they all contributed in work to furnish shoes and other foods and other things that were necessary to those who did the actual work in the wheat. In fact, all the boys in the Training School at Boonville contribute something to each other in all the work they are doing. If the Traning School is required to pay this $1.30 per bbl. you can see it is quite an item during the year.
>
> Would be pleased to be advised by you whether you think there is anything that might be done to relieve us of this tax."

You inquire whether the Missouri Training School at Boonville may be required to pay the processing tax on wheat raised by the institution.

Process tax is levied by the Agricultural Adjustment Act of May 12, 1933, chapter 25, 48 Stat. Section 9, paragraph (a) of the Act provides:

> "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such

determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first demestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. * *"

Paragraph (d) of said Section 9 provides as follows:

"(d) As used in part 2 of this title - -
(1) In case of wheat, rice, and corn, the term 'processing' means the milling or other processing (except cleaning and drying) of wheat, rice, or corn for market, including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only.
(2) In case of Cotton, the term 'processing' means the spinning, manufacturing, or other processing (except grinding) of cotton; and the term 'cotton' shall not include cotton linters.
(3) In case of tobacco, the term 'processing' means the manufacturing or other processing (except drying or converting into insecticides and fertilizers) of tobacco.
(4) In case of hogs, the term 'processing' means the slaughter of hogs for market.
(5) In the case of any other commodity, the term 'processing' means any manufacturing or other processing involving a change in the form of the commodity or its preparation for market, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry."

Disregarding the statute, a process is generally accepted to mean a mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject matter to be transformed or reduced to a different state or thing. According to Section 1 of paragraph (d) of the Act in the case of wheat, "processing" means the milling or other processing (except cleaning and drying) of wheat, including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only. Under Section 2, processing of cotton means spinning and manufacturing. Under Section 3, the case of tobacco processing means manufacturing of tobacco, and under Section 4 in the case of hogs, it means slaughter of hogs for the market. Under general Section 5, as applied to all other commodities, processing means"any manufacturing or other process involving a change in the form of the commodity, or its preparation for market."

As we interpret the above sections, processing does not

mean the production of the wheat from the soil. Under Section 1 above, it means milling (except cleaning and drying), and shall not include the grinding and cracking thereof in the form of flour for feed purposes only. We believe that the proper construction of the Act is that a processing tax is not applicable to wheat grown and harvested where no other process is applied to the wheat. That interpretation seems to be entirely consistent with the various definitions of processing, as contained in paragraph (d) of Section 9. It is not, under said paragraph, the raising of the hogs that lays the basis for the process tax, but the slaughtering of them. It is not the raising of the cotton, but the spinning and manufacturing.

Although your inquiry is silent as to any processing which your institution might do to the wheat, we have assumed that the wheat is raised by your institution and marketed in its original form, without any processing, as is defined in paragraph (d) of Section 9. If our assumption is correct then we are of the opinion that as a producer of wheat who does not change the form thereof and does nothing in the form of processing, that the institution would not be liable for the processing tax. On the other hand, if your institution so deals with the wheat, as milling it, etc., as to come within the basis upon which the process tax is levied, we are still of the opinion that your institution would not be subject to the processing tax, for the following reasons hereinafter set out.

In 37 C. J. 883, it is said:

> "Congress possesses no power to lay taxes which would obstruct or interfere with the legitimate and efficient workings of the state governments, or of the agencies or instrumentalities employed by them."

The above principle is further expressed in the case of Metcalf v. Mitchell, 70 L. Ed. 384. The court says at page 391:

> "We pass to the more difficult question, whether Congress had the constitutional power to impose the tax in question and this must be answered in ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the Federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the Federal government."

> "Just what instrumentalities of either a state or the Federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune

from the taxing power of the other. Thus, the employment of officers who are agents to administer its laws (Collector v. Day, supra; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022), its obligations sold to raise public funds (Weston v. Charleston, 2 Pet. 449, 467 L. ed. 481, 487; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 585, 586, 39 L. ed. 759, 820, 821, 15 Sup. Ct. Rep. 673), its investments of public funds in the securities of private corporations, for publid purposes (United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597), surety bonds exacted by it in the exercise of its police power (Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 13 Am. Crim. Rep. 699), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it (Pollock v. Farmers' Loan & T. Co. and Gillespie v. Oklahoma, supra) and forbids an occupation tax imposed on its use (Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; and see Dobbins v. Erie County, supra)."

"Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the Federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

"While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

"It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function is prohibited."

There can be no question but that the State of Missouri,

in the operation of its penal institutions, is performing a governmental function. It is just as much a part of the governmental function to apprehend and incarcerate criminals for the protection of itself and its citizens as it is to provide agencies for the protection of its own property and the property and rights of its citizens. As a matter of fact, it is only by the apprehending and incarcerating of the criminals that it can protect its own property and the property and rights of its citizens. These penal institutions, as an arm of the State in carrying out its governmental functions, are generally supported by taxation and by revenue from the various institutions. The amount of taxation necessary for the support of such penal institutions varies in so far as the institutions are capable of producing income for their own support. Revenue raised by taxation is an income of the State. Money derived from products produced and sold by the various penal institutions are also an income of the State. No one would contend that the Federal government would have a right to levy any sort of tax against the general revenue raised by the State of Missouri, and as we view it, they would have no more right to levy any sort of tax against products or incomes derived in the management of its penal institutions.

This principle is not new and has been generally recognized in the exempting from Federal income taxes, salaries of state officials. The salary of a state officer, however, at the time that it would be subject to income tax, is the personal property of the officer, and has ceased to be property of the state. Wheat raised by the Reformatory, however, never ceases to be income of the state, when in its original state or represented by money which it brings upon the market. If the Federal government cannot tax incomes of the state officials because it would be a burden upon the state, then it is hard to understand by what theory the Federal government could tax the income resulting from state property and the operation of state institutions. If it had a right to tax the income derived from the properties of the State of Missouri, then, by the same token, it would have a right to tax the physical property of the State. This it certainly cannot do. The Federal government has no right to tax the revenue derived by the State, and yet, to permit a tax on the income or products derived from state properties would be in effect a tax on a portion of that revenue.

It is therefore the opinion of this Department that the Missouri Training School at Boonville is an agency or instrumentality of the State of Missouri, created and controlled by it exclusively to enable it to perform a governmental function; that the Federal government would have no authority to levy any tax on such instrumentality or agency. In view of that holding this institution would not be liable for any processing tax, whether or not the facts are such as would bring it within the purview of the Federal statutes above quoted.

Very truly yours,

APPROVED:

Franklin V. Sayers
Assistant Attorney General.

Attorney General.

GAME LAWS: Legal interpretation of still-hunting.

8236 Laws-31

12-11

November 23, 1933.

FILED

62

Honorable Peter H. Huck
Prosecuting Attorney
Ste.Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

Your request for an opinion dated November 4, was as follows:

> "During our last open deer season, Octo. 26, 27, and 28, a controversy arose between our Game Warden and a number of deer hunters in our county, on which question we would be glad to have a legal opinion from your department.
>
> The question arose over the interpretation of the phrase, 'or to take deer in any manner except through the method known as still hunting', as used in section 8236, R. S. of 1929.
>
> I am informed the facts to be- That a group of deer hunters, stationed several of their number at supposed deer crossings and the other hunters started at a certain place in the woods to drive deer in the direction of the hunters stationed at said supposed crossings, making noise in brushes, shooting occasionally and mimicing the barking of dogs; our local game warden contends that the method of hunting as above set out is not still hunting the hunters claim that such is not unlawful.
>
> Universal Dictionary defines 'still hunt' as noiseless hunting; stalking. I have not at hand definition of 'still hunt' by any of the Courts of our land. Kindly let me hear from you on the above at your convenience."

Section 8236 R. S. Mo., 1929, as amended by the laws of 1931, page 327, provides in part as follows:

> "No person except landowners when hunting on their own premises shall hunt or kill deer in any manner except through the use of a gun propelling one all-lead or lead alloy or soft-nosed or expanding bullet or ball at a single discharge, or to take deer in any manner except through the method known as still hunting, but at no time shall it be lawful to shoot at, kill, wound, or capture or attempt to kill, wound, or capture, any deer while taking refuge in or swimming through the waters of any stream, pond, or lake, or between one-half hour after sunset and one-half hour before sunrise, nor shall it be lawful to make use of a dog in hunting, chasing, taking, or killing deer."

The courts in this country have never defined the word still-hunt, but Section 655, R. S. Mo., 1929 provides in part as follows:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import:* * * *."

Funk and Wagnall's Dictionary defines still-hunt thus:

> "Still-hunt - To approach or pursue noiselessly; stalk; as, to still hunt deer. To hunt game without noise or by stealth."

Webster's Dictionary defines still-hunt thus:

> "Still-hunt - A hunting of game in a quiet manner, or under cover; stalking. The pursuit of any object quietly and calmly. To hunt or pursue noiselessly or stealthly; to stalk."

The sport of still-hunting deer is described to me by an old sportsman of the days before game laws, as the practice

of going quietly to a salt-lick before day break, knowing that deer were in the habit of visiting this location, the hunter conceals himself quietly, and without dogs or noise waits the approach of deer. The hunter cautiously selects his game, being sure to pick a buck deer of the proper age and being sure that his prey is no other object or animal than a select deer.

The hunting of deer in any other manner than by still-hunting is dangerous to the life of other hunters who are pursuing their chosen sport. It is also considered more sportsman like to pursue your game rather than entrap them. This legal method tends to protect our wild deer from extermination. These were the reasons for the passage of this law which is the subject of interpretation.

In considering another statutory prohibition the St. Louis Court of Appeals in State v. Schwartzman 40 S. W. (2d) 479 l. c. 48, the court said:

> "The legislature act should be given such construction as to suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and for private gain, and to add force and life to the cure and remedy, for the public good. * * *. It is true that a criminal statute is construed liberally in favor of the defendant, and against the State, but this rule affords no warrant for a construction out of harmony with the manifest purpose and intent of the statute."

The hunters described in your letter do not practice still hunting, but rather practice the style of hunting known as the chase. It is the opinion of this office that the courts will follow the dictionary definition of still-hunt if called upon to interpret this law.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.
WOS:H

TAXATION:- Missouri Training School at Boonville being in-
EXEMPTION OF AGENCY strumentality of the State and carrying on
OF THE STATE:- governmental function, shall not be required to pay Federal processing tax on wheat raised or purchased by it and milled.

12-30

December 28, 1933.

FILED
43

Hon. Stephen B. Hunter,
Director of Penal Institutions,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you state as follows:

"Your letter of November 10, relative to processing tax on wheat raised by the Missouri Training School, received, and I am convinced that I should have been more explicit in my inquiry.

The Missouri Training School made arrangements to have the mill at Boonville process the wheat raised by the Missouri Training School, reducing it to flour, and the flour that was to be made out of this wheat raised by the Training School was to be used in bread making at the institution, and the offal, or the bran, was to be used in feeding the dairy cows belonging to the Missouri Training School.

The processing tax that the Collector of Internal Revenue, at Kansas City, said we would have to pay was on the flour that would be made from the wheat raised on the lands farmed by the Missouri Training School. I felt quite sure that if we milled this wheat ourselves there would be no processing tax, but when we take the wheat to the mill at Boonville and pay them to reduce the wheat to flour, the Government demands a processing tax.

You might look at the question even in this way: suppose that the penal institutions bought wheat, then made a contract with the milling company here in Jefferson City to grind this wheat and reduce it to flour, and all the flour and bran that is made in the processing of the wheat into flour would be used by the penal institutions; then, would we owe the processing tax on the flour made from this wheat in this way?

If we owned the mill and ground the wheat our-

selves, it seems we would not, but the Internal Revenue Collector contends we owe it if the wheat is ground in some mill not owned by the penal institutions. It should not make any difference whether we grew the wheat or bought it as to whether we should pay the processing tax.

I am making this explanation so that you may better understand what I had in mind as to processing tax."

On November 10th, in our first opinion upon this question, we called your attention to some Federal decisions which held that the Federal Government has no right to levy or exact a tax from the states or their political subdivisions. This general proposition is well recognized. We do not believe that it would serve any useful purpose to requote those decisions in this reply.

As pointed out in the first opinion, the processing tax is levied against the individual who does the milling or other processing. There cannot be any question but that the Missouri Training School at Boonville, as covered fully in the first opinion, is a department of the State of Missouri, and a tax of any nature against this institution would be a tax against the State of Missouri. If the Missouri Training School at Boonville were subject to a processing tax, then we believe it would be subject to that tax on wheat which it milled, regardless of whether it grew the wheat or whether ir purchased the wheat. On the other hand, since it is exempt from taxation as being an instrumentality of the State of Missouri it makes no difference whether the wheat which is mills is raised upon its farm, or whether the wheat is purchased from an individual and then milled. The processing tax is levied upon the actual milling and it is immaterial where the wheat is grown or where the wheat is milled. The levying of this tax on wheat purchased and milled by you is just as much a tax upon the State of Missouri as if the wheat had been produced by the institution.

We are therefore of the opinion that in view of the Federal Government's lack of power to tax the State of Missouri or its institutions, the Missouri Training School at Boonville cannot be required to pay a processing tax upon wheat which it mills, regardless of where the wheat is grown and regardless of where the wheat is milled. In view of the position of the Internal Revenue Collector on this matter, I believe it would be proper for you to suggest to him that in as much as the Attorney General of Missouri has advised you that no tax is due from your institution, that he obtain an opinion from the Attorney General of the United States upon this question with the view of avoiding any difficulty over the collection of this tax.

Very truly yours,

Frankel V. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

Foreign insurance companies may only issue insurance policies in conformity to the Missouri Laws.

January 20, 1933

5796 R S Mo 1929

FILED
44

Mr. Jos. B. Thompson,
Sup't. Insurance Dep't.,
Jefferson City, Missouri.

Dear Sir:-

Your letter of January 18, 1933 requesting an opinion has been received and is as follows:

> "Can a foreign mutual fire insurance company authorized by the laws of the state of its creation to issue a non-assessable policy and licensed to do business in Missouri under Article 6 of the Missouri Insurance Laws issue a non-assessable policy in the state of Missouri."

Section 4596, R. S. Mo. 1929 with reference to foreign corporations doing business in Missouri provides:

> "Such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign corporation established or maintained in any way for pecuniary profit of its stockholders or members shall engage in any business other than that expressly authorized in its charter, or by the law of this state under which it may come,"

Section 5796, R. S. Mo. 1929 prohibits a mutual insurance company from issuing non-assessable policies.

Foreign insurance companies doing business in this state cannot exceed the powers and duties granted to domestic corporations. The Supreme Court of Missouri en banc in Head v. Insurance Co., 241 Mo. 403, l.c. 413, in passing upon this question said:

> "It has been repeatedly ruled in this state since the enactment of (now sections 5741, 4596, 4599, R.S. Mo. 1929) that foreign insurance companies admitted to carry on their business in this state can only con-

> tract within the limits prescribed by our statutes and that in the conduct of the business under the license granted by this state, they shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. The effect of these decisions is to write into every insurance contract made by a foreign insurance company, so licensed, in this state, all of the provisions of the statutes of this state appurtenant to the making of such contract and wh ch define and measure the reciprocal rights and duties of the parties thereto. These statutes are declaratory of the public policy of this state, and inhibit the doing of the business of insurance in this state by any corporation contrary to their regulations by annulling all the stipulations which offend the provisions of the statutes. Cravens v. Insurance Co. 148 Mo. 583."

An insurance contract which is made in this state by a corporation doing business under license from this state cannot be allowed to introduce into its policy, terms which are forbidden such corporations by our laws. Summers v. Fidelity Mutual Aid Association 84 Mo. Appeals, 605.

The last word on this subject was written by the Kans s City Court of Appeals in Weed v. Banks Savings Life Insurance Co., 24 S.W. (2d) 653, l.c. 657, in the following language:

> "It has been held that foreign insurance companies who do business in this state do so not by right but by grace and must make their business conform to our laws."

We therefore hold that a foreign mutual fire insurance company doing business in this state cannot issue a non-assessable policy.

Yours very truly,

FRANKLIN E. REAGAN
Ass't. Attorney General

Approved:

ROY McKITTRICK
Attorney General

FER/mh

SHERIFF'S FEES -- Section 1870, and Section 11789, R.S. Mo. 1929

FILED
44

January 25, 1933

Hon. David E. Impey
Prosecuting Attorney
Houston, Missouri

Dear Sir:

Your letter of January 14, 1933 addressed to the Attorney General has been handed the undersigned for attention. In your letter you recite the following facts:

> "Texas County by the census of 1930 had a population of 18,580.
>
> "Is the Sheriff entitled to charge and collect his per diem of three dollars for attendance upon courts of record for each day that the Probate Court and the County Court are in session, if the Sheriff is not (in person or by deputy) in actual attendance?
>
> "Since the statute makes it part of his duty to attend, I take it the presumption is that he did his duty and the burden would rest upon the county to show that he was not in attendance.
>
> "May the Probate Court and the County Court by order direct that the Sheriff not attend and thus relieve the county from the payment of the per diem, or has the Sheriff the right in the face of such an order to actually attend (in person or by deputy) and insist upon his right to three dollars per diem for such attendance?"

The law of this state imposes a duty upon the Sheriffs in the counties of this State. Section 1870, R.S. Mo. 1929, provides:

> "The several sheriffs shall attend the courts held in their counties <u>except where it shall be otherwise directed by law</u>. *** "

Section 11789, R.S. Mo. 1929, provides for the fee of sheriffs and among fees provided for therein is the following:

> " *** For attendance each court of record or criminal court, and for each deputy actually employed

in attendance upon such courts, the number of such deputies not to exceed three per day, $3.00. *** "

This section further provides that:

"In all counties of this state, which now have or may hereafter have a population of more than 50,000 inhabitants, and less than 125,000, the sheriff shall not be allowed the fee of $3.00 for himself or deputies for attendance, on the county or probate court, except for such days as such court shall by an order request such attendance."

It will be observed that the latter part of this Section only applies to counties having a population of more than 50,000.

Section 1870 is a part of Chapter 9, Article 1 of the Statute, designated, "Courts of Record ". The County and Probate Courts are Courts of record, and therefore referred to in Section 1870 by the language <u>each court</u>.

The Sheriff, having the duty imposed upon him by the Statute as aforesaid, to attend each court and there being no statutory enactment relieving him from such duty, in counties of less than 50,000 in population, it is the opinion of this department that the Sheriff would be entitled to his fees for such service.

If the Sheriff was derelict in his duty and wilfully failed or neglected to perform the services required of him by law, he could and should be proceeded against for a neglect of his official duty. In that event, we seriously doubt his ability to recover when not in actual attendance upon the court.

The Legislature has prescribed the duty of the Sheriff as above set forth, and only through an act of the Legislature could such duty be modified or changed. In our opinion, your County Court would be without authority to order the services of the Sheriff with respect to his duties of attending the Courts of record in your county, discontinued.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General

CCA:ER

Approved_____
Attorney General

RIFF'S FE Section 1870, and Section 11789, R. S. Mo. 19

February 27, 1933.

FILED
44

Hon. Owen C. Rawlings
Prosecuting Attorney
Marshall, Missouri

Dear Mr. Rawlings:

Your request to the office of the Attorney-General dated February 23rd, has been handed the undersigned for attention. You ask advice upon the following matter, to-wit:

"a.-Can the County Court, without the attendant and assistance of the sheriff, legally open and transact business as a Court?

b.-If the sheriff must be present to open court, is it necessary that he remain continuously during the sitting of the Court, i.e. must the sheriff be present all day every day of such court?

c.-Is the sheriff entitled to his fees for attending such court, even during such times as he does not personally attend and wait upon the Court? "

On January 25, 1933, the writer prepared a request opinion for Hon. David E. Impey, Prosecuting Attorney, Houston, Missouri, on the same subject matter which we believe will answer the inquiry made by you, and as stated above. We are, therefore, enclosing a copy of said opinion herewith.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

CCA:EG
Enc.

OPERATOR OR CHAUFFEUR -- License required, but no license obtainable in either case under age of eighteen.

7765 R.S. Mo. 1929

April 7, 1933.

FILED
44
15

Hon. F. J. Iffrig
Representative, St. Charles County
House of Representatives
Jefferson City, Missouri

Dear Mr. Iffrig:

Answering your letter of March 30, 1933, enclosing a letter from Mr. Joe Muellewig of St. Charles County, relative to Oliver Mahon's right to drive a bus transporting school children to and from school. In Mr. Muellewig's letter he states that Oliver Mahon, who has been or wishes to drive a school bus, is sixteen years old.

Under Section 7759, R. S. Mo. 1929, under the heading of "Definitions", an "operator" is defined to be, "Any person who operates or drives a motor vehicle."

Under the same section, a "chauffeur" is defined as,

> "An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire."

Both, an "operator" and "chauffeur" are required to secure a license.

Section 7766, R. S. Mo. 1929, states,

> "No certificate as a registered operator shall be issued to any person under the age of eighteen years."

Section 7765, R. S. Mo. 1929, states that,

> "No certificate of registration as chauffeur shall be issued to any person under the age of eighteen years."

It is our opinion from the foregoing that no one under the age of eighteen years can operate a bus for school districts that carry pupils backward and forward, as he cannot secure a license as a "chauffeur" on account of his age, and it would be illegal for him to drive a bus under that age.

Very respectfully,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

INHERITANCE TAX: Ruling on Estate by entirety.

May 9, 1933.

FILED 44

Mr. Arch A. Johnson,
Attorney at Law,
Landers Building,
Springfield, Missouri.

Dear Mr. Johnson:

This department is in receipt of your letter of April 21 in which you request a ruling from this office as to the taxation of a will. Your letter is as follows:

> "***The 28th paragraph of her will is as follows: 'I give and bequeath to David and Dora Schwab, of Springfield, Missouri, the sum of Five Thousand Dollars'.
>
> Dora Schwab named in said bequest is a niece of the testatrix and David Schwab is her husband, related to testatrix only by marriage as stated.
>
> Question: How should this bequest be taxed?
> ***"

I do not believe there is any question but that the above bequest created an estate by the entirety in David and Dora Schwab. In the case of Lomax v. Cramer, 302 Mo. A. 365, the Court had up for construction a bequest "to my brother, D.A. Robinson, and wife $5,000.00". In holding the bequest to create an estate by the entirety, the Court said:

> "There is no question but that in this state when a husband and wife take an estate by the entirety they hold not as separate individuals and by moieties but as one person each holding the whole of it. For this purpose they are a unit and upon the death of either the entire estate belongs to the survivor. It is also well established that there can be an estate by the entirety in personal as well as in real property. (Ryan v. Ford, 151 Mo. App. 689; Johnston v. Johnston, 173 Mo. 91). In such an estate the husband and wife each owns, not a part or a separable interest, but the whole; and therefore, the death of

one leaves the other still holding the whole as before with no one to share it. (Wilson v. Frost, 186 Mo. 311, 319; Frost v. Frost, 200 Mo. 474, 480)."

For further authority see Goldberg Plumbing Company v. Taylor, 209 Mo. A., l.c. 101.

Section 572 R.S. of Mo. 1929 provides as follows:

"When property, or any beneficial interest therein or income therefrom passes by any such transfer where the amount of property, interest or income shall exceed in value the exemption hereinafter specified and shall not exceed in value twenty thousand dollars, the tax hereby imposed shall be as follows:

* * * * * *

When the person or persons to whom such property or any beneficial interest therein passes shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic, association, institution, or corporation, at the rate of five per centum of the clear market value of such property or interest therein. * * * *"

Therefore, it is the ruling of this office that the bequest be taxed at the rate of five per cent with no deductions.

Yours very truly,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

Attorney General

JWH:AH

INSURANCE DEPARTMENT: What constitutes an insurance contract and the doing of insurance business in this state. Penalty for transacting insurance business in this state without authority.

May 12, 1933

#44

Insurance Department
Jefferson City, Missouri

Gentlemen:

Receipt of your letter dated April 12, 1933, is acknowledged. The letter is as follows:

> " A number of unlicensed companies are attempting to do business in Missouri both by mail and through representatives. The literature of two of these companies, The National Aid Association and Lincoln Aid Association, is enclosed.
>
> We should like your opinion as to whether the business transacted by such companies is insurance within the meaning of the Missouri Statutes. If it is insurance, what steps can be taken to prevent solicitation of members in this state.
>
> Is it permissable for unlicensed insurance companies to advertise and solicit business through radio stations located within the state?"

Attached to your letter is a purported application for certificate of membership in Lincoln Aid Association of Wilmington, Delaware; also copy of purported form of certificate or contract presumed to be in use by the Lincoln Aid Association; also attached to your letter in connection with the foregoing are various promotion circulars; a letter of the president of the company with

reference to prospective salesmen for the company and also magazine advertising used by the Lincoln Aid Association. Also attached to your letter are substantially the same application, certificate and literature of the National Aid Society, said to be incorporated under the laws of the State of Indiana.

The purported application for certificate of membership in the Lincoln Aid Association states that it is:

> "Application for Certificate of Membership in
> Lincoln Aid Association of
> Wilmington, Delaware",

then follows space for name and address of the applicant, name and address of beneficiary.

It is further stated in the application that the application shall be considered a part of the contract for membership.

It is further stated in the application:

> "It is also agreed that there will be no liability on the part of the Association unless and until the certificate of membership is issued and delivered to me, while I am alive and in good health, free from disease and that no liability shall exist against the Association if any of the answers to the above questions relative to my health on the date below are found to be untrue."

The application further appoints and constitutes the board of directors or a majority thereof as attorney in fact for the applicant, to cast the vote of the applicant at any meeting.

The form of certificate or contract states that the Lincoln Aid Association agrees that for the consideration of a membership fee of $4.00 and a registration fee of $1.00, the application executed by the member and the further payment of all amounts required to be paid under the conditions of the certificate during its continuance, the person named in the certificate (thereinafter to be called the member) is entitled to all benefits as provided in the by-laws of the

association and in the event of the natural or accidental death of the member, the beneficiary named in the certificate or contract is entitled to the benefits designated in a schedule set out on the face of the certificate,to-wit:

"Persons from 1 to 10 years inclusive, $500.00;
11 to 55 years inclusive, $1,000.00;
56 to 65 years inclusive, $750.00;
66 to 70 years inclusive, $500.00;
71 years and over,inclusive,$250.00."

Provision is made for the payment of disability benefits when such disability is suffered through violent, external and purely accidental means and a schedule of the amounts to be paid for such disability is set out on the face of the certificate or contract; then is provided a space for the name of the Company, its registrar and president.

Certain purported by-laws are printed on the certificate. Section 2 of Article I of the by-laws states:

"Section 2. Purpose - To unite reputable men and women who are wage earners, for the purpose of giving aid to the widows, creditors and those dependent on its deceased members."

Section 4 of Article I of the by-laws provides as follows:

"Section 4. Certificates - When an application is accepted by this association and the membership fee in advance is paid, the association will issue to such applicant a certificate, but no liability shall arise thereon against the association, nor any benefit be due to the applicant until the issuance of such certificate and its delivery to and acceptance by the applicant, while such applicant is alive and in good health."

Article IV provides for the amount of benefits to be paid members under certain contingencies.

Article V of the by-laws provides in part as follows:

"Section 1. When a death or permanent disability shall occur to a member to whom this contract is issued and the association is liable therefor,

> it shall be the duty of each member to make a contribution, if the directors deem it necessary, which contribution will be $1.00. This is the only time a contribution is required, except for expenses."

The purport of Article V is explained at the close thereof by the following:

> "Guaranteed costs: The above section provides that in no case can the directors call on the members to contribute more than $1.00 a month for death claims, making the guaranteed cost for death claims not to exceed $12.00 yearly. There is absolutely no other contributions called for, except expenses and even that is limited to an amount not to exceed $4.00 during any twelve month period."

Section 1 of Article VI of the by-laws provides for the giving of notice to the secretary of the association in case of death of a member.

Article VII of the by-laws provides that upon death or permanent disability of a member of the association, who is a member in good standing the secretary shall mail the beneficiary blank proof of claim which shall be completed and filed with the association and if the claim is approved by the directors of the association, the secretary of the association shall notify the members of the fact that a contribution is due, if a sufficient amount is not already in reserve to pay the claim and it is further provided in such Article VII that:

> "Every member of this association shall, within thirty days after the mailing of any notice, of contribution, pay the amount thereby requested from him or her, and the failure so to do shall ipso facto suspend the member so failing from all rights and benefits in this association".

Section 2 of Article VII of the by-laws reads as follows:

> "Section 2. All payments made by any member now or hereafter are voluntary contributions for the purpose of aiding members of this association, and to take care of expenses of said association".

Section 4 of Article VII of the by-laws reads:

> "Section 4. It is the purpose and object of this association to furnish protection to the beneficiaries of the members hereof. Before a person is eligible to become a member, it is absolutely necessary that they be in good health, free from any disease or disability".

Section 5 of Article VII undertakes to fix the time within which suits may be brought against the association on account of matters arising out of the certificate or contract.

The certificate or contract recites that the Lincoln Aid Association is chartered by the State of Delaware. We take it therefore that it is a corporation organized under the laws of the State of Delaware. The liabilities provided for in the certificate or contract are the liabilities of the Lincoln Aid Association. It is recognized in the certificate that suits may be brought against the association growing out of the certificates issued by it. While it is stated in the certificate that the payments made by the members are voluntary contributions, yet it is also provided that members who fail to pay these contributions lose all of their rights of membership in the association. There is nothing in the certificate or contract which bears any resemblance to reciprocal or inter-insurance between persons who voluntarily band themselves together to insure each other.

A contract of insurance is defined in Words and Phrases, Volume 4, page 348, as follows:

> "An ordinary 'contract of insurance' is defined as an agreement to pay a given sum on the happening of a particular event, contingent on the duration of human life in consideration of the immediate payment of a smaller sum or a certain equivalent periodical payment."

The foregoing is the general definition of a contract of insurance accepted by all of the authorities in this countyy. See

Pirics v. First Russian Slavonic Greek Catholic Benevolent Society, 83 N. J. Eq. 29;

Tourtlott v. Insurance Company, 126 Me. 118;

Baltimore Life Insurance Company v. Floyd, (Del.) 91 A. 653, 655;

Attorney General v. Osgood, 144 N. E. 377.

It is our opinion that the foregoing certificate if and when issued to an insured by the Lincoln Aid Association, would be an insurance contract and if applied for in and delivered to a resident of the State of Missouri would constitute a transaction of insurance business within the meaning of the Missouri statutes.

If such business is conducted in this state without authority from the Superintendent of Insurance, any agent or solicitor for the company who acts for them as agent or solicitor in this state, could be prosecuted by virtue of Section 5908, Revised Statutes Missouri, 1929.

Any person or persons acting as agents or solicitors for any such company not licensed to do business in this state where such agency or solicitation is carried on or made by means of a radio located in this state, would be guilty under the provisions of said Section 5908.

The purported application and certificate in use by the National Aid Society, submitted with your letter, are in substance the same in character, form and meaning as the application and certificate of the Lincoln Aid Association and what is said as to the Lincoln Aid Association application and certificate applies equally to the application and certificate of the National Aid Society.

We are returning you herewith the files and exhibits transmitted to us with your letter of April 12, 1933.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

INHERITANCE TAX: War Risk Insurance)
Service - connected disability) Not subject to
Adjusted Compensation) inheritance tax.

May 25, 1933.

44

Hon. Samuel Richeson,
Judge of the Probate Court,
Washington County,
Potosi, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of May 8th in which you make the following requests:

> "Is inheritance tax due the State of Missouri on property, otherwise subject to the tax, but which is a part of the estate of a deceased veteran of the World War, and which was accumulated and derived from the following sources:
>
> 1. From the United States Government as compensation for service-connected disability, paid by the Government to the Guardian of the veteran, who was insane and incompetent, held by the guardian until the death of the veteran, then paid by the guardian of the veteran to the administrator of the estate of such deceased veteran, and which will in the ordinary course of administration be paid to the heirs at law of the deceased veteran?
>
> 2, Interest and income accumulated by the guardian on such sums, and paid by him to the administrator of the estate of the deceased veteran and which will be distributed to the heirs at law of the veteran?
>
> 3. Proceeds of warrisk insurance policy paid by the Government to the guardian of the deceased veteran on account of total disability, and turned over by the Guardian to the administrator of the estate of the deceased veteran and which will be distributed to the heirs at law?

4. Interest and income from the accumulation of the proceeds of such war risk insurance, which interest and income was collected on investments made by the guardian for his insane ward, held by the guardian until the death of the ward, then turned over to the administrator and which will be distributed to the heirs at law?

5. Amount received from Government upon an adjusted compensation certificate, paid by the Government to the administrator of the deceased veteran, and which will be distributed to the heirs at law of the veteran?

Questions numbers 1, 2 and 5 may be treated together.

Section 618 of Title 38, U.S.C.A. provides:

"No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate shall be subject to attachment, levy or seizure under any legal or equitable process, or to national or state taxation, and no deductions on account of any indebtedness of the veteran to the United States shall be made from the adjusted service credit or from any amounts due under this chapter."

In the case of Jones et al. v. Price et al, Sup. Ct. of App. of W. V., 146 S.E. 890, the court held that the administrator of a veteran may not divert to his creditors the sum payable to his dependents under that chapter, and the court said:

"Congress has manifestly intended to so surround this fund with protection that creditors cannot take it away from the dependents. It was well said in a recent Iowa decision: 'In other words, during the course of human events, the thought became developed among states and nations that for the good of mankind there are instances when it is best that creditors go unpaid in order that certain individuals in society may have a particular source of income dedicated to personal or family sustenance, maintenance and enjoyment." Andrew v. Bank, 219 N.W. 62, 64.

> Congress having dedicated this bounty exclusively to the dependents of the decedent the administrator is without any authority whatsoever to divert it to his crediters. See, generally, Crotty v. Eagle's Adm'r., 35 W. Va. 143, 13 S.E. 59."

Of course, if property has been purchased for a World War veteran's use with money received under the World War Adjusting Compensation Act, it would undoubtedly be subject to taxation.

> State v. Wright (Ala.) 140 So. 584.

However, we have no such case presented here.

Therefore, in view of the foregoing, it is the opinion of this office that there is no inheritance tax due to the State of Missouri as to the compensation for service-connected disability, and as to the adjusted compensation certificate received from the United States Government.

As to the War risk insurance policy, the proceeds have generally been held not taxable by the states. Re Estate of Harris, 179 Minn. 450, 229 N.W. 781, and Cross v. State of Washington, 278 Pac. 414. War risk insurance was first provided for by the United States Government by an Act of Congress in 1914. Section 454 U.S.C.A. 38, in speaking of war risk insurance says this insurance shall not be assignable, shall not be subject to the claims of creditors, "and shall be exempt from all taxation."

In the case of In Re Harris' Estate, Sup. Ct. of Minn., 229 N.W. 781, the court held that payments of war risk insurance to deceased soldier's administrator or to deceased beneficiary's estate are not subject to state inheritance tax. The court said:

> "Counsel for the state, with commendable fairness, have cited leading cases holding that proceeds of war risk insurance paid over by the government to the administrator or estate of a deceased soldier are not subject to a state inheritance tax. Tax Commission v. Rife, 119 Ohio St. 83, 162 N.E. 390, 392; In Re Cross' Estate, 152 Wash. 459, 278 P. 414; In Re Wanzel's Estate, 295 Pa. 419, 145 A. 512; Watkins v. Hall, 107 W. Va. 202, 147 S.E. 876. The case of Succession of Geier, 155 La. 167, 99 So. 26, 32 A.L.R. 353, may be added. In these cases the exemption is generally placed on two grounds: First,

> that the exemption from taxation provided in section 454 of the War Risk Insurance Act, supra, is applicable; second, that the persons entitled to the payments do not take as heirs of the deceased soldier or of the primary beneficiary, but take as beneficiaries under the War Risk Insurance Act and under the contract between the government and the soldier. In the case of Tax Commission v. Rife, supra, the Court said: 'This right to take this property is by virtue of a contract between the United States government and the soldier, and does not arise by reason of the statutes of descent and distribution of this state. * * * The administrator becomes a mere trustee or conduit for the government to make the payments to the persons entitled to the same under the provisions of the federal law. The intestate laws do not operate upon the decedent's property, but are referred to in order to determine who shall take the proceeds of the insurance." On appeal in the same case, 27 Ohio App. 516, 521, 162 N.E. 398, 400, it is said: 'In our view, the statute of the United States, which provides that this insurance shall be exempt from all taxation, controls.' * * *"

Therefore, it is the opinion of this department that the proceeds of War Risk Insurance are not subject to inheritance tax in the State of Missouri.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

Attorney General.

JWH:AH

IN RE: INHERITANCE TAX: CONSTRUCTION OF WILL: STRANGER TAXES FIVE PER CENTUM.

C
O
P
Y

May 26, 1933.

FILED
44

Hon. Thomas A. Walker
Probate Judge
Lexington, Missouri

Dear Sir:

This department is in receipt of your letter of May the 24 in which you make the following request:

> "I am herewith inclosing you a copy of the Will of Henry Mollenkamp deceased, and would like to have your opinion as to the bequest to Mrs. A. H. Fuhr, is subject to the payment of the Inheritance Tax. Mrs. Fuhr is no kin to deceased, except she was a sister to Mrs. Mollenkamp."

It is the opinion of this office that the bequest to Mrs. Fuhr is subject to Inheritance Tax in the State of Missouri at the rate of five per centum, as provided in Section 572 R. S. Mo. 1929, subdivision 5, as follows:

> " Five Per Cent -- Other Rates -- Where the person or persons to whom such property or any beneficial interest therein passes shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic, association, institution, or corporation, at the rate of five per centum of the clear market value of such property or interest therein."

Respectfully submitted,

JOHN W. HOFFMAN, JR.

APPROVED:

ROY MCKITTRICK
Attorney General

IN RE: INHERITANCE TAX: NON-RESIDENT OF STATE ALLOWED SAME EXEMPTIONS AS IS RESIDENT.

FILED
44

June 1, 1933.

Hon. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

In reply to your letter of May 31, I wish to say that a non-resident of this State, who inherits property is entitled to the same exemptions, under Section 572___ 575 R. S. Mo. 1929, as is a resident of this State.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH/ AJ

COPY

Inheritance Tax - Suggestions relating to Procedure Thereto.

June 7, 1933.

FILED
44

Hon. Roy McKittrick
Attorney General
Jefferson City, Missouri

Dear General:

The question has arisen concerning the procedure relating to Inheritance Tax Law in the State of Missouri. The question concerns the construction of Section 563, R. S. Mo. 1929.

This statute may be divided into three parts:

(1) That notice be served upon the State Treasurer and the Attorney General at least ten days before the delivery or transfer of any assets standing in the name of the decedent.

(2) That delivery or transfer without retaining a sufficient amount to pay the tax and/or interest which may be assessed on account of the transfer of such assets shall not be made.

(3) That no assets standing in the name of a decedent shall be transferred or delivered unless a sufficient amount is retained for any tax and/ or interest that may be found due, or unless the consent of the State Treasurer and the Attorney General is secured.

The statute also provides that failure to serve such notice, or failure to retain a sufficient amount for the

payment of such tax and/or interest shall render the safe deposit company, trust company, corporation, bank or other institution, making such delivery or transfer liable for the payment of the tax, and in addition thereto a penalty for such failure of one thousand dollars.

Since the decision in the case of First National Bank of Boston, Executor of the Estate of Edward R. Mackell, Deceased, vs. the State of Maine, there can be no tax due the State of Missouri on the transfer of stock of Missouri corporations belonging to a non-resident decedent. Consequently, the Office of the State Treasurer has not been requiring waivers in order that stocks of Missouri corporations may be transferred when held by a non-resident decedent.

There have been many requests for an opinion from this office as to whether or not, since the decision in this case, we would continue to demand waivers. It is respectfully submitted that the policy of requiring waivers for the transfer of stocks and other evidences of indebtedness be continued and adhered to strictly for the following reasons:

I. There is a possibility that there could be some question as to the domicile of a decedent. For instance, Mr. "A", who had resided in Kansas City for a number of years, leaves Kansas City and moves to California for say six months. While in California, Mr. "A" dies intestate. His heirs might contend that he died a resident of California; and, if the Probate Court of California granted Letters of Administration, the Probate Court of Kansas City would authorize the foreign administrator, upon filing an affidavit of no debts and an authenticated copy of his appointment, to have any assets standing in the decedent's name transferred to his, after the expiration of the six months'

period. It can easily be seen that, if the State of Missouri requires no check upon these non-resident estates, there would be no way for the State to ascertain the actual residence of the decedents. In the hypothetical case, cited above, Mr. "A" might only have been visiting in California, in which event he would still be a legal resident of the State of Missouri and his estate would be subject to the inheritance tax laws of the State of Missouri.

For that reason, a form has been prepared which is attached hereto whereby the executor or administrator of a non-resident decedent, in order to secure the consent of the State of Missouri to the transferring or delivering of assets standing in the name of the non-resident decedent, will be compelled to make affidavit that the decedent was, at the time of his death, a legal resident of the foreign State.

II. A more serious question arises with respect to stocks, bonds, notes, mortgages and other evidences of indebtedness that may have acquired a business situs in the State of Missouri though standing in the name of a non-resident decedent. The law pertaining to the business situs of securities has never been enforced in the State of Missouri according to Mr. Goyert, the present State Supervisor, and it is respectfully submitted that this law should be strictly enforced in the future.

To return to our hypothetical case once more, suppose that Mr. "A" is a legal resident of the State of Kansas living, as many people do, just over the state line in Kansas City. He has for many years carried a large brokerage account with the brokerage firm of Harris Upham and Company. This firm has been acting as his agent in the buying and selling of stocks and other securities for many years. Mr. "A" dies. On the face of it, it would seem that these securities being intangible

personal property should be subject to tax at the domicile of the owners and unless some check were made, that would be the procedure.

In the very recent case of State vs. Baldwin, (Supreme Court of Missouri) 19 S.W. (2d) 733, the court held that the transfer of property belonging to a non-resident decedent consisting of notes, some of which were secured by mortgages on land in the State, bank deposits in the State and Liberty Bonds, all of which were in the possession of the administrator appointed within the State, was subject to an inheritance tax as being "within the jurisdiction of the State", even if the property was not "within the State" under the doctrine of "mobilia personam sequuntur", and notwithstanding the same property was taxed in the State of the owner's domicile.

The court said in relation to the law of "business situs":

> "It possibly acquired a business situs in this state. Whether it did or not, it was within the jurisdiction of the state, and property subject to the transfer tax. It would have been a proper subject of inquiry by the trial court to determine how and why and under what conditions these evidences of debt were in this state, but, whatever the determination of that question, the property was legally within the jurisdiction of the probate court of Lewis County in this state, and subject to the tax."

This case was reversed by the Supreme Court of the United States in the case of Baldwin vs. Missouri, 74 Law Ed. 1056, in which it was held that the imposition of an inheritance tax by a State in respect of the deposits in banks within the State to the credit of a non-resident decedent, and bonds of the United States and notes executed by individual citizens of the

State physically present therein, belonging to such decedent which have not been given a business situs in such State violates the due process clause of the Fourteenth Amendment.

It will be noticed that the Supreme Court of Missouri was reversed for the reason that no business situs had been established for those securities. It is respectfully submitted that the purpose of the affidavit attached hereto is to prevent non-resident estates from escaping inheritance tax law of the State of Missouri where there has been an actual business situs established in this State. The wording of the Supreme Court of Missouri in the case cited supra states our position clearly; that is, that there should be an inquiry to determine how and under what conditions these evidences of debt are in this State. There is no doubt in our mind but that many estates are evading the inheritance tax laws of Missouri through the fiction of "mobilia personam sequuntur."

III. In the very recent case of First National Bank of Boston vs. the State of Maine, 53 Sup. Ct. 174, shares of stock in a Maine corporation sought to be subjected to inheritance taxes were part of the estate of the decedent, who at the time of his death was domiciled in Massachusetts. Most of the property of the corporation was located in Maine. The stock, as a part of the decedent's estate had been subjected to inheritance tax by the State of Massachusetts and the State of Maine sought to collect an inheritance tax on the same stock. The court held that shares of corporate stocks were subject to inheritance tax in the State of the owner's domicile under the maxim of "mobilia personam sequuntur? On the face of this taxation, it would seem that there was no need for a State to give its consent for the transfer of corporate stock belonging to a non-resident decedent for the reason that the State would not be able to subject the stock to taxation; however, the basis upon which these recommendations are being made is that where there has been a business situs established, then and in that event these stocks, bonds and other credits are

subject to the inheritance tax in the State in which they are physically present and on this point, the Supreme Court of the United States in the case of Boston vs. Maine, cited supra, said:

> "We do not overlook the possibility that shares of stock as well as other intangibles may be so used in a State, other than that of the owner's domicile, as to give them a situs analogous to the actual situs of tangible personal property. See Farmers' Loan Company case supra, 280 U. S. p. 313; 50 Sup. Ct. 98; 74 Law Ed. 371; 66 A.L.R. 1000. That question has been reserved and it still is reserved to be disposed of when, if ever, it properly should be presented for our consideration."

In the case of Farmers' Loan and Trust Co. vs. Minnesota, 280 U. S. 204; 74 Law Ed. 371, the court said:

> "New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, and Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L.R.A. 1915 C, 903, 31 Sup. Ct. Rep. 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

The court, in the case of Board of Commissioners vs. Hewitt, 93 Pac. 101, 76 Ks. 816, said:

> "Notes, mortgages, tax sale certificates, and the like, might be brought into the State for something more than a temporary purpose and be devoted to some business use here, and thus become incorporated with the property of this state for revenue purposes. Such situs had been aptly termed

"business situs." Board of Com'rs v. Hewitt, 93 Pac. 181, 184, 76 Kan. 816, 14 L.R.A. (N. S.) 493."

A line of cases hold that wherever a money lender has a local agent in another state, and permits that agent to control the evidences of debt and the mortgages securing them and to continue, for a long course of dealing, the business of lending money, collecting and re-lending money in the state of the agent's residence, the evidences of debt and the mortgages securing them have what has come to be known as a "business situs" for purposes of taxation and for other purposes. Adams v. Colonial & U. S. Mortgage Co., 34 South. 483, 536, 82 Miss. 363, 17 L.R.A. (N.S.) 138, 100 Am. St. Rep. 633 (citing Jahier v. Mascoe, 63 Miss. 699).

In view of the law as cited above it is expressly recommended that the attached affidavit be used before the consent of the State of Missouri is given in the transferring of any assets belonging to a non-resident decedent. It is further recommended that the field men, working under the treasurer, endeavor to ascertain the names of non-residents, who are now or who may be in the future dealing in securities in Missouri, so as to give those securities a business situs in Missouri.

IV. In 1927 the General Assembly of the State of Missouri passed an act that is known as the "estate tax for the State of Missouri". This act is contained in Section 573, R. S. Mo. 1929, which provides as follows:

> "In the event that the total of the inheritance taxes imposed upon the several interests and property comprising the estate of the deceased, by law, less exemptions allowed by law, and all other state inheritance taxes, shall not equal eighty per centum of the amount of the tax imposed upon the value of the net estate of said decedent, under the federal estate tax law, whenever the federal estate tax is determined an additional tax shall then be imposed upon the value of

the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said Section 872 as amended and eighty per centum of the tax imposed by said act of congress. (Laws. 1937, p. 100. Amended 1939, p. 103.)"

It is expressly recommended that in view of this Act the office of the State Treasurer furnish the Office of the Attorney General a complete list of all estates exceeding in value Fifty Thousand ($50,000.00) Dollars, and that the field men working under the State Treasurer be required to ascertain the amount of the tax paid in these estates to the Federal government, and report the same to the State Treasurer in order that it may be determined whether or not there is an estate tax due and owing to the State of Missouri. The Office of the State Treasurer and the Office of the Attorney General in order to carry out the provisions of this law, should work together and in complete harmony.

Respectfully submitted,

JOHN W. HOFMAN, JR.
Assistant Attorney General.

JWH/AJ

INHERITANCE TAX: Age of majority of distributee fixed by the Law of the domicile of the ward.

June 9, 1933.

FILED
44

Hon. D.F. Warren,
Judge of Probate Court,
County of Grundy,
Trenton, Missouri.

Dear Sir:

This department is in receipt of your letter of June 6, 1933, in which you request an official opinion from this office on the following proposition:

> "'A' died intestate in this county and state leaving nothing but personal property; administration in regular way. Among his heirs-at-law is a niece, a resident of Illinois, aged 20. Were she a resident of Missouri, a guardian would have to be appointed to receive her distributive share and receipt the Administrator. In Illinois, they say that a female is of age at 18 and demands her distributive share from the Administrator and contends she is qualified to receive and receipt for it.
>
> "Questinn, what should this Court order the Administrator to do to protect him?"

Section 374, R.S. Mo. 1929 provides:

> "All persons of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained, they shall be considered minors. (R.S. 1919, Sec. 370. Amended, Laws of 1921, p. 399.)"

Section 432, R.S. Mo. 1929 provides:

> "The court shall order payment of the amount found to be due, and the rendition of any effects, property rights or credits belonging to the ward, to such ward having attained majority, or to the successor of such guardian or curator, as the case may be, and enforce such order by attachment against the guardian or curator and his sureties. (R.S. 1919, Section 428)"

It is the opinion of this office that Section 374 only affects a ward domiciled in Missouri. As affecting a ward residing in another state, it would seem that the word "twenty-one" means "coming of age" under the laws of the state constituting the domicile of the ward.

It will be noticed that Section 432, R.S. Mo. 1929, says that payment shall be made "to such ward having attained majority."

In the case here under consideration, the heir-at-law is a resident of Illinois and has already attained her majority under the laws of that state.

In the case of Woodward v. Woodward, 11 S.W. 892 (Sup. Ct. of Tenn.), the court held that the guardian is not required to wait until the ward is twenty-one before settling with him as the ward "twenty-one", as used in the statutes is synonymous with "full age", and a minor domiciled in another state and emancipated by its laws from the disabilities of infancy may demand and receive personal property held for her by a guardian appointed and resident in Tennessee to which she is entitled as distributee of a decedent, as she will be gagarded "full age" in Tennessee for that purpose. The court said:

> "So that under our law he is required to settle when the ward is of full age, and, under the jus gentium, the petitioner is of full age and he must settle. The enforcement of this rule of private international law only requires that the common-law age of majority as fixed by the law of the domicile of the ward,

> unless there be something in our statutes or decisions which are to be understood as indicative of a policy or purpose to enforce the particular law, without regard to the rules of private international law which asks its suspension in favor of the Lex domicilli."

In the case of Memphis Trust Company v. Blessing, 58 S.W., l.c. 116, the court extended this rule to include real property; and, after quoting with approval the wording of the court in Woodward v. Woodward, supra, the court said:

> "We think this construction of our statutes conclusive of this case whether the property involved be realty or personalty. The statute was designed to fix a time for final settlement with wards in this State and has no application to wards who have arrived at full age by the law of their domicile. The court below so held and the decree is affirmed."

In the case of In Re Honeyman, 192 N.Y.S. 910, the court held that a resident of full age--18 years--in the State of Illinois is entitled to a decree revoking letters of her guardianship in the State of New York under the laws of which she is a minor until reaching the age of 21 years, and requiring the guardian to account for and pay over to her forthwith her property in this State. The court said:

> "I am of the opinion that the petitioner, as a resident of, and of full age, in the State of Illinois is entitled to her property in New York. It is her property. Possession is an incident of a right of property. In my opinion to withhold from the petitioner her property in New York is a clear violation of the property rights of a resident of another state and the constitutional provision guaranteeing property rights. Likewise, it would be a violation of the comity which exists between the states."

In the rather recent case of In Re Golding's Estate, 216 N.Y.S. 593, the court held:

> "Mabel Golding, testator's daughter, has been a resident of the State of Illinois since prior to the death of testator, and attained the age of 18 years on January 28, 1922. The laws of that state provide that an infant attains her majority at the age of 18 years. She is therefore competent to administer her own estate. The decree should provide that payment of her distributive share of the estate be made to her direct. Matter of Honeyman, 117 Misc. Rep. 653, 192 N.Y.S. 910, affirmed 202 App. Div. 728, 193 N.Y.S. 936; Matter of Danvers, Law Journal, April 10, 1923."

In conclusion therefore it is the opinion of this office that the heir-at-law, residing in Illinois and having reached the age of twenty years, is qualified under the laws of that state to receive and receipt for her distributive share of the estate.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

JWH:AJ

IN RE: INHERITANCE TAXATION: FORGIVENESS OF A DEBT SUBJECT TO TAXATION.

June 20, 1933

FILED
44

St. Louis Union Trust Company
Saint Louis
Missouri

Attention: Mr. F. A. Murphy
Assistant Trust Officer

Gentlemen:

This Department is in receipt of your letter of June 10 in which you request an opinion from this office on the following state of facts:

> "Under Section Two of her last will and testament, decedent directs that any note or notes of her son, Arthur W. Schultz, be cancelled and the note or notes returned to him as his property.
>
> "Mr. A. W. Fink, the appraiser appointed by the St. Louis Probate Court to adjust the Missouri inheritance tax in this estate, has taken the position that forgiveness of the indebtedness of Arthur W. Schultz is subject to Missouri inheritance tax.
>
> "While I agree with Mr. Fink that forgiveness of an indebtedness is taxable, if the obligor is solvent, nevertheless it is my opinion that when the obligor is insolvent, there should be no tax imposed upon the forgiveness of the indebtedness, as the indebtedness has no value. In this case there is no doubt

> but that Mr. Arthur W. Schultz is insolvent, and there is no way the executors could enforce payment of these notes.
>
> "* * * * * * * * * * * * * * * * * * *
>
> "I would appreciate your opinion as to whether or not, under the circumstances above set forth, the forgiveness by the testatrix of the indebtedness of Arthur W. Schultz is subject to Missouri inheritance tax."

There is no doubt that the Missouri Inheritance Tax Law has its historical basis in the New York Inheritance Tax Law. Therefore, in the absence of Missouri decisions, the decisions of the State of New York undoubtedly are entitled to much weight in construing a certain point under the Missouri Inheritance Tax Law.

In 61 C. J. 1653, the rule is stated as follows, "where decedent is the creditor, the remission or forgiveness of the debt by will is usually regarded as a legacy or bequest and taxable as such."

Gleason and Otis in their work "Inheritance Taxation, (4 Ed.) upheld the principle of law that the forgiveness of a debt is to be treated as a legacy. At page 340 of this work, it is said: "The rule is established in England that if a decedent is a creditor of a legatee, and, in his will provided for the remission or forgiveness of the debt, it is to be treated as a legacy and taxed as such. Attorney General v. Holbrook, 12 Price 407; Morris v. Livre, 11 L. J. Ch. 172; and this is the general rule. Matter of Gould, 156 N. Y. 423, 51 N. E. 287; Tyson's Appeal 10 Pa. St. 220."

The case of Tyson's Appeal, supra, held that where a textatrix, reciting that "A" was indebted to her on a bond, declared that in case he made no demands against her estate for boarding or services rendered her she bequeathed him the debt due by him and directed her executors to cancel the bond, the legacy was subject to the collateral inheritance tax law.

In the case of In Re Tuigg's Estate 15 N. Y. Supp. 548, there was a bequest of the residue of the testator's estate which included a note by the legatee. It was claimed on behalf of the legatee that, as to the note, the legatee was exempt from tax on the ground that the note had no market value inasmuch as the testator, by his will, forgave and estinguished the debt. It was also claimed that the note had no market value inasmuch as it had no legal inception and, if sued upon, no recovery could be had thereon. The facts therefore of this case are, in effect, similar to the facts as presented to us in the case here under discussion for it is contended that the legatee in the case now before us is insolvent and that there should be no inheritance tax levied upon the bequest inasmuch as there is no way the executors could enforce the payment of these notes. However, the court in the Tuigg's case, citing with approval the case of Tyson's Appeal supra held:

> "The note in the case at bar represents a debt due by the legatee to the testator, and the executors could be compelled to include it in their inventory as an asset of the estate. If testator died insolvent, creditors might pursue the maker on this obligation. The legatee must either accept the benefit provided in the will under the condition of assuming with it the burden imposed by law, or he may reject the same. If he elects to reject the legacy provided by the will, the legacy would go as in case of intestacy, forming, as it does, a part of the residuary estate, and following the rule where a portion of the residuary bequest is void. In that event there can be no doubt that the next of kin could sue upon the note. The appraiser properly reported this portion of the residuary estate as subject to the tax."

In the case of In Re Hirsch's Estate, 145 N. Y. Supp. 3004, the testator released and discharged his son from any and all claims and demands which he had against

his son, the court said:

> "In the case at bar, the financial condition of the son, Louis Hirsch, is certainly improved to the extent of $27,868.67 by the provision of his father's will and the latter's estate to that amount diminished. The result in any proper view of it, as it seems to me, was simply a transfer within the contemplation of the Transfer Tax Act (Consol. Laws c. 60, Sections 220-245)."

Therefore, in view of the foregoing, it is the opinion of this Department that the remission or forgiveness of a debt by will is taxable under the Missouri Inheritance Tax Law as a bequest from the testator to the legatee.

Respectfully submitted.

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

IN RE: INHERITANCE TAX : BEQUEST FOR FUNERAL EXPENSES OF SISTER-IN-LAW SUBJECT TO TAX.

570 Laws-31.

FILED
44

June 21, 1933.

Mr. Carl R. Morris
Farmers Bank of Trenton
Trenton, Missouri

Dear Mr. Morris:

This Department is in receipt of your letter of June 19 requesting an opinion from this office upon the following state of facts:

> "I have been appointed the Appraiser of the Estate of Allie French deceased, for Inheritance Tax. In her will is the following clause; quote 'Thirteenth-Should Mercy Muir, of Edna, Kansas, (who is a sister of my late husband, James A. French) survive me, I direct that the sum of Two hundred fifty Dollars, be reserved and held for the purpose of defraying her funeral expenses at her death'.
>
> "Mercy Muir did survive Mrs. French and is alive to day. Is this $250.00 just a debt against the Estate or is it an inheritance that will be subject to tax? If subject to tax, what will the rate be? Please advise me soon."

Section 570, Laws of Missouri, 1931 provides:

> "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations

> or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state. *******

Under the facts as stated in your letter, the estate of Mercy Muir is certainly enriched to the extent of Two hundred fifty ($250.00) Dollars and so is within the provisions of Section 570, cited supra.

Therefore, it is the opinion of this office that the bequest of $250.00 to Mercy Muir is subject to inheritance tax in the State of Missouri at the rate of five (5) per centum.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General

JWH/AJ

597-597 R S Mo 1929

LIFE ESTATE: Taxation of.

July 19,1933

FILED
44

Hon. Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

This department is in receipt of your letter of July 17, 1933, in which you make the following request:

> "J. W. Craig died leaving a widow and no children. His estate is appraised at $17,000.00. His will provides a life estate in all his property for his wife, OR UNTIL SHE REMARRIES, in event of her death or remarriage, the estate passes to his three brothers and sisters." * *
>
> QUESTION: Does the provision that remarriage of the widow affect the use of the mortality tables in determining the value of a life estate and the amount of inheritance tax to be paid by the remainder of the estate?" * *"

Section 597 R. S. Mo. 1929, provides in part as follows:

> "* * *Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting."

In the case of In re Plum's Estate, 75 N. Y. S. 940, testatrix devised her residuary estate in trust, the income to be paid to her sister Mercy Plum, until her marriage or death unmarried, then the fund to go to the brother of the testatrix and her sisters S. & M. if living. The court held:

> "Mercy M. Plum is properly taxable on an estate for life, although, by her own act she may marry, and thus cut down her life estate to one for a term of years only." " "

Section 230 of the Tax Law provides as follows:

> " " "Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting." " "

This holding of the court is upheld by Gleason and Otis in their work "Inheritance Taxation", p. ~~254~~ 497, wherein it is said:

> "Whether the life estate be absolute or defeasible, as by remarriage, or per autre vie, whether subject to dower and curtesy, or whether it is coupled with a power to invade the principle or power of appointment, or limited by time, as surviving to a certain age; it is, in the contemplation of inheritance tax law, a present right presently valuable and taxable." " "

Section 595 R. S. Mo. 1929, provides in part as follows:

> "The value of every future or contingent or limited estate, income, or interest, shall, for the purposes of this article, be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities, and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum." * * *"

Therefore, it is the opinion of this department that the provision in the will of J. W. Craig that the life estate of his widow shall cease upon her remarriage does not affect the use of mortality tables in determining the value of the life estate and the amount of inheritance tax to be paid by the remainder of the estate, since under Section 597 R. S. Mo. 1929, an estate for life subject to be divested by the act or omission of the legatee or devisee shall be taxed as if there were no possibility of such divesting.

Very truly yours,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:MH

INHERITANCE TAX: Bequests to Missouri charities not subject to tax.

August 21,1933

FILED
44

Hon. Luke E. Hart
% Hart & Hart
Attorneys & Counselors
1303 LaSalle Building
St.Louis, Missouri

Dear Sir:

This department is in receipt of your letter of August 8, 1933, requesting an opinion as to the following state of facts:

> "Replying to your question, I would say that the property involved is to be used by the Ursuline Sisters in the state of Missouri.
>
> I trust that this information will enable you to give me an opinion to the effect that under the circumstances of this case the property bequeathed to Sister Honora for the use of the Ursuline Sisters in Missouri by Sister Thomasine is not subject to the payment of inheritance tax under the provisions of Section 602. As you probably know, the work of the Ursuline Sisters is religious and education entirely."

Section 602, R. S. Mo. 1929, reads as follows:

> "When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state, to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly

> , or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members."

Therefore, it is the opinion of this department that the bequest to Sister Honora for the use of the Ursuline Sisters in the State of Missouri, is not subject to inheritance tax in the State of Missouri.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

Attorney General.

JWH:MM

INHERITANCE TAX: Taxation of bequest to adopted dau
and husband.

September 20, 1933.

FILED
44

Hon. Forrest C. Donnell,
Telephone Building,
1010 Pine Street,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> '"In an estate which I have for appraisal in re Missouri Inheritance Tax, the testatrix left an interest in certain real estate 'to my adopted daughter Laura Schmidt and her husband William Alois Schmidt.' I shall thank you to inform me whether or not an inheritance tax will be assessable against the husband of said adopted daughter, assuming that the value of said interest so devised is in excess of $1,000.00. If a tax is assessable against him, please also inform me whether or not it is proper to assess him upon one-half of the value of the interest so devised to said devisees in said real estate."'

I do not believe there is any question but that the above bequest created an estate by the entirety in Laura Schmidt and her husband William Alois Schmidt. In the case of Lomax v. Cramer, 202 Mo. App. 365, the court had up for construction a bequest "to my brother, D.A. Robinson, and wife $5,000.00". In holding the bequest to create an estate by the entirety, the Court said:

> "There is no question but that in this State when a husband and wife take an estate by the entirety they hold not as separate individuals and by moieties but as one person each holding the whole of it. For this purpose they are a unit and upon the death of either the entire estate belongs to the survivor. It is also well established that there can be an estate by

> the entirety in personal as well as in real property. (Ryan v. Ford, 151 Mo. App. 689; Johnston v. Johnston, 173 Mo. 91). In such an estate the husband and wife each owns, not a part or a separable interest, but the whole; and, therefore, the death of one leaves the other still holding the whole as before with no one to share it. (Wilson v. Frost, 186 Mo. 311, 319; Frost v. Frost, 200 Mo. 474, 480)"

For further authority see Goldberg Plumbing Co. v. Taylor, 209 Mo. App., l.c. 101.

In view of the foregoing, Laura Schmidt and her husband, William Alois Schmidt, each and both own the whole estate during their joint lives, and upon the death of either, the survivor continues to own the whole estate. Each is seized of an indivisible entity so neither has a separate interest therein that can be aliened.

Therefore, it is the ruling of this office that the bequest be taxed at the rate of 3% with the statutory deduction of $500.00 allowable to the son-in-law.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

INHERITANCE TAX: Contingent remainder taxable though original bequest made before inheritance tax passed.

September 27, 1933

FILED
4-4

Mississippi Valley Trust Company
St. Louis, Missouri

Attention: C. A. Tolin, Associate
Trust Officer.

Dear Sir:

This department is in receipt of your request for an opinion from this office as to the following state of facts:

"We are acting as successor trustee under will of George Lich. This trust terminated on August 12, 1933, date of death of Mary A. Weidner, the last surviving child of the testator. Mr. George Lich died in 1891, and the will provides that on the death of the last surviving child, the trust shall terminate and the corpus divided among descendants of the testator's four children. The surviving descendants are as follows:

Angela Lich, daughter of George Lich, Jr.
Charles A. Lich and Florenz Elizabeth Abbott, children of Charles Lich.
Amy Stansbury, daughter and
Adele Hays, grand-daughter of Mary Weidner.

Elizabeth Lich, daughter of testator died in 1932 without issue.

We are enclosing a copy of the will of George Lich for your information. This will has been in litigation and we refer you to the case of Lich vs. Lich, 158 Mo. App. 400. In view of the fact this trust was created prior to the Missouri Inheritance Tax Law, we ask your opinion as to the liability for inheritance tax of the descendants of George Lich, to whom distribution will be made. The estate consists of one piece of real estate valued at $20,000.00 and $30,000.00 personal property."

It is well recognized that remainders that vested prior to the statute providing for an inheritance tax are not taxable at the death of the life tenant, and any such statute declaring them taxable is unconstitutional. Matter of Pell 171 N.Y. 48; 63 N.E. 789.

However, a different rule prevails where the remainder is contingent. Section 597 R. S. Mo. 1929, provides in part as follows:

> "* * *Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited.*****"

In view of this provision of the statute, if the descendants of George Lich are contingent remaindermen under the will then an inheritance tax is due to the State of Missouri.

> "A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event." 21 Corpus Juris 981.

In the case of "In Re Cupple's Estate"(Sup.Ct.) 199 S. W. 556, the Court in defining the word descendants, said:

> "In fact, the word "descendant," when applied to inheritance, includes those, and those only, who take by the law of descents in the descending line."

In view of this definition, it may be seen that at the testator's death, there was no assurance that there would be "descendants" capable of taking the property at the death of the last surviving life tenant. In other words, there was a contingency upon which the passing of the remainder interest was based. The Court, in the case of "In Re Hoadley" 101 Fed. 233, said:

> "* * * Besides the above considerations, the cases quoted by the referee, confirmed also by the still later cases of In re Brown, 154 N.Y. 313, 48 N.E. 537, Paget v. Melcher, 156 N.Y. 399, 51 N. E. 24, and Clark v. Cammann, 160 N.Y. 315, 54 N.E. 709, show that where, as under these wills, the testator directs a division of the estate into shares upon the termination of the life tenancy, and a gift to his children then living, or in the case of the death of either them to the lawful issue of any deceased child, the intent of the testator, if nothing else indicates the contrary, will be construed to be to convey to the future beneficiaries no estate or interest of any kind until the termination of the life estate; or as stated by Earl, J., in Delafield v. Shipman, 103 N.Y. 463, 9 N.E. 184;
>
> > 'He (the testator) vested the whole estate in the trustee during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or to be seized by their creditors; and after the death of his widow he gave it not to the children living at his death, but to the children and descendants of children deceased, living at her death.' Page 468, 103 N.Y., and page 185, 9 N.E.
>
> And again in Campbell v. Stokes, 142 N.Y. 23, 36 N.E. 811, Andrews, C.J., explaining the case of Townshend v. Frommer, 125 N.Y. 446, 26 N.E. 805, observes:
>
> > 'That case arose under a trust deed, whereby the grantor retained the beneficial use of the property for life, and which contained directions for the disposition of

> the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened.'
>
> In such cases, therefore, it is held that there is no alienable or descendible interest while the precedent life estate is outstanding.* * **

Fortunately for the solution of the problem before us, the will here under consideration has been construed by the St.Louis Court of Appeals. In the case of Lich v. Lich, 158 Mo. App. 400, the Court said (l.c. 430):

> "* * *The duration of the trust is 'so long as any of my children are alive, and upon the death of the last survivor it shall cease.' When this will undertakes to dispose of the estate at the end of the trust, it provides for its distribution on the death of the last of the four children, and the language used is 'the estate shall then be divided among the descendants of my said four children, said descendants taking per stirpes and not per capita.' It is to be observed of this clause that it does not provide for distribution on the death of the last of the four children among the grandchildren, as seems to have been thought by counsel and by the learned trial court, but it is then to be divided among 'the descendants of the four children.' The word grandchildren does not occur in the will at all. It cannot therefore be claimed that a vested remainder was lodged in the grandchildren or any one else by these terms. No one can now say who will be the descendants capable of taking. The taker might not be a grandchild. Hence there is no vested remainder even in the grandchildren.
>
> 'Descendants is a good term of description in a will and includes all who proceed from the body of the person named; as (children) grandchildren and great grandchildren.'(Black Law Dict.) As no one can say who will be the descendants of the children when all of the four die, the remainder is a contingent remainder."

There has therefore been a determination by the Court that the remainder interests passing to the descendants of the four children of the testator are contingent remainders. This being so, it is the opinion of this department that the estate passing to the said descendants is subject to an inheritance tax under the laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

JWH:MM

SCHOOLS: . Endorsement of second grade certificate. Teacher must have certificate throughout term of school.

9476-74 RSMo 1929

September 28, 1933.

10-2

FILED

44

47

Hon. David E. Impey,
Prosecuting Attorney,
Texas County,
Houston, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 7, 1933, which is as follows:

> "'Statement of Facts: A teacher now employed to teach a school in this, Texas County, holds a second grade certificate issued in another county on August 6, 1932. This certificate bears no state grades, but county grades only. This certificate was endorsed by the County Superintendent of Texas County on September 28, 1932 'for one year'; he refuses to reendorse it.
>
> Your opinion is requested upon the following points:
>
> First, Does the county superintendent have the right to restrict his endorsement to a period of one year, or does the endorsement validate the certificate in this county for the lifetime of the certificate, i.e., two years from date of issuance on August 6, 1932, without reendorsement?
>
> Second, If the restriction upon the endorsement is valid, can the teacher, having begun the current term prior to the expiration of one year from the date of endorsement by the county superintendent of this county, nevertheless continue to teach after September 28, 1933, until the termination of his existing contract to teach this school?
>
> This matter will be up for decision and

action by the County Superintendent on the 15th inst. and your very prompt advise will be appreciated.'"

On July 25 this department rendered an opinion to the Hon. Thomas A. Mathews, Prosecuting Attorney of St. Francois County, in which it was held that the County Superintendent in a situation such as you present, must endorse second grade certificates issued by the County Superintendent of another county regardless of whether the original certificate was issued on county grades or state grades. We are enclosing a copy of the opinion for your benefit.

The situation presented in your letter, however, differs in that the County Superintendent has endorsed the certificate, but for only one year and refuses to endorse for another year. Section 9474 R.S. Mo. 1929 refers to the endorsement of certificates, and the part applicable is as follows:

"****Provided that the county superintendent must indorse without examination second grade certificates from other counties in this state on the payment of a fee of one dollar and fifty cents; and such second grade certificate, when thus indorsed by the county superintendent, shall entitledthe holder thereof to all the rights and privileges granted under and by a teacher's certificate issued by such superintendent under a regular examination, and shall not be revoked unless specified charges be made and filed with the county superintendent, notice thereof be given and an impartial hearing be had thereon, as is fully provided for in section 9476."

Having held in the enclosed opinion that the County Superintendent must endorse the certificate, then under the above quoted section the holder of the certificate is in the same position as "under a regular examination", and the endorsement would be for the period of the certificate and the Superintendent would have no authority to endorse only for one year. His endorsement for one year only is in substance a revocation of the certificate and this he could not do except under the conditions as set out in Sec. 9476 R. S. Mo. 1929 as follows:

> "The county superintendent may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract. All charges must be preferred in writing, signed and sworn to by the party or parties making the accusation, which must be filed with the county superintendent, and the teacher must be given due notice, of not less than ten days, an opportunity to be heard, together with witnesses.********* "

The decision in the case of State ex inf. Burgess v. Hodge, 8 S. W. (2nd) l. c. 883, bearing on the point is as follows:

> "This certificate was evidence of a valuable right vested in respondent, not only to teach school in any county in the state for a full period of three years, but to have that right renewed or extended 'an unlimited number of times' on the sole condition (for the proof was that respondent 'had had five years' experience in teaching and was employed as a teacher January 1, 1912,' and held a first-grade certificate), that he be faithful in the performance of his professional duties. Section 11361, supra. Certainly the county superintendent of public schools was without power to shorten the three-year period evidenced by the certificate except by revoking the same for cause (section 11364, R. S. 1919,), and it is nowhere contended that he did this."

As to the second question "can the teacher having begnn the current term prior to the expiration of one year from the date of endorsement by the county superintendent of this county nevertheless continue to teach after September 28, 1933, until the termination of his existing contract to teach this school", in the decision of School District v. Edmonston, 50 Mo. App. l. c. 69, the Court said:

> "II. It is urged against defendant, that her contract was void for another reason, viz: That she had not, when employed, a teacher's certificate for the period of

her employment. The facts are that she was employed in May for a six months' term beginning in September, and that she had, at the time of her employment, a certificate which expired the following July. That on its expiration, she obtained another certificate for another year, thus covering the period of her engagement to teach. That this certificate was dated back to May so as to cover the day she was employed.

Under sections 7995 and 8021, Revised Statutes, 1889, it is necessary to the validity of a teacher's contract that she shall have a certificate to teach, and it is provided in the former section that: 'The certificate must be in force for the full time for which the contract is made.' A proper and reasonable construction of this statute does not require that the teacher shall, at the time of employment, have a certificate which reaches to the end of term of such employment, provided that during the term of such employment he has the proper certificate. Certainly no more should be asked of the teacher than that he renew his certificate at its expiration, as is permitted by sections 8030 and 8031. It is provided in section 7996, that if a teacher's certificate be revoked the contract shall become void, and doubtless the same result would follow if the teacher should fail to have a certificate renewed which had expired during the term of employment."

Also, in the decision cited in Hibbard v. Smith, 135 Mo. App. 721, the court said:

"The clauses regarding the certificate to teach contained in section 9766, have been construed in connection with other statutory provisions regarding teachers' certificates contained in section 9796, and held to mean the teacher must hold a certificate through the entire term of the employment, but that this requirement will be satisfied by holding a certificate yet in force when the hiring occurs and obtaining another upon

> its expiration, to extend over the term. Such was the decision in a case identical with the one at bar in the facts bearing on the immediate point. (School Dist. v. Edmonston, 50 Mo. App. 65.) We consider this interpretation of the statute sound. It was not proved plaintiff deposited or filed her certificate with the clerk before the latter attested the contract, as the statute says shall be done, but we do not regard this omission as fatal to the employment. (Saleno v. Neosho, 127 Mo. 627.) She held a certificate then, and later, when asked to produce a certificate, proffered for filing one extending over the six months' term, but the directors declined to accept it.* * * * * * * * *"

In the decision of State v. School District, 324 Mo. l. c. 502, the court further upholds the above decisions as follows:

> "Error is assigned by appellant in the action of the trial court in striking from defendant's answer the affirmative defense that plaintiff did not have on file with the clerk of defendant school district, on December 18, 1924, a certificate of qualification authorizing her to teach in the public schools of Gentry County for the full time of employment provided by the contract of December 18, 1924. Section 11137, Revised Statutes 1919, provides: 'The certificate must be in force for the full time for which the contract is made.'
>
> On December 18, 1924, the date of execution of the contract of employment, plaintiff held a certificate of qualification, issued and signed by the superintendent of schools of Gentry County, authorizing her to teach in the public schools of said county until August 31, 1925, and such certificate was then on file with the clerk of defendant school district. Another certificate of qualification was issued to plaintiff by the Superintendent of Schools of Gentry County on August 31, 1925, authorizing plaintiff to teach in the public schools of said county until August 31, 1927. Such was a sufficient

> compliance with the statutory requirements. It has been consistently and repeatedly ruled that a proper and reasonable construction of the statute does not require that the teacher shall have, at the time of employment, a certificate which extends to the end of the term of employment, provided that, during the term of employment, such teacher has the proper certificate.* *"

In view of the above decisions, it is the opinion of this Department that a school teacher is not compelled to have, at the time of employment, a certificate which extends throughout the term of employment, but the school teacher must have during the term of employment, a proper certificate.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:AH

INHERITANCE TAXATION: Transfer by will subject to tax regardless of motive or consideration.

FILED 44

October 4, 1933 10/7

Mr. Wm. J. Baggerman
1110-1112-1114 Washington Avenue
St. Louis, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion as to the following state of facts:

> "I have been informed by the Appraiser for inheritance tax purposes in an Estate of which I am Executor that your office has ruled that a 5% Inheritance Tax is payable on an inheritance where a sum was bequeathed for services actually rendered over a ten year period and so stated in the will.
>
> Will you kindly give me such citation as you can so that I may determine whether the statement is correct or not."

Under the facts as contained in your letter we are not dealing with a transfer of proper inter vivos but with a transfer of property accomplished by will. Transfers actually accomplished by will have almost always been held taxable, even when the will was made in pursuance of an antenuptial agreement for the consideration of marriage or other consideration. The theory of the law is that the tax runs against transfers by will and that the motive for the transfer cannot affect its character, and that if the beneficiary takes under the will he cannot avoid tax on the theory that he might have elected to take under the agreement, if one there be, and present his claim as a debt against the estate. Pinkerton - Inheritance and Estate Taxes; Gleason & Otis - Inheritance Taxation, (4th Edition).

In the case of Clarke v. Treasurer, 226 Mass. 301,115 N.E.416, the testator made a will containing this clause:

> "If my housekeeper,Sarah Elizabeth Willgoose, continues to discharge her duties to my satisfaction and I retain her in my employ until my death, I give her two thousand ($2,000) dollars, with the additional sum of five hundred ($500) for each year after I am eighty years old, and a proportionate part of five hundred ($500) dollars for the fraction of a year. The said legacies to the said Sarah Elizabeth Willgoose to depend entirely upon my retaining her in my employ until my decease, and I am to be sole judge of whether her services continue efficient and satisfactory."

In holding the transfer subject to tax, the Court said:

> "The question is whether this legacy is subject to the excise tax imposed by St.1912,c.678,Sec.1,which must be levied on 'All property within the jurisdiction of the Commonwealth, corporeal or incorporeal,.....which shall pass by will, or by the laws regulating intestate succession, or by deed,grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor. ******
>
> It is plain that the will gives a legacy. The property passes to the housekeeper by reason of the will. The antecedent contract between the parties required the testator to make a will and therein 'bequeath' a definite sum with a rule for its increase by lapse of time. This contract was executed exactly according to its terms. The promise of this contract, if kept, does not give rise to a debt. It is in this respect

> distinguishable from that before the court in Krell v. Codman, 154 Mass. 454. It simply creates an obligation to give a legacy by will. It is a contract not unusual in its substance. Contracts to make a legacy not infrequently come before the courts. Howe v. Watson, 179 Mass. 30. Wellington v. Apthorp, 145 Mass. 69.**********
>
> There are no words of exception or limitation in the statute which indicate any legislative purpose to exempt from its sweeping provisions a legatee standing as does the one at bar."

In the case of Richardson v. Lane, 126 N. E. 44, 234 Mass. 403, decedent, in consideration of an agreement to provide her suitable maintenance for life, agreed to pay the petitioners $300 in cash, and to make a will devising her house to them in fee simple, both of which she did. In holding the transfer subject to tax, the Court said:

> "For the reasons stated in a similar case of Clarke v. Treasurer, 226 Mass. 301, 115 N. E. 416, it is plain that the property passed to the Richardsons by reason of the will and that the devise is subject to an inheritance tax under St. 1909, c. 490, Pt. 4, Sec. 1, as amended by St. 1912, Chapter 678, Sec. 1."

The case of the Matter of Gould, 156 N. Y. 423, 51 N. E. 287, is illuminating on this point so far as the courts of Missouri are concerned, for the reason that their inheritance tax law finds its origin in the inheritance tax laws of New York and Illinois. In that case, Jay Gould, shortly before his death, agreed with his son that the value of the latter's services in his father's business for twelve years amounted to $5,000,000, and that the father was indebted to his son to that extent. He thereupon made a will, reciting the facts respecting the services the son had rendered him, and fixed their value at the agreed amount. The court in holding that this bequest was subject to a legacy tax, said (l.c.288):

> "It is certainly within the constitutional power of the legislature to tax all property transferred by will, whether the motive of the testator be to make a gift or pay a debt, and the language, absolutely unambiguous and

> free from saving clauses, which the legislature employed to accomplish that result, affords the best indication that the word 'transfer' in the statute is used advisedly and according to its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter. Bouv. Law Dict. Indeed, it can easily be imagined that the legislature aimed to prevent parties from avoiding payment of the tax by changing intended beneficiaries into testamentary creditors. It matters not what the motive of a transfer by will may be-- whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection -- if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the state, by the statute in question, makes a tax to impinge upon that performance."

In State v. Mollier (Sup. Ct. Kan.) 152 P. 771, a will was executed bequeathing all the property of the testator to his niece in pursuance of a contract entered into between them many years before, by which she agreed to live with and care for him as long as he lived. The Court held that the property passed by will and was liable to the succession tax imposed by the Inheritance Tax Law, and that the provision exempting from the operation of the Act the case of a bona fide purchase for full consideration in money or money's worth was intended to apply solely to transfers by deed or grant made in contemplation of death, and that it had no application to the transmission of property by will. The court said (l. c. 772-773):

> "The Legislature, however, recognized the force of 'the ruling passion strong in death', and also the fact that the experience of other states was demonstrated that various shifts and devices would naturally be resorted to by the owners of large estates for the very purpose of avoiding taxes upon successions and inheritances, and that actual transfers of property would frequently be made in

> contemplation of death with the intent that the property transferred should escape the tax. This is what the Legislature had in mind by the provision that the succession should be taxed in all cases, except where the transfer, made by deed or grant in contemplation of death, was supported by a 'full consideration' either in money or in money's worth."

The case of Carter v. Craig, (Sup. Ct.N.H.)90 Atl. 598 is a case similar in point of fact to the Mollier Case, supra; however, the wording of the Court is illuminating on this point:

> "It can make no difference that there was a valid consideration for the contract to transfer the property by will. The imposition of the tax is not limited to property passing gratuitously by will, but extends to 'all property ' so passing. If the Legislature had intended to limit the imposition of the tax to property passing gratuitously, it could easily have said so; but, by providing that all property passing by will should be subject to the tax, it manifested an intention not to limit it. Matter of Gould, 156 N. Y. 423, 51 N. E. 287; State Street Trust Co. v. Friebe, 209 Mass. 375; 95 N. E. 851."

Therefore in view of the cases cited herein, it is the opinion of this office that where there is a transfer of property accomplished by will that the transfer is subject to an inheritance tax in the State of Missouri, regardless of the consideration and motive for the transfer.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JWH:LC

LEGISLATURE: Validity of the Act of extra session introduced prior to message on subject.

November 10, 1933

FILED NO. 44

Hon. F. J. Iffrig
House of Representatives
Jefferson City, Missouri

My Dear Mr. Iffrig:

We render you the following opinion in accordance with your oral request for advice as to the constitutionality of an act which was introduced in the House prior to the time the subject matter of such act was referred to the General Assembly by the special message of the Governor.

We shall first refer to the constitutional provisions respecting the powers of the General Assembly in extra session. Portions of Section 9 of Article 5 of the Constitution reads as follows:

> "* * *On extraordinary occasions he (the Governor) may convene the General Assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary."

And Section 55 of Article 4 of the Constitution reads as follows:

> "The General Assembly shall have no power, when convened in extra session by the Governor, to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened."

The foregoing constitutional provisions are self-enforcing and have been held to be mandatory. 295 Mo. 402. Whether or not a bill introduced prior to the special message may be proceeded upon is controlled by the proper interpretation to be placed upon the phrase "to act" as used in Section 55 above quoted. There seems to have been no direct decision on this

matter but in our opinion the case of Wells vs. The Missouri Pacific Railroad Company, 110 Mo. 286, leads us to the correct interpretation of this phrase. In that case the Court was considering a law enacted in special session in respect to railroads, and after holding that the act did not fall within the Governor's special message, the Court considered the effect of the Governor's approval of the bill as ratifying or validating the act. The Court in referring to the process through which a bill goes before becoming a law, stated at page 297:

> "* * *When the people have declared a certain form indispensable to the proper expression of their will, it is no part of our function to adjudge that form unnecessary or immaterial. On the contrary, our bounden duty is to enforce that declaration.
>
> It follows that the 'act' in question cannot be sustained as a constitutional exertion of the law-making power.
>
> That position being reached, it is unimportant that the governor, by his formal signature, in due course, approved the bill after its passage by the general assembly.
>
> By the terms of the constitution the legislative power to act in the premises depended on the governor's taking the initiative, by a proclamation or a message. His subsequent approval cannot be accepted as a substitute for these earlier steps which the fundamental law prescribes.* * *"

In Webster's we find the verb 'act' as meaning "to exert power." The introduction of a bill is an exertion of legislative power required in the process of enacting a valid law. Under the decision in the Wells case, the General Assembly in special session is without the power to act until the Governor has taken the initiative and placed the matter before the assembly. It is accordingly the opinion of this office that no validity has been given the act in question by the subsequent message of the Governor.

We return herewith two copies of the bill, one typewritten and one printed, but as we understand your inquiry, the only information you desired on this bill has been answered in the foregoing opinion. We do not pass upon any other feature of the Act.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

_____
Attorney General.

, INHE .E TAX: (a) Where property passes by will by virtue of power of appointment contained in earlier will, the transfer is taxed as part of the estate of the decedent who died last.

(b) The relationship of the grantee to the donee of the power determines the rate of tax.

11-23

November 13, 1933.

A - 591 Laws 1929

FILED

Mr. Henry A. Baker,
1018-22 Federal Commerce Trust Bldg.,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter of October 26, 1933 in which you request an opinion as to the following state of facts:

> "In the above estate the decedent exercised a power to dispose of property by her last will, which power was given her by the last will of A.P. Ghio, deceased.
>
> I, myself, have always held in cases like this that the property disposed of by the exercise of the power passes under the will of the decedent who created the power, and that the relationship which controls and by which the inheritance tax was determined, was the relationship of the beneficiary to the decedent creating the power. In the above estate, however, the attorney for the executor has advanced the theory that it is the relationship of the beneficiary to the person who exercised the power that controls. This theory does not seem right or reasonable to me; however, I shall be guided by your opinion in the matter.
>
> I am all ready to tax the estate, so I would very much appreciate a prompt ruling from you. The two propositions of law to be determined are as follows:
>
> 1. Where the power is exercised in transferring property, does the property pass under the will of the testator creating the power, or under the will of the testator exercising the power?
>
> 2. In determining the inheritance tax,

must the relationship of the beneficiary to the person exercising the power, or to the person who created the power, be taken into consideration? Which controls?

I.

Where property passes by will by virtue of power of appointment contained in earlier will, the transfer is taxed as part of the estate of the decedent who died last.

Section 571, R.S. Mo. 1929 provides in part as follows:

"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this law, such appointment when made shall be deemed a transfer taxable under the provisions of this law in the same manner as though the property to which said appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donor by will; ****"

The Missouri Inheritance Tax Law was taken either from the State of New York or the State of Illinois.

"Our statute covering this particular subject **** was either borrowed from New York or Illinois."

In Re Kinsella's Estate,
293 Mo. 545.

In construing the Missouri law, therefore, we may have recourse as pursuasive to the construction put upon the law in cases which construe the New York Law. In the case of the Matter of Dows, 167 N.Y. 227, affirmed by the Supreme Court of the United States in 183 U.S. 228, the Court held:

"****But whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to-wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a

> privilege accorded by the state which it may tax or charge for, it follows that the right of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the state. When David Dows, Sr. devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will. ****"

CONCLUSION

Therefore, in view of the foregoing, transfers occasioned by the exercise of a power of appointment are taxable to the same extent as though the donee of the power were the absolute owner of the property transferred, and the property passes under the will of the testator exercising the power.

II.

The relationship of the grantee to the donee of the power determines the rate of tax.

Under the common law rule relationship to the donor of the power of appointment and not the donee determined the rate of tax. Gallard v. Winans, 111 Md. 434, 74 Atl. 26. However, under the statutory rule the common law rule is reversed.

It will be noticed that Section 571, R.S. Mo. 1929, as set out, supra, provides that the transfer shall be taxable as though the property to which said appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donor by will.

In the case of Matter of Rogers, 71 App. Div. (N.Y.) 461, the Court had before it this identical problem in connection with the New York Statute, which is substantially similar to the Missouri law. In that case a testator who died in 1869, by his will gave his wife a life estate in certain real and personal property together with the power to dispose of such property by will. The widow died in 1900 leaving a will, by which she exercised the power of appointment as to the bulk of the real and personal property in favor of her brother, who was a stranger in blood to her husband. It was held that under the provisions of subdivision 5 of section 220 of the tax law (Laws of 1896, Chap. 908, as amd. by Laws of 1897, chap. 284)

the property should, for the purposes of the transfer tax, be regarded as passing directly from the widow to her brother, and that under the provisions of section 221 of the Tax Law the transfer was taxable at the rate of one per cent upon the personal property alone, and that it was not taxable at the rate prescribed in section 220 of the Tax Law, to-wit, five per centum upon both the real and personal property. The Court said:

> "'Subdivision 5, section 220, of article 10, chaptor 908 of the Laws of 1896, as amended by chapter 284 of the Laws of 1897, provides: 'Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will.' This provision of law was before this court in Matter of Seaver (63 App. Div. 283), and it was there held that section 220 expressly declares that it is the exercise and not the creation of the power of appointment which effects the transfer upon which the tax is enforced; hence the fund must, for taxing purposes, be regarded as having passed from mother to son, and the case is governed by section 221 and not by section 220. (Citing authorities at p. 286.)
>
> Wilmer S. Wood is a brother of Virginia B. Rogers, deceased, and, under the appraisal and order as it now stands, is made subject to a tax of five per centum upon both the real and personal property coming to him under the will. If the provision of the statute above cited means anything, it is that, for the purposes of this tax, the property is to be regarded as coming directly from Virginia B. Rogers to her brother; and, under the provisions of section 221 the tax is fixed at one per centum upon the personal property alone.'"

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that in determining the inheritance tax rate under a power of appointment, the relationship of the beneficiary to the person exercising the power of appointment controls.

Respectfully submitted,

APPROVED:

ROY McKITTRICK
Attorney General

JOHN W. HOFFMAN, Jr.
Assistant Attorney General.

INHERITANCE TAX: A contingent remainder is taxable although the original trust was created prior to the passage of the Mo. inheritance tax law.

11-23

November 14, 1933.

FILED
4/4
59

Mississippi Valley Trust Company,
St. Louis, Missouri.

Gentlemen:

This department is in receipt of your request for an opinion as to the following state of facts:

> "'The Mississippi Valley Trust Company is successor trustee under the will of William L. Ewing, deceased. Mr. Ewing died on October 22, 1873. The original trustees were his wife and his two sons. The trust is for the life of his daughter, Clara Louisa Ewing, and the will provides:
>
> > 'and it is my will that at the death of my said daughter CLARA LOUISA leaving children surviving, said principal shall be paid and conveyed to said children share and share alike discharged of this trust, and if said CLARA LOUISA shall die leaving no children surviving then the principal fund shall vest in my right heirs.'
>
> The daugher Clara Louisa Wilson died this year and the property passes to her following five children: Louise W. Schwarz, Victor Wilson, William Sydney Wilson, George K. Wilson and Alfred C. Wilson. The total value of all the property constituting the trust fund is $59,000.00.
>
> It is our opinion that this trust fund is not subject to inheritance tax and we ask that you issue an unconditional waiver to transfer the assets of this trust to the five children of Mrs. Wilson.
>
> For your information we are enclosing herewith a photostatic copy of the will. We refer you to Item 7, which covers the trust in question. '"

I.

A contingent remainder is taxable although the original trust was created prior to the passage of the Missouri Inheritance Tax Law.

It is well recognized that remainders that vested prior to the statute providing for an inheritance tax are not taxable at the death of the life tenant, and any such statute declaring them taxable is unconstitutional. Matter of Pell, 171 N.Y. 48; 63 N.E. 789.

However, a different rule prevails where the remainder is contingent. Section 597 R.S. Mo. 1929 provides in part as follows:

> "****Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. ****"
>
> "A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event."
>
> 21 Corpus Juris, 981.

Item 7 of the will of William L. Ewing, deceased, provides for certain payments to the daughter, Clara Louisa, during her natural life, free from all control or interference of her husband should she thereafter marry. At the time the will was executed the daughter of William L. Ewing was evidently unmarried and there were therefore no children in existence to whom the will could have been held applicable. At testator's death there was no assurance that there would be any children surviving the daughter of William L. Ewing capable of taking the property at the death of said daughter. In other words, there was a contingency upon which the passing of the remainder interest was based.

In the case of In Re Hoedley, 101 Federal 233, the Court said:

"'****Besides the above considerations, the cases quoted by the referee, confirmed also by the still later cases of In Re Brown, 154 N.Y. 313, 48 N.E. 537, Paget v. Melcher, 156 N.Y. 399, 51 N.E. 24, and Clark v. Cammann, 160 N.Y. 315, 54 N.E. 709, show that where, as under these wills, the testator directs a division of the estate into shares upon the termination of the life tenancy, and a gift to his children then living, or in the case of the death of either then to the lawful issue of any deceased child, the intent of the testator if nothing else indicates the contrary, will be construed to be to convey to the future beneficiaries no estate or interest of any kind until the termination of the life estate; or as stated by Earl, J., in Delafield v. Shipman, 103 N.Y. 463, 9 N.E. 184:

> 'He, (the testator) vested the whole estate in the trustee during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or to be seized by their creditors; and after the death of his widow he gave it not to the children living at his death, but to the children and descendants of children deceased, living at her death.' Page 468, 103 N.Y., and page 185, 9 N.E.

And again in Campbell v. Stokes, 142 N.Y. 23, 36 N.E. 811, Andrews, C.J., explaining the case of Townshend v. Frommer, 125 N.Y. 446, 26 N.E. 805, observes:

> 'That case arose under a trust deed whereby the grantor retained the beneficial use of the property for life, and which contained directions for the disposition of the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened.'

In such cases, therefore, it is held that there is no alienable or descendible interest while the precedent life estate is outstanding. ****"

Page on "Wills ", Section 1119, defines "contingent remainder" as follows:

> "'A future interest is contingent if the person to take is not in existence, as where the gift is to children, heirs of the body, and the like of one who, at that time, has no living descendants.
>
> It is also contingent where, by the terms of the gift, the beneficiaries can not be ascertained until the happening of some future event. Where a devise is made to a class in such terms that the class can not be ascertained at the death of the testator, but must be ascertained at some future time, the interest of the members of such class corresponding to such description is a mere contingency until such class is definitely ascertained. A gift to the 'heirs' of a certain person, to be ascertained at some time in the future, 'heirs' being used in its primary meaning, and not as equivalent to children; or a gift to the members of a class, such as children, who may be living at some future period of time, is contingent. A gift to A for life and at his death to his children and the heirs of such as might be deceased, or to the survivors of a class, as to A's children or the survivors of them, or to A and his children if he has any living, is a contingent remainder.'"

In the case of Dickerson v. Dickerson, 211 Mo. 483, the testator by will gave to his wife the use and income of his dwelling house and the 200 acres of land in controversy "to have and to hold the same for her during the term she may remain my widow. If she marries or ceases to be my widow, the farm then reverts to my children to be equally divided between them and at her death, the said farm to be divided between my surviving children and grandchildren if any whose parents are dead". Judge Woodson, after an exhaustive opinion, held that the will created a contingent remainder in the children which vested in the children alive at the wife's death and the child who died before she did leaving no children of his own took no interest in the estate. Judge Woodson said:

> "'And if those words referred to the death of the testator, why did he provide in the will that upon the death or marriage of his widow, the farm should then go to his children, and further provide in the same clause of the will that the land should at that same time be equally divided between his 'surviving children, and grandchildren if any whose parents are dead?' If it was the intention of

the testator to give the farm to such of his children as were living at the time of his death, then we are unable to see what he meant by the use of the words 'and at her death said farm to be equally divided between my surviving children and grandchildren, if any whose parents are dead.' Conceding the testator, at the time of his death, knew which of his children were then living, yet neither he, because of his death, nor any other person could tell which of his children would be dead and leave living children at the time of the death or marriage of the testator's widow. And yet, by the express terms of the will the estate was not to terminate until the happening of one of those events, and at the same time the remainder was to pass to and be divided equally between his children and grandchildren then living. There was not only an uncertainty as to which of his children would be alive at the time of the termination of the particular estate; but there was also a further contingency which could not be forseen, and that was which, if any, of his children would be dead, leaving surviving children at the marriage or death of the widow. If, upon the other hand, those words refer to the death or marriage, they become of much significance by making definite and certain the persons who are to take the remainder after the termination of the particular estate.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the property passing to the children of Clara Louisa Wilson by reason of the will of William L. Ewing is subject to the inheritance tax laws of the State of Missouri. The remainder interests of the children were contingent until the death of Clara Louisa Wilson this year, and by Sec. 579 R.S. Mo. 1929, supra, are especially made subject to the inheritance tax of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

ERITANCE TAX: Advancements, as such, are not subject to the Inheritance Tax Laws of the State of Missouri.

Acc 5710 Laws 21

11-23

November 15, 1933.

FILED
44
59

Hon. Dockery Wilson,
Prosecuting Attorney,
Harrison County,
Bethany, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> '"The Probate Judge has asked me to write to you for an opinion in regard to inheritance tax findings. The facts are:
>
> The Executor of the Estate of Charles W. Burgess, deceased, found among the papers in deceased's bank box, an envelope containing receipts amounting to $7200.00. These receipts were for money given to the heirs in 1922 and on the receipts and envelope was written 'This is advancement.' The will of the deceased made no provision about the advancement in any way. Question: Is this amount subject to inheritance tax? Also, should this amount be deducted from the heirs to which the advancements were made at final settlement?'"

I.

"Advancements", as such are not subject to the Inheritance Tax Laws of the State of Missouri.

"The mere fact that a gift inter vivos is to be considered as an advancement to the donee and deducted from any amount he may receive from the donor's estate does not necessarily bring the transfer within the terms of a statute taxing transfers in

> contemplation of death or intended to take effect in possession or enjoyment after the death of the transferror."
>
> 61 C.J. p. 1656.

The Missouri Inheritance Tax Law was taken either from the State of New York or the State of Illinois.

> "Our statute covering this particular subject **** was either borrowed from New York or Illinois."
>
> In Re Kinsella's Estate, 293 Mo. 545.

In construing the Missouri law, therefore, we may have recourse as pursuasive to the construction put upon the law in cases which construe the New York law. In the case of In Re Mead's Estate, 194 N.Y.S. 349, the Court held:

> "Gifts to children by deeds are complete and so not subject to transfer tax, notwithstanding agreements that the conveyances should be considered as advancements out of grantor's estate, to be deducted from any amount thereafter becoming payable to the grantees from grantor's estate, the agreements being merely in diminution of their bequests."

In the case of Kratz's Estate, 72 Pa. Super. 232, the Court held:

> "Where a testator had made irrevocable gifts in his lifetime, which had passed from him and which were not a part of the estate of which he died possessed, such advancements are not subject to the payment of the direct inheritance tax and the amount of them is erroneously included in an appraisment and a tax assessed on them by the appraiser for the purposes of determining the direct inheritance tax in invalid."

Therefore, unless the "advancements" come within Section 570, Laws of Mo. 1931, p. 130 providing for an inheritance tax to be imposed upon the transfer of property made in contemplation of death, there can be no inheritance tax assessed.

> "'To have a taxable transfer under a statute taxing transfers 'in contemplation of death' not only must there be a contemplation of death, but it must be shown that such contemplation was the direct and moving cause of the transfer or gift; and if something other than the contemplation of death is the controlling motive for the transfer, it is not taxable.'"
>
> 61 C.J., p. 1656.

According to the facts as given to us in your letter, these advancements were made in 1922. The date of death of Charles W. Burgess is not given, but it may be safely assumed that it took place in the year 1933, eleven years after the advancements were made to the heirs. In view of this fact, the theory that these advancements were made "in contemplation of death" is untenable.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the advancements made to the heirs of Charles W. Burgess in 1922 are not subject to the Inheritance Tax Law of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

INHERITANCE TAX: A bequest to A for life and remainder to heirs is a contingent remainder.

A contingent remainder is taxable although the original bequest be made before the Inheritance Tax Law of the State of Mo. was passed.

11-23 2110 - 1119 R S Mo 1929

November 16, 1933.

FILED

Mr. J.D. Moore,
Rich Hill, Missouri.

Dear Sir:

This department is in receipt of your letter of October 26, 1933 in which you request an opinion as to the following state of facts:

> "Mrs. Mitchell asked me to assist her in making an inheritance tax return.
>
> Her father made a will in 1895, probated in 1896. After the formal part and sundry bequests and naming an executor, the will provided for a trustee, named by him in the will, to handle the property until such time as it could be apportioned by a commission appointed by the court to divide the land into three equal lots. This commission divided the land as provided in the will into three equal parts or lots and provided that the one part set aside to his son during his natural life and to his heirs.
>
> The son took charge and handled the part set aside to him from that time until his death this year. The provision of the will in setting aside this lot to the son states that he was to have use and control and benefit of the lot so apportioned to him during his life and then at his death to his heirs. It now developed that the heirs of the son was the same as set aside by the will to the other interests. That is to say, they were the heirs of both the maker of the will and the son. On the death of the son the heirs took control of the land and divided it by partition in the Circuit Court among themselves. The attorneys consulted by me disagree in regard to whether the land is subject to inheritance tax."

A bequest to A for life and remainder to A's heirs is a contingent remainder.

Section 3110, R.S. Mo. 1929 provides as follows:

> "Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited to them."

In the early case of Emmerson v. Hughes, 110 Mo. 627 (1892), Judge Black in construing a conveyance of land "to C for her natural life with remainder to the heirs of her body", held (l.c. 631):

> "'The deed here in question would, it is believed, create an estate tail at common law under the influence of the rule in Shelley's case. Section 8838, Revised Statutes, 1889, first enacted in 1835, abolishes the rule in Shelley's case (Riggins v. McClellan, 28 Mo. 23; Tesson v. Newman, 62 Mo. 198; Muldrow v. White, 67 Mo. 470), and at the same time declares what effect shall be given to a deed like the one now in question. It provides: 'Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited in them.' ***** The statute just quoted converted the estate tail, created by the deed at common law, into a life estate in the first taker with a contingent remainder in fee simple in favor of those persons who should answer the description of heirs of the body of the tenant for life.'"

In the case of Wiggins, et al. v. Perry, et al., (Sup. Ct. Mo. 1925), 271 S.W. 815, the Court had before it a will devising property in trust for the sole benefit of the testator's daughters during their natural lives with remainder over to the heirs of their body. The Court held:

"'In the light of the foregoing authorities, it seems to us perfectly clear that the daughters of the testator in this case take life estates only under his will. Assuming this to be so, it only remains to determine the nature of the interests which are given to the remaindermen. Is it contingent or vested? The learned trial court held that the remainders were contingent, and with this view the authorities both in this state and elsewhere appear to be in complete accord. The last two cases on this subject in the state are Hartnett v. Langan, 282 Mo. 471-492, 222 S.W. 403, and Schee v. Boone, 295 Mo. 212-224, 243 S.W. 882. In the Hartnett Case the gift was in this language, 'I give, bequeath and devise to my niece, Winifred Langan for life the other half of the residue of my estate, remainder in fee to the heirs of her body, or in default of such issue' then over, and it was held, at page 493 (222 S.W. 410) that the remainder was purely contingent, and Goodman v. Simmons, 113 Mo. 122-126, 20 S.W. 972, and Emmerson v. Hughes, 110 Mo. 627, 19 S.W. 979, were cited, where similar rulings were made. The authorities outside of this state are to the same effect: DuBois v.Judy, 291 Ill. 340-347, 126 N.E. 104; Walcott v. Robinson, 214 Mass. 172-178, 100 N.E. 1109; Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406-412, 94 N.E. 669; Aetna Life Ins. Co. v. Hoppin, 214 F. 928-933, 131 C.C.A. 224;Baxter v. Bickford, 201 Mass. 495-496, 88 N.E. 7; Coolidge v. Loring, 235 Mass. 220, 126 N.E. 276; McKinney's Estate, 260 Pa. 123-128, 103 A. 590; Gadsden v. Desportes, 59 S.C. 131, 17 S.E. 706.

We therefore respectfully submit that the will of John E. Liggett, construed according to its true intent and purpose, creates life estates only in his daughters, with contingent remainders over in the heirs of their respective bodies, and that the lineal descendants only of each daughter who answers the description of such heirs at the time of her death take such remainders, and that the trial court was clearly right in so ruling.'"

The decisions we have quoted above have reference to the rules of law applicable to life estates with remainder in fee tail. In the case here under consideration, however, we have a life estate with remainder to the heirs of the life tenant.

In the case of Green v. Irvin (Sup. Ct. Mo. 1925), 274 S.W. 684, the Court held that the rule of law laid down in the case of

Emmerson v. Hughes, supra, was applicable whether the remainder be limited to heirs or to heirs of the body. The Court said:

> "'Nor does the fact that in Emmerson v. Hughes and the other cases the remainder was limited to heirs of the body make the rule inapplicable to this case. Whether the remainder be limited to heirs, or to heirs of the body, in either event, it could not be told who will be such heirs until the death of the life tenant. Section 2269, R.S. 1919, is as follows:
>
> > 'Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers, in fee simple, by virtue of the remainder so limited in them.'
>
> This section appears in that form in R.S. 1845, p. 220, sec. 7, and in all subsequent revisions. Its terms were applied in Hartnett v. Langan, 282 Mo. loc. cit. 492, 222 S.W. 403, a case wherein the remainder was limited to heirs of the body. Se, also, Schee v. Boone, 295 Mo. loc. cit. 224, 243 S.W. 882, and Cox v. Jones, 229 Mo. 53-64, 129 S.W. 495.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the bequest to the son for life and remainder to his heirs, created a contingent remainder in the heirs of the son.

II.

A contingent remainder is taxable although the original bequest be made before the inheritance tax law of the State of Missouri was passed.

It is well recognized that remainders that vested prior to the statute providing for an inheritance tax are not taxable at the death of the life tenant, and any such statute declaring them taxable is unconstitutional. Matter of Pell, 171 N.Y. 48; 63 N.E. 789.

However, a different rule prevails where the remainder is contingent. Section 597, R.S. Mo. 1929 provides in part as follows:

> "****Estates in expectancy which are contingent or defeasiable and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. ****"

> "A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event." 21 Corpus Juris, 981."

Page on "Wills", Section 1119, defines "contingent remainder" as follows:

> "'A future interest is contingent if the person to take is not in existence, as where the gift is to children, heirs of the body, and the like of one who, at that time, has no living descendants.
>
> It is also contingent where, by the terms of the gift, the beneficiaries can not be ascertained until the happening of some future event. Where a devise is made to a class in such terms that the class can not be ascertained at the death of the testator, but must be ascertained at some future time, the interest of the members of such class corresponding to such description is a mere contingency until such class is definitely ascertained. A gift to the 'heirs' of a certain person, to be ascertained at some time in the future, 'heirs' being used in its primary meaning, and not as equivalent to children; or a gift to the members of a class, such as children, who may be living at some future period of time, is contingent. A gift to A for life and at his death to his children and the heirs of such as might be deceased, or to the survivors of a class, as to A's children or the survivors of them, or to A and his children if he has any living, is a contingent remainder.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the contingent remainder interests passing by reason of the death of the life tenant are subject to the Inheritance Tax Laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

Banks and Banking: The McCawley Act does not apply to banks being liquidated.

FILED
45

April 25, 1933

Mr. James A. Jeffries
Special Deputy Commissioner In Charge
The Bank of St. Clair
St. Clair, Missouri

Dear Sir:

This is to acknowledge your letter of April 14, 1933, which reads as follows:

> "Under the recently passed bank legislation, especially the McCawley Act, would it come within the meaning and provisions of such act for the depositors of a closed bank to exercise any plan, with the concurrence of 85% of such deposits, that they might think would expedite the liquidation of such bank. For instance if 85% of such deposits would agree, by the proper method, to take 50% of their credit balances in assets of the bank, could they do so."

You state that the Bank of St. Clair is now in liquidation and you wish to know if the provisions of the McCawley act applies to a bank being liquidated.

House Bill No. 91, approved February 22nd, 1933, known as the McCawley Act, provides that a bank may authorize the suspension of payment of checks of depositors for a period of six banking days, and after said bank has pursued such a course of suspension, the State Finance Commissioner shall be immediately notified and the Finance Commissioner shall thereupon supervise the withdrawal of assets during the sixty day period that the Finance Commissioner has charge of said bank; that if he approves a contract or plan of reorganization and said plan of reorganization is entered into by depositors owning 85% or more of the deposits, then such bank shall be permitted to open. And

if the finance commissioner after taking possession of the bank finds that such bank should not be permitted to continue in business, then he shall proceed to liquidate "as provided by law" (Section 4 of the act).

From the foregoing it is our opinion that the bank being in liquidation no such agreement as mentioned in your letter comes under the provision of the "McCawley Act", and that said bank should be liquidated according to law.

Trusting this answers your inquiry. I am

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

ELEEMOSYNARY INSTITUTIONS/ Commission for the Blind transferred To Board of Managers of Eleemosynary Institutions. Board of Charities and Corrections abolished--Home at Carrollton placed under supervision of the Board of Managers of State Eleemosynary Institutions.

July 8, 1933 7-8

8888-8892 Laws 33

11659 D Laws 33

FILED
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32

Hon. W. Ed. Jameson, President
Board Of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We wish to acknowledge your letter of June 5th, 1933, which is as follows:

> "The Eleemosynary Board is required to meet twice each year in Jefferson City. The last Legislature abolished the Commission for the Blind and substituted the Eleemosynary Board as the Commission for the Blind. Section 8891 R. S. Mo. 1929, requires the Commission for the Blind to meet monthly. It seems there is some conflict here. Would it be possible for you to render an opinion that it is not required of this Board to meet more than twice each year? I ask that for the reason the Legislature failed to make appropriation for the expenses of more than two meetings per year.
>
> The Legislature also abolished the Board of Charities and Corrections and substituted the Eleemosynary Board as the Board of Charities and Corrections. Is there anything in the Statutes requiring the meeting of the Board of Charities and Corrections, referring to their Board meetings, that would make it mandatory to meet more than twice each year?"

Section 1 of Senate Bill No. 12, approved March 16, 1933, provides as follows:

> "That Sections 8888 and 8892, Chapter 50, Revised Statutes of 1929, be and the same are hereby repealed and two new Sections enacted in lieu thereof, to be known as Sections 8888 and 8892, and to read as follows:"

Section 8888 of the above act provides the following:

> "The Missouri Commission for the Blind shall hereafter consist of the Members of the Board of Managers of the State Eleemosynary Institutions as now or hereafter provided for and constituted by Article 1, Chapter 46, Revised Statutes of 1929, and wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of this act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind. The officers of the Board of Managers of the State Eleemosynary Institutions shall be the officers of the Commission for the blind as herein constituted."

You will observe that the above act merely places the Missouri Commission for the Blind under a new head or commission, namely, the members of the Board of Managers of the State Eleemosynary Institutions, without changing or altering any of the duties now performed by the said Missouri Commission for the Blind. But all duties heretofore performed by said Commission for the Blind will after July 24, 1933, be performed by the members of the Board of Managers in the same manner and way as now performed by the present commission.

Section 8891 R. S. Mo. 1929, relating, among other things, to the duties performed by the Missouri Commission for the Blind, provides, among other things, the following:

> "Said commission etc., * * * * * * * * * it shall hold regular monthly meetings, etc."

Thus, it is the duty of the Commission for the Blind to hold regular monthly meetings, and, as their duties will be after July 24, 1933, performed by the Board of Managers of the

State Eleemosynary Institutions, such Board of Managers will have to meet monthly as provided in the above section.

We now proceed to the question as to the payment of expenses of the members attending such monthly meetings.

Senate Bill No. 12, supra, also provides:

> "Sec. 8892. The officers and members of the Commission hereby created shall receive no salary or other compensation for their services as officers or members of the Commission for the Blind, but their traveling expenses and other necessary expense in the performance of their duties as officers and members of the Commission for the Blind may be allowed and paid them out of any funds that may be appropriated by the State for the use of said Commission."

We now look to the fund appropriated by the Legislature to defray such expenses contemplated by Section 8892, supra.

House Bill No. 669, approved April 28, 1933, is an act appropriating moneys for the use of the Commission for the Blind. This appropriation act contains this provision:

> "D. Operation:
> General expenses consisting of communication, printing and binding, transportation of things, travel, other general expense, hospital expenses incurred for eye operations, material and supplies consisting of clothing and dry goods, educational, scientific and recreational supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies. . . . . .39,832"

You will note that travel and other general expense is taken care of in this appropriation and when the Board of Managers meet to perform the duties under the statutes relating to blind persons, their expenses are paid out of same. We call your attention, in support of our opinion, to the latter part of Section 8892, and quote again from it

> "* * *but their traveling expenses and other necessary expense in the performance of their

> duties as officers and members of the Commission for the Blind may be allowed and paid them out of any funds that may be appropriated by the State for the use of said commission."

And further from Section 8888:

> "* * *and wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of the act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind." * * *"

Therefore, if the Commission for the Blind when used in the statutes is to be read as Members of the said Board of Managers of the State Eleemosynary Institutions, then the appropriation act in which the words Blind Commission is used must be read as Members of the Board of Managers of the State Eleemosynary Institutions.

We now proceed to the second paragraph of your letter.

House Bill No. 13, approved April 3, 1933, reads as follows:

> "Sec. 1. That Sections 12927, 12928, 12929, 12930, 12931, 12932, 12933, 12934, 12935, 12936, 12937, being all of Article 1, Chapter 90, Revised Statutes of 1929, relating to state board of charities and corrections, be and the same are hereby repealed."

You will note that Article 1, Chapter 90, has been repealed and stricken from the statutes and is no longer in force and effect. It is in this article and chapter that the state board of charities and corrections was created and in said article and chapter the provision was made for its quarterly meetings which are not now in the statutes by virtue of the above act repealing same.

Article 4, Chapter 125, provides for a state home for children which is now located at Carrollton. Section 14096

was repealed and two new sections only enacted in lieu thereof. The rest of the sections were not amended or repealed and they remain part of the statutory law relating to the state home for children.

House Bill No. 7, approved April 3, 1933, which becomes effective July 24, 1933, reads as follows:

> "Sec. 1. That Sections 14096 of Article 4, Chapter 125, Revised Statutes of Missouri 1929 be and the same is hereby repealed and the following new sections enacted in lieu thereof, to be known as and numbered '14096' and '14096a' and to read as follows:
>
> Section 14096. The board of managers of the state eleemosynary institutions as now or hereafter constituted (hereinafter referred to as the board) shall have and exercise the general control and management of said home. Said board may take, hold and manage all lands and other property acquired by purchase, gift, donation, devise or bequest for the use of the institution.
>
> Section 14096a. All of the powers and duties heretofore conferred upon and required by law of the State Board of Charities and Corrections with respect to the care, importation, supervision and placing of children, and the Children's Home at Carrollton shall hereafter be exercised and performed by the Board of Managers of State Eleemosynary Institutions until otherwise provided by law. Wherever in any law reference is made to said State Board of Charities and Correction it shall hereafter be held and construed as the Board of Managers of State Eleemosynary Institutions."

Nowhere in Article 4, Chapter 125, is it provided for any meetings to be held by the custodian of the institution, as amended. Now the statute being silent, the Board of Managers of the State Eleemosynary Institutions may in their discretion hold a meeting or when meeting for any other purpose may discuss the problems and affairs of the Children's Home at Carrollton. We call your

attention however to Section 8573 R. S. Mo. 1929, which provides for a meeting at least twice each year for the Board of Managers of the State Eleemosynary Institutions which now has the care and control of the Children's Home at Carrollton, and it provides as follows:

> "The board of managers shall meet at least twice each year, during the months of June and December, at such time as said board may decide; said regular meetings shall be held at the capital of the state, and said board shall meet at such other times and places as may be directed by the governor or president thereof."

Therefore, it is our opinion that the Board of Managers of the State Eleemosynary Institutions does not have to meet at any time on matters relating to the Children's Home at Carrollton, but such meetings may be held at their discretion, if at all, or that when the board meets twice each year as required by Section 8573, supra, then those meetings may also include for its purpose the Children's Home at Carrollton.

Respectfully submitted,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED

(Acting)
Attorney General.

JLH:MM

PROSECUTING ATTORNEY)
FEES)

In what form to be paid to the County Treasurer.

11315 R S Mo 1929

7-26

July 14, 1933.

FILED
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34

Hon. J. E. Johnson
Treasurer
Ripley County
Doniphan, Missouri

Dear Mr. Johnson:

This office is in receipt of your letter of June 26th, relative to the form of payment of fees by the Prosecuting Attorney in your County. You desire an opinion from this office upon the following question as submitted in your letter:

> "Section 11315, R. S. Mo. 1929, provides that the Prosecuting Attorney shall pay over to the County treasurer all moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the Clerk of the County Court.
>
> Is the Prosecuting Attorney allowed to pay these fees with a salary warrant or is he required to pay the fee in money as collected?"

Section 11315, R. S. Mo. 1929, the pertinent part bearing on the question in your letter, is as follows:

> "It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately

> file with the clerk of the county court, and shall at the end of every quarter make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid-- said report to be verified by affidavit-- and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury."

From the foregoing section it will be noted that the prosecuting attorney of your county shall charge on behalf of the county every fee that accrues in his office and at the end of each month pay over to the county treasurer all moneys collected by him as fees, taking two receipts therefor.

In construing this statute, it is the opinion of this office that the salary warrant mentioned in your letter can be accepted by you in payment of the fees collected by the prosecuting attorney during the month. We cannot construe the statute as specifying any special form of specie, currency or check by which it should be paid. The statute does not make it mandatory on the prosecuting attorney to pay over such fees until at the end of each month and we cannot construe the statute to mean that the prosecuting attorney must hold his fees in the original form and pay them over to you at the end of the month.

However, we call your attention to this contingency which might arise, in the event that the salary warrant offered to you by the prosecuting attorney is not worth the full amount of its face value or is subject to discount as is the condition of the warrants in some counties, you would then be placed in a position of having given to him your receipt and not receiving in return the full amount of his fees, you would then be short in your accounts which might subject you to action on your bond.

In conclusion, for your own protection you would be within your just rights to demand of the prosecuting attorney the cash or the equivalent of the same or a check which is entirely satisfactory to yourself.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:RG

ELEEMOSYNARY BOARD - Validity of contract with member of Board made prior to appointment to such Board.

July 26, 1933.

FILED
45

Honorable W. Ed Jameson,
Chairman - State Eleemosynary Board,
Jefferson City, Missouri.

Dear Sir:

We acknowledge receipt of your letter requesting an opinion of this office on the following statement:

> "On January 23, 1930, W.E. Jameson, as lessor, made and entered into a lease contract with State Hospital No. 1 at Fulton, Missouri, by J.J. Corey, Steward, and approved by Roy H. Monier, then President of the Eleemosynary Board, for a term of five years, ending February 28th, 1935, on a certain 160 acre farm adjoining the State Hospital lands.
>
> Three years of this lease have expired and the Hospital is in possession of and using said premises for the current farm year.
>
> On March 1, 1928, the Callaway Bank at Fulton, Missouri, as lessor, entered into a contract with the same parties as lessee, for a term of three years, ending March 1, 1931, and covering a certain 276 acre tract near Fulton, Missouri, known as the Collier farm. This lease, you will notice, expired in 1931 but has been continued from year to year, and the said State Hospital is and has been in continuous possession of said premises, using and occupying the same for farm purposes.
>
> With reference to this last named farm, W.E. Jameson acquired title by foreclosure under a second mortgage during the year 1932 and is now the record owner of the same.

On March 13, 1933, W.E. Jameson, the lessor on the two farms, was appointed by Governor Park as Chairman of the State Eleemosynary Board. So now the said Jameson is in the position of being both the lessor and, as president of the said Board, representing the State as lessee.

I quite naturally want to know the legal status of these matters, both as it affects myself and as to the validity of the leases.

It was deemed essential by the Eleemosynary Board to take term leases on these properties so that the program of development and rotation could be carried out, which could not be done on a one year contract.

When I became Chairman of the Eleemosynary Board, a new farm year had begun under each of the leases as of March 1, 1933.

I beg to enclose a copy of a resolution passed at a meeting of the Eleemosynary Board on April 29, 1933.

This being a matter that affected me personally, I took no part in the said proceedings and was not present when this resolution was adopted.

It is evidently the opinion of the Eleemosynary Board that the use of both of these farms is regarded as indispensable in carrying on the work at Fulton and that both leases were operative and in force before the present Board took office and before the undersigned was made chairman.

I enclose the lease on the 160 acre tract which, as you will observe, does not expire until February 28th, 1935.

I cannot submit a written lease on the 276 acre tract as that lease expired in 1931 and has just been continued from year to year since that time and such lease has never been in my possession.

Will you kindly give me your opinion on this situation, as it affects me as President of the Eleemosynary Board and as to the validity of the leases?"

It is apparent from the foregoing, and from the written statement of Roy H. Monier, former President of the Board, that the agreement for the renting and leasing of these farms was entered into, and was a closed transaction in all respects prior to the date that you became a member of or Chairman of the Board.

The following are the sections of the 1929 Revision which refer to contracts in which members of the Board are interested:

> "SEC. 8620. NO MEMBER OF BOARD OR OFFICER OR EMPLOYES TO BE INTERESTED IN CONTRACT FOR SUPPLIES--PENALTY. If any member of the board of managers **** of the eleemosynary institutions of this state, shall be, directly or indirectly, interested in any contract for any supplies in any quantity or of any kind to be furnished said institution, or any work of any class or kind to be done upon or about any of said institutions or on the property or premises appurtenant thereto, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

> "SEC. 8623. OFFICERS OR MEMBERS OF BOARDS MAY BE REMOVED BY THE GOVERNOR, WHEN. If the governor shall become satisfied that any officer **** so appointed by him, is interested in any contract above mentioned **** the governor shall have the power to at once remove said appointee ****".

However, it is apparent that the rental agreements herein referred to are not of the class of subjects referred to in the foregoing sections, the subject of such contracts being supplies and work or services.

As the agreements had been reached prior to the date of your appointment to the Board and were made with the Board, the majority of which was of an opposite political party, we cannot see that your appointment to the Board should affect the validity of the contract, or that such agreements should subject you to the penalties herein referred to.

The foregoing being predicated upon the fact that such agreements are to the best interests of the institution involved,

both as to the suitability of the property involved, the reasonableness of the rental to be paid, and the necessity of the rental of any such property for the most advantageous management of State Hospital No. 1.

We return herewith the lease forwarded for our examination.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

Attorney General

HGW:AH
Encl-1

COUNTY TREASURER: Salary within discretion of county court.

7-22

July 30,1933

FILED
45
33

Hon. W. Irvin Jackson
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Sir:

This department is in receipt of your letter of July 23, 1933, in which you make the following request for an opinion:

> "In view of the recent legislation with reference to taxes and their collection, it seems to me that our county court is paying to our collector a salary wholly inadequate.
>
> I am of the opinion that he should be paid a salary of $100.00 to $125.00 per month and am sure that the county court would make such an order if should see fit to so advise."

The treasurer of Wright county, Wright county having adopted township organization, is also ex officio collector as provided by Section 12312 R. S. Mo. 1929.

Section 12316 Laws Mo. 1933, provides as follows:

> "The county treasurer in counties adopting township organization shall be allowed a salary by the county court as at present provided by law. the county collector for collecting and paying over the same shall be allowed a

> commission of two per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: Provided, he shall receive nothing for paying over money to his successor in office."

It will be noticed that the salary of the treasurer in counties adopting township organization shall be fixed by the county court as at present provided by law. This provision of the statute is referable to Section 12138 R. S. Mo. 1929, which provides as follows:

> "Unless otherwise provided by law, the county court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

In the case of Sanderson v. Pike County, 195 Mo. 598, the Court said:

> "* * *It will thus be seen that the Legislature has vested in the county court the power to fix the compensation of the treasurer for his general services and for his services in disbursing the school moneys of the county. With this discretion neither this court nor the circuit court has any right to interfere. The county court is a court of record, and its acts and proceedings can only be known by its record.* * **"

In the case of State ex rel. Dietrich v. Daues et al, (Supreme Court Mo.) 287 S. W. 430, the Court said:

> "* * *It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office

> is purely legislative in character. That power, as respects the office of county treasurer, the Legislature has delegated to the county court the agency most familiar with the fiscal affairs and financial condition of the county, as well as the services required to be performed by the treasurer---which may vary in different counties and at different times in the same county. The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only. Its action in the exercise of that discretion is not subject to judicial review, for the simple reason that neither the statute which conferes the discretion nor any other makes it so." " "

Therefore, it is the opinion of this department that the question as to whether or not the compensation of the treasurer allowed by the county court may be deemed just and reasonable as provided by Section 12138 R. S. Mo. 1929 is a question committed to the discretion of the county court and to it only.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:MM

ELEEMOSYNARY INSTITUTIONS: ~~Legislative~~ Quasi-judicial power may not be delegated to sub-board but must be performed by board as provided by statute.

August 1, 1933. 8-2

FILED 45

Hon. W. Ed Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

My dear Mr. Jameson:

We wish to acknowledge your letter of July 6th, 1933, which reads as follows:

> "At a meeting of the Eleemosynary Board in my office on June 30, the following resolution was adopted:
>
> 'Doctor Bliss moved that if it is possible under the law, that the Eleemosynary Board, or the Governor, shall be able to appoint a sub-group to handle the entire problem of the Blind to report to and be responsible to this Board. Mr. Reason seconded the motion. Carried.'
>
> I would be very glad if you would have your office render me an opinion as to whether or not we would have the authority to delegate the duties of this Board to a sub-board to be appointed either by the Governor or this Board, and oblige"

You asked the question as to whether or not the Board of Managers have authority to delegate duties imposed upon said board by statute to a sub-board. It is our opinion that the maxim, delegato potestas non potest delegari, meaning "delegated authority cannot be re-delegated" is applicable to

your situation. We hold to the conclusion that the duties and powers that involve a trust and confidence, judgment and discretion imposed upon said board shall not be delegated.

In the case of The Board of Commissioners of Excise of Delaware County, Respondent, v. Daniel W. Sackrider, Appellant, 35 N. Y. Reports, p. 154 l. c. 156 et seq., the court held:

> " * * * It is not a case where the commissioners employ an attorney to bring particular suits, they themselves having first considered the question as to the propriety of the suits; but the attorney is left to act in the place of the board of commissioners and determine for them what suits shall be brought. The commissioners substitute the attorney in their place and stead, and undertake to depute to him all their authority, so far as they have authority, to determine any question as to the propriety of bringing suits against individuals for violation of the excise laws.
>
> In my opinion, the commissioners of excise are clothed with something more than a mere naked authority; they are intrusted with an office which requires discretion, and are clothed with a trust which is to be exercised for the public good. Etc."

And further,

> "The duties of the office involve a trust and confidence which they cannot assign to a stranger. (Cases cited)"

And further,

> "The law having cast the duty upon the board of commissioners of excise in such a case, I do not think it can be or should be deputed to third persons. Etc. "

And in the case of Perry and Finehout, overseers of the poor of the town of Saratoga Springs, vs. Tynen, Barbour's

Supreme Court Reports (N. Y.)22, 137 l. c. 140, the court said:

> "* * * In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment--in other words, if it is a judicial act--the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after all have been notified to attend. Etc."

See also, Commonwealth v. Armstrong, 4 Pa. County, 5 and 6; Ruggles et al. v. Collier et al., 43 Mo. 353 l. c. 365.

Thus, duties set out in the statutes to be performed by the members of the Board of Managers must be performed by them and shall not be delegated. Section 8891 R. S. Mo. 1929, further bears out this contention when it gives the right of the commission to appoint agents and employees to carry out the ministerial portions of said act. A part of said section reads as follows:

> "It shall have power to appoint such agents and employes as it shall deem necessary and fix their compensation within the limits of the appropriation that shall be made by the General Assembly."

However, other duties such as are found in Sections 8896, 8897, 8891 and other sections that involve a trust and confidence, or which require judgment and discretion upon or by the members of the Board of Managers must be performed by such board and shall not be delegated to another by them.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

Beer: Cities of third class;-licensing vendors for an occupation tax.

8322 Rev. 1919

August 4, 1933.

FILED 45

Hon. Elza Johnson,
City Attorney,
Carthage, Missouri.

Dear Mr. Johnson:

Your letter requesting an opinion from this office is in words and figures as follows:

> "The Mayor of the City of Carthage has requested me to write you and ask your opinion on the question of whether a city of the third class in Missouri may license, tax, or regulate the manufacture, sale or transportation of beer containing not more than three and two-tenths per cent alcohol. And, if so, to what extent and under what regulations.
>
> I shall greatly appreciate your giving an opinion on this question, and will consider it a personal favor."

Section 6840, R. S. Mo. 1929, as amended by the laws of 1931, page 277, in cities of the third class, provides in part as follows:

> "The council shall have power and authority to levy and collect license tax * * * soft drink and ice cream stands and vendors **** and all other vocations and business whatsoever, and all other pursuing like occupations."

In the case of St. Charles ex rel. Palmer v. Schulte, 305 Mo. 124, l.c. 128, 264 S. W. 654, our Supreme Court held that the above section was constitutional and said further:

> "St. Charles is a city of the third class. As such it was expressly authorized by Section 8322, Revised Statutes 1919, 'to levy and collect a license tax on . . . soft drinks and ice-cream stands and vendors.' That 'non-intoxicating near-beers or . . . beverages . . . manufactured wholly

> or in part from malt or malt substitutes' are included within the term soft drinks is scarcely open to question. They are so included by popular acceptation, of which we take judicial notice, and they have been expressly classified as soft drinks by the Legislature itself in a subsequent act."

It is the opinion of this office that the city of Carthage is authorized, under the provisions of the above section, to pass an ordinance to levy and collect a license tax from any person, firm or corporation engaged in the business of selling beer or near-beer.

If this does not answer your question, we will be pleased to hear from you.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

IN RE: HOURS OF WORK FOR BARBERS.

FILED
45
39

August 16, 1933.

8-17

Mr. Irving E. Jenkins
623 South Calhoun Street
Mexico, Missouri

Dear Sir:

Replying to your letter of August 11 which reads in part as follows:

> "I am writing for information regarding the hours we are allowed to keep our barber shops open.",

it is the opinion of this department that, other than the general provisions of Section 13,205 R. S. Mo. 1929 making the period of eight hours a legal day's work, there is nothing in the statutes of Missouri restricting the hours of work for barbers. Of course, if the barbers of your community form a voluntary organization and fix the hours of work, it is then a question of whether or not members of such organization live up to same.

This department gathers from your letter of August 11 that the barbers of Mexico have formed an organization under the National Industrial Recovery Act. If you have joined the same, of course, you are subject to the provisions of said act unless you secure an exemption therefrom under section 3, title I. of said National Industrial Recovery Act.

It is the understanding of this department that the Federal industrial recovery act prohibits the adoption

of codes by organizations such as a barbers' organization that will promote monopolies or monopolistic practices or eliminate or oppress small enterprises or will discriminate against them. Section 3 of said industrial recovery act provides as follows:

> "Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices; * * * *. The President may, as a condition of his approval of any such code, impose * * * * such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Your letter states that it is your opinion, the operation of the National Industrial Recovery Act, through the barbers' organization in Mexico, is working a hardship on you because of the different conditions surrounding your business and that of the barbers in the business section of your city. This difference of conditions would be a basis for you to apply for an exemption as to hours under the industrial recovery code. The industrial recovery act is to be put into operation and carried out in this and other states through local boards and agencies as this department understands it.

This department suggests that you get in touch with the State organization appointed by the National Administration at Washington to administer the National Industrial Recovery in this State and present to them the difference in the conditions surrounding your business and that of your fellow craftsmen engaged in following their avocation in the business part of Mexico and make that the basis for the request for an order exempting you from the hours of labor accepted by the barbers' organization under the industrial recovery act for Mexico, Missouri.

Respectfully yours,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

TAXATION:---Expense of publication of list of delinquent lands not chargeable to County, Section 9952b.

94 S.B. laws 33

August 18, 1933

8-22

N. S. Jacka

FILED
45
39

The Missouri Democrat
911 Wyandotte Street
Kansas City, Missouri

Gentlemen:

We acknowledge receipt of your letters of July 31, and August 10, respecting the printing of the delinquent tax list in accordance with the provisions of Senate Bill 94, and wherein you request a ruling of this office as to the effect of section 9952b as contained in said bill. Your request dated July 31, reads as follows:

> "John R. Ranson, County Collector of Jackson County, has taken up with us the matter of publishing the County's delinquent tax list, in accordance with the provisions of Senate Bill No. 94.
>
> It is the opinion of the Collector that Section 9952b makes no provision for the payment of such advertisement except for that portion as may be sold in November. In other words, it is his interpretation that the Collector is not obligated to see that advertisement is paid for and that the county is in no wise responsible.
>
> However, the Section mentioned does not seem in any way ambiguous to us. We interpret it to mean that the Collector is required by law to have the publication, and that at the completion of such advertisement it is his duty to approve the bill for same and order it paid by the County Treasurer. The treasury is then reimbursed as the property is sold. The last sentence in the Section, which is in parenthesis, leaves no room for doubt when it says 'and when such costs are repaid, they shall be returned to the county treasuryr
>
> Will you please give us a ruling on Section 9952b, so that the Collector may know how to proceed?"

We shall first refer to the Missouri Laws of 1933 containing this new section, and herewith quote to you portions of said Section found at pages 430 and 431, which we deem pertinent to your inquiry.

> "* * * The expense of such printing s shall be paid by the purchaser or purchasers of the lands and/or lots sold and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed the legal rate for the entire notice, as such legal rate is fixed by Sec. 13773, which costs of printing at the rate specified shall be taxes as part of the costs of the sale of any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be prorated against all such lands or lots so sold or redeemed prior to any such sale."

This section, as contained in my copy of the Laws of 1933 does not contain any clause, in parentheses or otherwise, reading as follows: "and when such costs are repaid they shall be returned to the County treasury." Our opinion accordingly is based upon the law as we find it in the Laws as published by the Secretary of State.

Before any County or City can lawfully enter into any contract or be charged upon any contract, it must be authorized by law and the contract made and the obligation created in the manner provided for by law. This is clearly put by Judge Walker in the case of Pulitzer vs. Gilbert, 218 Mo. 500 l. c. 537.

> "The powers of a county as a subdivision of the State are clearly defined and limited by law, and its administrative agents, the members of the county court, have no authority except that clearly conferred by law."

Then too, we have a legislative enactment pertaining to this matter in Section 2962, R. S. Mo. 1929, portions of which read as follows:

"Section 3962. CONTRACTS,* * * *. No county, city, * * * * or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law,* * * *."

The section above referred to has been the law of this State for some sixty years, and has been constantly referred to by the Courts in determining the liability of the County upon contracts of various kinds.

Senate Bill 94 contains no provision sufficient to authorize a charge against the County for costs of publishing of delinquent lists. The Act is entirely silent as to this item of expense, except for the portion underlined in the quotation above set out. No reference is made in the Act relating to the presentation of the bill for advertising to the County Court, or for any certification by the collector to the County Court that the bill is proper, nor is any provision made in the Act as to the fund from which the bill is to be paid. The only expression of legislative intent is found in the sentence, "the expense of such printing shall be paid by the purchaser* * * of the land* * * *." The Act provides for the prorating of this expense to the lands contained in such list, and that such printing expense be taxed as part of the costs of the sale. It is apparent that the Act contemplates an assessment of the prorated portion of advertising expense to each lot offered for sale, and a collection of that assessment at the time of the sale as a part of the costs for the benefit of the publication publishing the delinquent list. This construction is consistent with the methods of procedure in collecting delinquent taxes in the past. The County or the State has never assumed any obligation for any costs incurred or accrued in the collection of delinquent taxes, but have at all times required the parties paying the tax or redeeming the property to pay the costs necessarily incurred, after which the various persons entitled to costs received the amount due them from the funds thus paid by taxpayer or person redeeming the property.

Our Courts have in the past considered matters containing the same legal point as here involved. One of the earlier cases is that of Finney vs. Sullivan County, 48 Mo. 350. The facts in the case are briefly set out on page 351 as follows:

> "This suit was brought to recover of Sullivan county (the defendant) the sum of $2.75 for services rendered by the plaintiff in 1866, in attending before the board of registration in that county as a witness. It is admitted that the services charged were rendered in obedience to the requirements of a subpoena duly issued by the board and served upon the plaintiff, There is no dispute about the facts. The single question presented in whether the county, under the circumstances, is legally bound to pay the claim."

The Court in considering the question stated at page 352:

> "In a word, the law makes no provision for the compensation of witnesses who are summoned to appear before registration boards. On what principle, then, is the county to be held liable for these fees? The registration officers were appointed by the supervisor of registration, who was appointed by the governor. They were not the agents of the county, nor was the county a party to the proceedings before the board. They county cannot be made liable for the fees or witnesses summoned to attend upon the registration officers, <u>without some express statute on that subject imposing the liability</u>, and there is no such statute. The county of Sullivan is therefore not liable for the plaintiff's claim."

Section 9952b is not as indefinite as the law considers in the above case, as it does make a provision for the publisher being paid at not more than the legal rate for printing, as provided by Section 13773, R. S. Mo. 1929.

In the later case of Miller vs. Douglas County, 205 Mo. 194, the Supreme Court considered the liability of the defendant County for an item of $116.55 for medical services and drugs furnished prisoners in the County jail by the plaintiff Doctor. The Court in denying the right of the plaintiff to recover this sum considered Section 8134, R. S. Mo. 1899, which reads as follows:

> "In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his services and medicine, when required, to be taxed and collected as aforesaid."

and stated as follows: l. c. 199.

> "That section (8134) is authority for a jailer to procure the necessary medicine or medical attention to a sick prisoner in his custody. But it is expressly provided that the costs of such medical attention and medicines 'shall be taxed and paid as other costs in criminal cases.' Costs in criminal cases are taxed by the proper officers, are certified by fee bills under the official oaths of prosecuting attorneys and judges of the various circuit courts, and are paid either by the county or by the State, as the case may be, on such certified fee bills. (See art. 15, chap. 16, R. S. 1899.) Manifestly plaintiff cannot recover under section 8134."

The Statutes above considered, required that the plaintiff's charges be taxed as costs. In the instant case, Section 9952b likewise requires the expense of printing to be taxed as cost. That such expenses shall be paid as costs logically and necessarily follows:

That Counties are not liable except where statutes so provided, is recognized as the law in other states. The Supreme Court of Georgia in the case of Daniels, et al vs. Hutchinson, Tax Commissioner, 150 S. E. 681, 66 A. L. R. 793, had for determination the liability of the County for the premium for the bond of the Tax Commissioner. The Georgia Laws require the Commissioner to give bond and security to the Governor and to the Board of Commissioners of Roads and Revenues, but con-

tains no express provision as to whether the Tax Commissioner or the County shall pay the premium for the bond. On this issue, we quote from the opinion as found in 66 A. L. R. on pages 794 and 795.

> "In Monroe County v. Flynt, 80 Ga. 489, 6 S. E. 173, it was said: 'There is no liability on the county for any cause whatever, except such as created by statute. Counties are not liable at common law; and it is for the reason t that the several counties of the state are political divisions, exercising a part of the sovereign power of the state; and they cannot be sued except where it is so provided by statute.' "
>
> "In this part of the statute there are no express words that make it obligatory upon the county to pay the premiums upon the bonds which the tax commissioner is to furnish, nor is there any provision in any other part of the act of 1927 which makes it the duty of the county to pay this premium;"
>
> "And we think that, inasmuch as he is to furnish this bond, he is also under the duty of doing that which would enable him to furnish it; that is, he is to find a 'reliable bonding company,' who will sign as security, and he must pay it that which is necessary to secure its signature, to wit, the premium exacted by the Company."
>
> "It follows that the judgment granting the mandamus absolute must be reversed."

It is, therefore, the opinion of this office that Section 9952b requires the expense of publication of lists of delinquent taxes to be taxed as costs and to be paid by the persons redeeming or purchasing the land, and that there is no authority in said Act, express or implied, for the payment of this expense by the County Collector or the County Court.

Respectfully submitted

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

STATE PURCHASING AGENT: Authority to authorize emergency direct purchases.

SB192 Sec 5 Laws 33

9/2 FILED 4/5 41

August 28, 1933

Honorable George C. Johnson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Johnson:

We hereby acknowledge receipt of your letter of Au ust 28, 1933 requesting an opinion of this office on the following matters:-

> "At the earliest possible moment, will you kindly advise me if, in your judgment, it is proper and legal for me to authorize State Institutions covered by the Act creating the office of State Purchasing Agent, to continue their present procedure in buying until such time as I am able to properly set up my office, arrange for the printing of the necessary forms, and the promulgation of proper rules and regulations as in said Act provided.
>
> This appears to be authorized in Section Five of the Act.
>
> Trusting that you can favor me with an immediate ruling, and thanking you in advance, I remain."

Section 5 of the State Purchasing Agent Act, as found on page 412 of the Laws of 1933, reads as follows:

> "The Purchasing Agent shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the Purchasing Agent together with all bids received and prices paid."

The above section clearly authorizes you to permit the Institutions to make emergency purchases. The purchases are to be made direct by the department or institution instead of through you. However, it is required that these emergency purchases be made under and consistent with rules and regulations promulgated by you.

> "He shall prescribe rules under which such direct purchases shall be made."

You are required by this clause to formulate rules to govern these emergency purchases, and, in turn, all emergency purchases must be made in accordance with such rules.

It should also be kept in mind that this authorization extends only to emergency purchases, and is not applicable to purchases which do not fall within this classification. Before any authorization is granted, you should first satisfy yourself that the purchase contemplated is an emergency purchase, and one which cannot be delayed until your office is prepared to handle the purchase in the regular manner.

One of the primary objects of the act is to require competitive bidding for the contracts. The first sentence of Section 3 is,

> "All purchases shall be based upon competitive bids."

The last clause of Section 5 reads:

> "All such direct purchases shall be reported immediately to the Purchasing Agent together with all bids received and prices paid."

It is evident that all purchases made direct shall be made after receiving competitive bids. This is also suggested by Section 9 of the Act, parts of which read:

> "All reports, bids, speficications and contracts, and all records of purchases and sales of any kind, whether by the Purchasing Agent or by departments as authorized by him, shall be kept in the office of the Purchasing Agent and shall be open to inspection by the public."

It is our suggestion that the rules and regulations promulgated by you covering direct purchases require the purchases be made only after the receiving of competitive bids.

We realize that you are confronted with the problem of permitting emergency purchases to be made before you have had time and opportunity to set up all rules and regulations provided for in the Act, but it is our opinion that you should at this time adopt temporary rules and regulations covering direct emergency purchases which will insure the fulfilling of the law by the departments or institutions, and will also permit an accurate record of all matters being kept by your office.

It is therefore the opinion of this office, that you are not authorized by law to permit State Institutions covered by the State Purchasing Agent Act to continue their present procedure in buying, but that you should adopt such temporary rules and regulations applying to direct emergency purchasing as will insure a compliance with the letter and spirit of the law by the institution affected, and permit a fulfillment of the requirements of the Act by your office.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

HGW:LC

C TREASURER'S BOND: Amount of under Sections 9266 & 12133 R. S. 1929.

September 13, 1933.

9-20

FILED
45

Mr. Lon L. Jackson
County Treasurer
Monroe County
Paris, Missouri

Dear Sir:

We are in receipt of your letter of September 11th, with request for an opinion as to the amount of bond the county court of your county (Monroe) may require you to give as County Treasurer. In connection with your request you state the following:

"My bond was one hundred, forty thousand dollars ($140,000.00) when I took office January 3, 1933. The County Court, on the advice of the Prosecuting Attorney, reduced the bond to one hundred thousand ($100,000.00) April 6, 1933.

I bought a commercial bond this year and prefer to give a commercial bond in the future but my salary will not justify the cost of a bond for the amount stated.

* *

I think my salary and the amount of my bond are out of proportion with those of the surrounding counties.

The amounts of my bond were based on Section 12133 (General Revenue Funds) and Section 9266 (School Funds) Revised Statutes of Missouri, 1929.
I will appreciate it if you will pass your opinion on this matter. Please address correspondence to me.

* *"

The amount of the bond required to be given by you as County Treasurer is found in Section 12133 R. S. 1929, which section reads as follows:

> "BOND TO BE GIVEN.--The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

The minimum amount of bond that you may give under this section is $20,000. The statute fixes the minimum and the county court has no discretion in the matter and cannot go below that amount. By referring to the Bluebook we find that your County is not under township organization and, therefore, under Section 9266 R. S. 1929, the county treasurer is "the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, * * *."

And it is further provided in said section 9266, supra, referring to the county treasurer, that,

> "* * *, he shall give a separate bond, with sufficient security, in double the probable amount of school moneys that shall come into his hands, payable to the State of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, all of such moneys as shall from time to time come into his hands; * * * * * * * * *."

The statute under this section has fixed the bond that the county treasurer shall give in double the probable amount of school moneys, etc., and the bond to be approved by the county court, and the only discretionary power allowed the county court is in estimating the probable amount of school moneys that shall come into the treasurer's hands. So, under both of these sections,

the county court in fixing these bonds has very little discretionary power and, of course, must follow the statutes.

We note from your letter that the bond required by your county court for the school moneys coming into your hands under Section 9266, supra, is much higher than the bond required of the county treasurer by the county courts of counties surrounding Monroe County. But this, of course, is no criterion or guide as to what your county court should do, and can be used only in the way of argument.

If there is any other question relative to this matter that you desire to inquire about, do not hesitate to write us again.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

NEPOTISM: Grandson of mother's half-brother not within fourth degree, using civil law method of computing relationship.

EMPLOYEES: Appropriation act permits employment of temporary help.

September 15, 1933.

10-2

FILED
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46.

Hon. W. Ed Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge your letter which reads as follows:

> "In the long trips that I am compelled to make over the State of Missouri in connection with the eleemosynary institutions, the Commission for the Blind and the Children's Home at Carrollton, I have found it necessary to employ a driver, which I feel certain I am permitted to do. I do not use a regular chauffeur, but some few days per month on these long trips I have been employing a young man who is the grandson of my mother's half-brother. I have just been reading Section 13 R. S. Mo. 1929, Page 157, which may have some bearing on this question. Will that Section apply to employing a temporary laborer for this purpose, or does it only apply to regular appointive jobs under these institutions?"

The above inquiry requests an opinion solely on the question of whether or not the grandson of your mother's half-brother employed by you, to act as a chauffeur on trips necessary in the performance of your duties, and paid by the State, is within the provision of Section 13, Article XIV, Constitution of Missouri, referred to as the "Nepotism" section.

You assume that you are permitted to employ a chauffeur to drive you when such method of transportation is necessary in the performance of your duties. And, while not asking a ruling as to your right to employ a person to render the services mentioned in your letter, we deem it necessary to establish that fact as a premise to a determination of your question.

Laws of Missouri, 1933, page 132, show the appropriation to the Board of Managers of Eleemosynary Institutions, which is as follows:

> "SECTION 1. TO PAY SALARIES, WAGES, AND PER DIEM OF OFFICERS AND EMPLOYEES.--There is hereby appropriated out of the state treasury, chargeable to the funds herein designated, the various amounts set out to pay the salaries, wages, and per diem of the officers and employees and other expenses of the eleemosynary board, state hospital No. 1, state hospital No. 2, state hospital No. 3, state hospital No. 4, the Missouri state school, and the Missouri State sanatorium for the years 1933 and 1934, as follows:
>
> For the board of Managers of the eleemosynary institutions payable out of state revenue fund as follows:
>
> A. Personal Service:
> The salaries of the president of the board of managers, chief clerk, stenographer and filing clerk, janitor, and the per diem of the board of eleemosynary institutions; also temporary help, clerks and stenographers $17,000
> Etc."

It is true the State furnishes you an automobile as the mode and ~~method~~ means of transportation. Now, if for any reason you are unable to drive the car, then it is our opinion you would have a right under your appropriation to employ temporary help to perform this necessary service.

Having, therefore, established your right to employ a person to render the service stated in your letter, we now pass to the question as to whether or not his relationship to you comes within the prohibited fourth degree by affinity or consanguinity. If it does, you have forfeited your office and the compensation paid to such person is illegal.

Section 13, Article XIV, page 157, Constitution of Missouri, reads as follows:

> "NEPOTISM, BY ANY OFFICER OR EMPLOYE, FORBIDDEN-- FORFEITS OFFICE.--Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

This section is self-explanatory and likewise self-enforcing. We have heretofore rendered opinions interpreting this constitutional provision and will not lengthen this opinion by citations sustaining the above conclusion. The matter simply resolves itself into what relationship the grandson of your mother's half-brother is to you. Using the civil law method of computing relationship, it will be readily ascertained that such person's degree of kinship is that of the fifth degree. Therefore, not being related to you by consanguinity within the prohibited fourth degree, you have not violated the nepotism provision of the Constitution, supra, and such is our opinion.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

RELATING TO POWER AND AUTHORITY OF BOARD OF MANAGERS OF ELEEMOSYNARY INSTITUTIONS

)Holding that the Board of Managers of
)eleemosynary institutions have no
)authority to grant lands or interest in
)same without act of the General Assembly.

70 So 1S Mo 19 9

11-3

October 21, 1933

FILED
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54

Mr. R. Ed Jameson,
President Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter under date of September 28, 1933, in which you inquire as follows:

> "The city of Fulton is endeavoring, with the help of the Federal Government under the Emergency Department of Public Works to construct a sewage disposal plant. It happens that the State of Missouri owns all the property lying east of the city of Fulton. We already have a sewage system with its outlet on state property belonging to Hospital #1. This system has been constructed by the city of Fulton. The School for the Deaf has its own sewage system which empties into the city's system about 1000 feet west of its present outlet.
>
> The State Hospital #1 has its own sewage system that empties into the city's system, about 1000 feet west of its outlet.
>
> The present sewage system takes the entire raw sewage of the city of Fulton and the two state institutions and discharges it, untreated, into a very small stream with intermittent flow. This condition is naturally a very unhealthful one, and construction of an adequate plant has been insisted upon by the State Board of Health for the past five years. In as much as the only available location for a plant of this type to handle the sewage problem of both the city and the state institutions, is on state owned ground,

it will be necessary in our application to thethe Federal Administration of Public Works to have some easement from the State of Missouri for the use of this ground.

We would like to have a ruling from the office of the Attorney General stating the necessary steps to secure such an easement, and the jurisdiction of the Eleemosynary Board over such matters."

Section 8574, Revised Statutes 1929, reads as follows:

"The board of managers of the eleemosynary institutions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers for the use and benefit of said institution; or in the event of a gift or donation to the use and benefit to either of said institutions as may be designated by the donor. The board of managers of said institutions shall not sell or in any manner dispose of any real estate belonging to either of said institutions without an act of the general assembly authorizing such sale or disposal of such real estate."

Section 7079, Revised Statutes 1929, reads as follows:

"Private property may be taken by cities of the fourth class, for public use, for the purpose of establishing, opening, widening, extending or altering any street, avenue, alley, wharf, creek, river, watercourse, market place, public park, or public square, and for establishing market houses and for any other necessary public purposes."

Section 7090, Revised Statutes 1929, reads as follows;

"Cities of the fourth class shall have the right to condemn lands by the same proceedings aforesaid and pay for the same out of any funds available out of the city treasury without any assessments for benefits, or to advance the amount of damages awarded at the time pending the proceedings and thereupon take possession of the property and to be reimbursed from the benefits assessed when the same are collected."

The question presented by your request is the power and

authority of the Eleemosynary Board to grant to the city of Fulton an easement over property belonging to State Hospital #1?

This question is settled by the plain provisions of Section 8574, supra, which reads as follows:

> "Board of managers of said institutions shall not sell or in any manner dispose of any real estate belonging to either of said institutions without an act of the general assembly, authorizing such sale or disposal of such real estate."

Since an easement is an interest in or over lands, it may be acquired either by express grant or by prescriptive right, or right of eminent domain.

(A) EXPRESS GRANT.

> The title to all real estate now owned by the eleemosynary institutions or by the State for their use is vested in the board of managers of said institutions and provided under Section 8574, supra, and since said board of managers is denied the right and authority to sell or in any manner dispose of same, without a Legislative act, it is very evident that an easement can not be given by the board of managers to the city of Fulton, with specific act of the General Assembly.

(B) PRESCRIPTIVE RIGHT.

> "Although in legal contemplation an easement lies only in grant, yet evidence to establish it is not necessarily a deed because an easement may have existed for such a length of time, and under such circumstances, that the law will presume a grant. This is what is meant by an easement established by prescription. When the evidence sufficiently shows the use of the privilege for a length of time equal to that prescribed by the Statute of Limitations for acquiring title to land by adverse possession, and that the use was adverse and under a claim of right with the knowledge of the landowner, the right to the easement is established." Anthony v. Building Company, 188 Mo. l. c. 719-720.

To establish an easement by prescription four essential facts must appear.

1st. User for the prescribed period.

2d. That the possession was adverse.

3d. That it was under a claim of right.

4th. Notice to the owner of the user and of its character and of the claim of right.

(C) EMINENT DOMAIN.

That cities of the fourth class have the vested right of eminent domain for any necessary public purpose, there can be no question, as provided under and by sections 7079 and 7090, supra.

The procedure with reference to condemnation proceedings by cities of the fourth class, in taking of private property for necessary public purpose, is found in section 7080 R. S. 1929, and that pertinent here is as follows;

"Whenever the mayor and board of aldermen shall provide by ordinance for . . . . . for the taking of private property . . . . . for necessary public purpose, and it shall become necessary for that purpose to take or damage private property, the mayor and board of aldermen shall, by ordinance, define the limits within which private property shall be assessed to pay for such improvements and the time and mode of payment of such assessments. The city shall thereupon apply to the circuit court of the county in which such city is located, or the circuit judge of that judicial circuit in vacation, by petition, setting forth the use for which said lands is to be taken and dedicated; the names of the owners of the several lots or parcels of land . . . . . , a correct description of the parcels of land, etc."

A suit by the city under the above section and others following in Article 8, relating to cities of the fourth class, against the Board of Managers of State Eleemosynary Institutions would result in obtaining right to construct a sewage disposal

plant upon the lands held by the Board of Managers of State Eleemosynary Institutions for the use of State Hospital #1, with damages to said board, by reason of said improvements to be made by said city, also the benefits to said property.

Now it follows, from what has been said and the provisions of the law relating to this subject, that we must hold that the Board of Managers of Hospital #1 have no authority, independent of a specific act of the General Assembly, to make an express grant to the City of Fulton, of the use of the lands of said State Hospital #1 for a sewage disposal plant.

We do not have before us sufficient facts to pass upon the question of an easement by right of prescription, however this question can be determined from what we have said, by an application of the facts to the law as defined by our Supreme Court in Anthony W. Building Company (Supra).

We further hold that the City of Fulton may, by proper suit, condemn as much of the property held by said Board of Managers as will be necessary for the contemplated improvement and no doubt this method will prove to be the best course to pursue.

Very truly yours,

W. W. Barnes
Assistant Attorney General.

APPROVED:

ATTORNEY GENERAL.

CIRCUIT CLERKS: Salary of Clerks and deputies affected by Sections 11786 and 11812, p. 369, Laws 1933.

October 25, 1933

FILED
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11-3

55

Hon. Dale H. Johnson
Circuit Clerk
Bollinger County
Marble Hill, Missouri

My Dear Mr. Johnson:

We acknowledge receipt of your letter of recent date wherein you request an opinion of this office on the following matter:

> "Please advise me as to whether Section 11812 of Missouri Session Acts 1933, in relation to Salaries and Fees of Circuit Clerks and Deputies is in force at this time.

The Section above quoted is one portion of the committees substitute for Senate Bill 74 which was passed by the 57th General Assembly and approved on May 1, 1933. Not having any emergency clause this law became effective on the 24th of July 1933. For convenience we will divide your inquiry into the following sub-divisions:

I.

SALARIES AND FEES OF CIRCUIT CLERKS IN OFFICE ON JULY 24, 1933, NOT EFFECTED BY COMMITTEE SUBSTITUTE SENATE BILL 74.

On page 369 of the Missouri Laws 1933, we find Section 11786 as enacted by the 57th General Assembly. This section provides the maximum amount of fees that may be retained by circuit clerks in counties having a population not exceeding 80,000 persons, such counties being classified according to population. This section contains the following proviso, l.c. 370:

> ** * *Provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

By reason of this proviso it was plainly the intent of the Legislature that all Circuit Clerks holding office on the effective date of the law would continue to be paid under Section 11786 as contained in the R. S. Mo. 1929, and such is the opinion of this office.

II.

APPOINTMENT OF DEPUTY CIRCUIT CLERKS CONTROLLED BY SECTION 11812, p. 37, SESSION ACTS 1933.

Section 11812 as amended and reenacted by the 57th General Assembly reads as follows:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

The only change made in this section pertinent to your inquiry was that the approval of the appointment is now to be made by the county court instead of the circuit court and it is now the county court that can modify or rescind its order or reduce the compensation theretofore fixed instead of the circuit court as provided in the former law. It is to be noted that there is no proviso in this section respecting deputy clerks as was placed in Section 11786 respecting the Circuit Clerks. It is therefore apparent that this law was to be immediately effective insofar as determining the manner of appointment and removal of deputy circuit clerks.

It has been so held by an official opinion of this office dated October 17, 1933, wherein this conclusion is reached:

> "* * *It is the opinion of this Department that the county court of your county has the power and has had the power since the 24th day of July 1933, to approve or disapprove the appointment of a deputy circuit clerk and to fix the compensation and period of employment thereof irrespective of any prior orders referring to the same subject."

III.

DEPUTY CLERK CONTINUING TO ACT IS DE FACTO OFFICER.

In the event the county court has failed to make any order approving the appointment of the deputy clerk as contemplated by Section 11812 as amended, the acts of such deputy are not to be considered as illegal and void. He would fall within the classification of a de facto officer.

In 46 C. J. 1053, Sec. 366, we find the following definition of de facto officer.

> "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession and is exercising the duties of an office, his incumbency is illegal in some respect; he has at least a fair color of right or title to the office."

Touching the validity of his acts as de facto officer, we find this statement in 46 C.J. 1060, Sec. 378:

> "The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party. But to be valid, the acts

> of a de facto officer must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of de jure officers.* * * **

It is therefore the opinion of this office that the acts of any such deputy circuit clerk are to be given full force and effect, and that such deputy would be entitled to the compensation provided by law until he was removed as provided in Section 11812, p. 371, Missouri Laws 1933.

Respectfully submitted,

HARRY G. WALTHER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

ADVERTISEMENTS -- ADVRE: ADVERTISEMENTS FOR BIDS BY STATE PURCHASING AGENT -- WHERE PLACED.

13773 74. RSMo 1929
11-1

FILED
45

November 1, 1933.

Hon. George C. Johnson,
State Purchasing Agent
Capitol Building
Jefferson City, Missouri.

Dear Sir:

Your letter of October 14, reads as follows:

> "The Purchasing Agent law provides that on purchases of $2000 or more, advertisement for bids shall be published in at least two daily newspapers of 'general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchase are to be opened.'
>
> "It is likely that advertisements in the St. Louis and Kansas City papers would be 'most likely to reach prospective bidders' etc. However, the rates for advertising in the metropolitan papers are considerably in excess of the maximum rates as provided by Section 10401, found at page 323, of the Session Acts of 1923, copy of which is attached.
>
> "Please give us an opinion as to whether or not we can run the advertisements in daily papers in smaller cities, for example, Jefferson City, where the rate would not exceed the maximum rate established by Section 10401, and still comply with the Purchasing Agent law."

STATUTORY PROVISIONS.

Section 10401, Revised Statutes of Missouri, 1919, referred to in your letter as repealed by Section 10401, found in Session Laws of Missouri of 1923, was a part of chapter 94, Revised Statutes of Missouri, 1919, said chapter being entitled "Public Notice and Advertisements" and said chapter appears now as chapter 114, Revised Statutes of Missouri, 1929, entitled "Public Notices and Advertisements."

Section 13773, Revised Statutes of Missouri, 1929, provides as follows:

> "When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the State, or for any public officer on account of, or in the name of the State, or for any county, or for any public officer on account of, or in the name of any county, there shall not be allowed for such publication a higher rate than * * * * *."

(and then follows a schedule of rates)

and then the section concludes as follows:

> "When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 13777, 13778 and 13779, R. S. 1929, are hereby repealed."

The sections named as not repealed apply to cities of one hundred thousand inhabitants or more and the provisions of said excepted sections do not bear on question you submit.

Section 13774 provides:

PAGE #3

Missing at time of Micofilming

for said advertisement.

Sections 13773 and 13774, Revised Statutes of Missouri, of 1929, include within the language thereof State supplies. The Purchasing Act of 1933 also covers "State supplies" and nothing else except negotiations for leases and purchase of lands for the State.

Section 13773, limits the rate to be paid for advertisements. The State Purchasing Act does not limit the rate to be paid.

Section 13773, is a general law on the subject of public advertisements while the State Purchasing Act is a particular law applying only to the Advertisement for purchase of State supplies.

The State Purchasing Agent Act of 1933 declares,

> "The Purchasing Agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders, * * * *."

This is a specific command. You state in your letter that the advertisement in the St. Louis and Kansas City papers would be most likely to reach prospective bidders; but the provisions of Section 13773, as to rates, forbids advertising in said city newspapers.

> WHERE ONE STATUTE APPLIES TO A MULTITUDE of SUBJECTS and a LATER STATUTE APPLIES ONLY TO ONE of the SUBJECTS, BOTH STATUTES MAY STAND.

It was clearly the intent of the Legislature that

advertisements for bids for such large quantities of supplies,as the State buys, should be made in at least two daily newspapers in the places where such advertisement would most likely reach prospective bidders and if St. Louis and Kansas City or Springfield or Hannibal or any other cities and towns are places where advertisements in daily newspapers would most likely reach prospective bidders, the Statutes of 1933, commands advertisement for bids in daily newspapers in said places.

The applicable rule of law is as follows:

> "Contradictions in Statutes cannot stand. Where there is an act or provision which is general and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general Act, they are not so inconsistent that both cannot stand, * * * * the general Act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special Act. " Lewis Sutherland on "Statutory Construction" (2d ed.) Sec. 365 and Sec. 374.

Our own court lays down the rule in the following language:

> " The particular mention of certain things in one statute will withdraw them from the application of the general words of another statute which would embrace them." Poor v. Watson, 32 Mo. App. page 89.

Applying these rules to the question submitted, it is the opinion of this department that the provisions of Section 13773 are broad enough to embrace within its terms - advertisements of the State Purchasing Agent for bids for State supplies as one of the many subjects to which said section would apply; and this would, of course, include the limitation in Section 13773, as to rates allowed to be paid for advertisement for State supplies, but the provision of the State Purchasing Act directing advertisements for State supplies only to be made where most likely to reach prospective bidders withdraws from

the many subjects included in Section 13773, the advertisements for State supplies by the State Purchasing Agent insofar as the limitation as to rates contained in Section 13773, is concerned if and when it is necessary for higher rates than those fixed in Section 13773, to be paid, to most likely reach prospective bidders for State supplies; but as to advertisements for all other matters than State supplies bought by the State Purchasing Agent, the rates fixed in Section 13773, for advertising are binding. This leaves both Statutes operating in their respective spheres.

It is the further opinion of this department, you should, when it is necessary to "most likely reach prospective bidders", advertise for bids in at least two daily newspapers of general circulation in St. Louis and Kansas City, Missouri.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

EXTRA SESSION -57th GENERAL ASSEMBLY
SENATE BILLS 36, 37, 38 and 39: Are constitutionally within the scope of the proclamation of the Governor convening the Extra Session of the 57th General Assembly of the State of Missouri.

November 20, 1933.

FILED NO. 45

Senator Jerome M. Joffee,
Senate Chamber,
Jefferson City, Missouri.

Dear Senator Joffee:

This department is in receipt of your request for an opinion as to the following state of facts:

> "At the request of the Committee on Wills and Probate Law, I have been instructed to write you and request that you furnish the Committee an opinion as to whether Senate Bills Nos. 36, 37, 38 and 39 are constitutionally within the scope of the proclamation of Governor Park convening this special session and his subsequent messages to the General Assembly, inasmuch as no specific mention was made therein as to inheritance taxes."

I.

Senate Bills Nos. 36, 37, 38 and 39 relating to Article 21, Chapter 1, Revised Statutes of Mo. 1929, are constitutionally within the scope of the proclamation of the Governor convening the Extra Session of the 57th General Assembly of the State of Missouri.

The proclamation of Governor Park whereby he convened the 57th General Assembly of the State of Missouri in Extra Session insofar as it is pertinent to the problem here under discussion provides:

> "****To raise revenue for the state and (or) any subdivision thereof by increasing the franchise tax on corporations; by increasing the tax on beer sold within the state; by taxing the manufacture of beer within the state; by increasing the license tax for the manufacture and (or) sale of beer within the

> state and by authorizing counties, cities, towns and villages to license, tax and (or) regulate the manufacture and (or) sale of beer and (or) to tax, license and (or) regulate the manufacture and (or) sale of intoxicating liquors; by a general sales tax; by a gross sales tax; by a tobacco tax and by any other constitutional method of raising revenue. ****" (Emphasis ours)

Article IV, Section 55 of the Constitution of the State of Missouri provides as follows:

> "The General Assembly shall have no power, when convened in extra session by the Governor, to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened."

Senate Bill 36 is an Act relating to rates to be levied upon inheritances and increasing such rates; Senate Bill 37 is an Act relating to exemptions under the inheritance tax law by decreasing exemptions to husbands, wives and descendants; Senate Bill 38 is an Act relating to exemption of property passing to or for the use of religious, educational and charitable institutions from inheritance tax where used in this state; Senate Bill 39 is an Act relating to property subject to inheritance tax, raising the presumption only that a conveyance made two years prior to the death of the grantor, vendor or donor was made in contemplation of death.

From a consideration of these bills, therefore, it is evident that their intent and purpose is to increase the rates to be levied upon inheritances and to subject additional property to the inheritance tax law and thereby increase the revenue in the State of Missouri.

The general rule with respect to the power of the General Assembly under Article IV, Section 55 of the Constitution is concisely stated in 59 C.J., p. 526, as follows:

> "Where a governor in calling a special session is required to specify the purpose for which it is convened, a submission which does not state specifically the subject matter on which legislation is desired grants no power to the general assembly. Within his discretion, he may confine legislation to the subjects specified, which may be done by his proclamation alone or by special message after the legislature has convened on call, or by both; and he may limit the consideration of a general subject to a specified phase of it; but he cannot restrict the details springing from such subject."

In the case of State v. Tippett (Sup. Ct. Mo. 1927), 296 S. W. 132, the Court held (l.c. 136):

> "'Defendant avers that the passage of the above section violated section 55, art.IV, of the Missouri Constitution, because it was not embraced within the proclamation of the Governor, or recommended by him in a special message. It is as follows:
>
> > 'The General Assembly shall have no power, when convened in extra session by the Governor, to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened.'
>
> It is evident from a reading of the constitutional provision that, if the act falls within the proclamation or the special message of the Governor, it is valid. The constitutionality of the Motor Vehicle Act has been upheld in a terse and well-reasoned opinion by Seddon, C., in Lauck v. Reis, 310 Mo. 184, 274 S.W. 827. We need not reconsider the questions there made clear. We merely state that judicial notice will be taken of the official proclamations and messages of the Governor. Wells v. Railway, 110 Mo. 286, 19 S.W. 530, 15 L.R.A. 847. The question then arises relative to the appositeness of the statute to the special message of the Governor, on June 22, 1921, reading:
>
> > 'The subject of regulating or licensing motor vehicles, and fixing the amount and manner of collecting such registration or license fees, is probably germane to that part of the call for this session which submits the road legislation. Nevertheless, you may desire to call upon motor licenses as a means of producing a maintenance fund for the roads to be constructed, and, in order that there may be no doubt of it, I submit this subject also.'
>
> We think the statute, relative to leaving the scene of accident, is comprised within the term 'regulating' as used in the special message. Lauck v. Reis, supra, defines 'regulate' among others, as 'to direct by rule or restriction.' It has also been defined as 'a rule prescribed for conduct.' Providing for a stoppage by the operator of a motor vehicle after

> injury or damage, or the reporting of the same, is directing by restriction or course of conduct the operation or use of the vehicle. That it proscribes free operating after an accident and prescribes a punishment therefor fails to limit the force of the term 'regulating' with respect to motor vehicles. In view of the recognized canon of construction that a statute is not to be held unconstitutional, unless clearly so, and that every fair and reasonable intendment in favor of its constitutionality is presumed, the assignment is ruled against defendant.'"

The Court in the case of City of Rockwood v. Rodgers (Sup. Ct. Tenn. 1926), 290 S.W. 381, set out the general rule of construction applicable to a section of the Tennessee Constitution, which is similar to Art. IV, Sec. 55 of the Missouri Constitution: (l.c. 382)

> "'In the case of State ex rel. v. Woolen, 128 Tenn. 456, 487, 161 S.W. 1006, Ann. Cas. 1915C, 465, the rule by which the language of the Governor's proclamation must be tested to determine whether the legislation under consideration was included therein is stated as follows:
>
> > 'It is agreed, so far as any of the cases speak on the matter, and this view is undoubtedly sound, that the presumption is always in favor of the constitutionality of an act, and that any piece of legislation so under consideration should be held within the call, if it can be done by any reasonable construction.'"

As was said in the case of In Re Likins, (Pa.) 72 Atl. 862:

> "Although a Governor who has decided to convene a special session of the legislature is empowered to proclaim, to indicate, to designate, the subjects for legislative consideration at such session, he cannot by his proclamation, any more than he can by his message to the same body when in regular session, prescribe or limit the manner in which or the extent to which the Legislature may dispose of these subjects which he designates in his proclamation as matters for legislative consideration."

In the case of Loiza Sugar Co. v. People of Porto Rico, 57 Fed. (2d) 705, (1932), the Circuit Court of Appeals held that a call for a special session of the Legislature to correct mistakes and discrepancies in the excise and revenue laws authorized an amendatory statute imposing an excise tax on the manufacture of sugar. The Court said (l.c. 706):

> "While section 33 of the Organic Act of Porto Rico provides that at special sessions of the Legislature no legislation not specified in the call shall be considered, under the call for the Special Session of August 13, 1923, the legislative authority was not confined within such narrow limits as contended by the appellant below. Any enactment during the special session, not clearly foreign to the purpose for which it was called together, should be held valid. The Porto Rican Legislature under the call could properly by amendment make clear their intent as to any provision of the original act, or correct any mistakes or discrepancies."

A problem practically identical with the question here under consideration has been passed upon by the Supreme Court of Colorado in the case of Parsons v. People, 76 Pac. 666, decided in 1904. The Constitution of the State of Colorado at that time authorized the Governor to call a special session of the Legislature but provided that thereat no business should be transacted other than that named in the proclamation. The proclamation of the Governor calling a special session recited that it was to provide necessary revenue and to enact a revenue law providing for the assessment of property for taxation and the levying and collection of taxes. An Act was passed at that special session which provided that every one selling liquor should, in addition to the other license fees exacted by law or by the ordinances of any municipality, pay to the State an additional license fee of $25.00. It was contended that this Act did not come within the Governor's proclamation; the Supreme Court of Colorado held (l.c. 669):

> "When the Governor, by his proclamation, declared, as he did, that one object of convening the General Assembly was to enact a revenue law for the state, his power was exhausted, in so far as concerns the right of the Legislature to carry that object into effect. <u>It was not competent for him to restrict the General Assembly to some particular method of raising revenue, or as to the subjects of taxation</u>, but having declared the general object for convening the General Assembly, viz., to pass a revenue law, <u>that body was at liberty to adopt such methods as it deemed best to effectuate that object, and to select for itself the subjects of</u>

taxation. A case quite in point is In Re Proclamation, 19 Colo. 333, 336, 338, 35 Pac. 530. For additional authorities see Baldwin v. State, 21 Tex. App. 591, 593, 3 S.W. 109; State v. Shores, 31 W. Va. 491, 7 S.E. 413, 13 Am. St. Rep. 875; Mitchell v. F. & C. Turnpike Co., 22 Tenn. 456."

CONCLUSION

In view of the foregoing, it is the opinion of this department that Senate Bills Nos. 36, 37, 38 and 39 are constitutionally within the scope of the proclamation of Governor Park convening the Extra Session of the 57th General Assembly of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

CONSOLIDATED SCHOOL DISTRICTS:

1. Board of Directors in Consolidated School District can compel children living in a certain ward district to attend the building in that ward.

2. When a ward building is closed the Board of Directors of the District must pay the transportation of all children living in that ward who live more than three and one-half miles from any proper school.

12-2

November 28th
1 9 3 3.

FILED
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61

Mr. Cecil Jenkins,
County Superintendent of Schools,
Savannah, Missouri.

Dear Mr. Jenkins:-

We have your letter of October 11, 1933, in which was contained a request for an opinion as follows:

"The Fillmore Consolidated District requested me to write to you for your opinion on two questions.

"The Fillmore District is a consolidated district composed of a town or central district and three rural districts. Since the consolidation, some years ago, the district has considered the old boundary lines between the old districts as the ward boundary lines of the consolidated district.

"Several families from the country ward schools think that they are getting better facilities by sending their children to the central building. This has been the custom for the last several years and has grown so that in one of the rural districts, twelve children in that ward are attending the central building, leaving only eight in the rural building.

"Now the questions which the board asked are:

"1. Can the board compel the children living in the ward district, to attend that building or do the children have the right to attend any building in the district if the building is easier of access or furnishes, in their opinion, better work?
"2. In the ward mentioned above, if the board should close the ward building as provided under Section 9354 of the School Law, would the board be compelled to pay the transportation of all children living in that ward, or only those now attending the ward school?

"I will appreciate an answer as quickly as possible."

Section 1, Laws 1933, page 388, amending Section 9354, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 9354. TRANSPORTATION--MAY BE VOTED ON.- The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 18 of an act of the 56th General Assembly, found on Page 344, Laws of Missouri, 1931. Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have all the seventh and eighth grade work done at the central high school building, provided fifteen days' notice has been given that such vote will be taken. Such seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting."

Section 18, Laws, 1931, page 344, referred to in the section quoted next above provides as follows:

"Sec. 18. PUPIL TO ATTEND MOST ACCESSIBLE SCHOOL, ASSIGNED BY COUNTY SUPERINTENDENT, TUITION.- Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the

assignment, subject to an appeal to the state superintendent by any county superintendent whose county is affected, and the decision of the state superintendent shall be final; provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

Section 9211, Chapter 57, Article 2, Revised Statutes of Missouri, 1929, said article being entitled, "Laws Applicable to all Classes of Schools", provides as follows:

Sec. 9211. VISITATION OF SCHOOLS. It shall be the duty of the board to visit the schools under their care, examine into their condition and the progress of the pupils, advise and consult with the teachers, and to exercise such supervision as will best promote the interests of the schools."

On the first question contained in yourletter, the above sections are the ones coming the closest to the situation and since there are no decisions whatsoever on this point, we shall attempt to give the above sections the most reasonable construction in view of the wording of the statutes, the probable legislative intent, and the object to be attained.

We are of the opinion that the Board of Directors has power to compel the children living in the ward district to attend that ward building. In the section of the Laws of 1933 above quoted, the sole amendatory part is the addition of the second proviso clause providing in part for the assignment of pupils and referring to the section of the Laws of 1931, above quoted, in connection therewith. The section of the Laws of 1931 provides in effect that pupils shall attend or be assigned to the most accessible school. While the words of the section refer to assigning a pupil to an adjoining district, we are of the opinion that the legislative intent was to provide for the assignment of a pupil to the most accessible school and that this should hold true even though such school were in another district. If a legislature goes so far as to provide the board or county superintendent with the power , and impose the duty, to assign pupils to the school of another district, it must be intended that such power and duty should exist for the assigning of pupils to certain schools of the same district. We are, therefore, following the well known rule of law that wherever possible, effect should be given to the legislative intent, express or implied.

Going further, Section 9211, above quoted, provides in part that the board shall exercise such supervision as will best promote

the interest of the schools. The interest of the schools, of course, means the interest of the people as a whole in the particular community. If the board does not have the power to compel the children of a certain ward to attend that ward school, the situation alluded to in your letter readily arises. Some people who are able to do so send their children to the central school and attendance falls off in the ward school until it is necessary to close same. Then transportation at the cost of the district must be provided for all children over three and one-half miles from any elementary school, and this added expense falls indirectly not only on those whose children have been attending the central school but also on those who were content to have their children attend the ward school. Our view on this matter is therefore supported by implied statutory authority and the rules of sound public policy. Clearly, the board should have this power for the best interests of those whom it represents.

On the second question, we are of the opinion that should the board close the ward building as provided in the section of the Laws of 1933, above quoted, it would have to pay the transportation of all children living in that ward without discrimination, i.e., so long as said children are not within three and one-half miles of another proper school.

There is but one case on this question but it is sufficient as to the principle of law expressed by our courts. The case we refer to is the case of State ex rel. Gastineau vs. Smith, 196 S.W. 115. This opinion was written construing section 4, laws 1917, page 511, which section with some changes has come to be section 9354, Revised Statutes of Missouri, 1929, as amended Laws 1933, page 388. The proviso clause of the statute affecting this situation has, however, remained unchanged. In this case, the court at page 115, stated as follows:

> "On reading the act of the Legislature it is clear that, if a vote is taken- and one was taken in this instance- to transport children who live farther than 2½ miles from a schoolhouse in the district, the transportation must include all children within the district falling within the class, and does not contemplate that the directors may use the incidental funds of the entire district to transport certain children in the district living more than 2½ miles from a schoolhouse and not transport other children in the district living more than 2½ miles from a schoolhouse. In other words, the act does not contemplate that a majority of the voters in the district or the school directors will be permitted to discriminate against certain children or certain parts

of the district. The whole district is taxed to create an incidental fund, and if used at all for transportation it must be used without partiality or discrimination."

Without comment on the equities involved, we feel the above case to be controlling in this matter.

Very truly yours,

CHARLES M. HOWELL, Jr.
Assistant Attorney-General.

APPROVED:

Attorney-General.

ELEEMOSYNARY BOARD - Without authority to purchase real estate.
STATE PURCHASING AGENT - To purchase real estate for Eleemosynary Board.

December 16, 1933

Mr. W. Ed Jameson
President, Board of Mgrs.
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

We have your request of December 4th, 1933 for an opinion upon the following state of facts:

> "The Missouri State Sanatorium, Mt. Vernon, has an opportunity to make what I consider a very advantageous and much needed purchase of a small tract of land adjoining its present premises.
>
> Will you please advise as soon as you can do so conveniently whether or not the Eleemosynary Board has the power to make such purchase? The owner thereof desires to close the sale before January 1st, hence the request for early action on your part."

THE AUTHORITY TO PURCHASE REAL ESTATE NEEDED BY THE ELEEMOSYNARY BOARD IS VESTED IN THE STATE PURCHASING AGENT.

We call your attention to the provisions of Section 8568, R. S. Mo. 1929, which reads as follows:

> "In case it may become necessary for any eleemosynary institution in this state to take or appropriate any lands

> of persons or corporations for the uses of such institution or for the purpose of constructing sewers, and the owners of said property cannot agree with the board of managers of the institution desiring to appropriate such lands, or to construct such sewers, upon the proper compensation to be paid, or in case the owner is incapable of contracting, unknown, or a nonresident of the state, then such property may be taken by said institution, by and through and upon the application of the board of managers of the same, in the same manner that is provided for by law in relation to the appropriation and valuation of lands taken for telegraph, macadamized, graded, plank and railroad purposes."

Section 8574, R. S. Mo. 1929, in part, provides as follows:

> "The board of managers of the eleemosynary instituions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers for the use and benefit of said institution; * * *"

The above and foregoing statutory provisions apply to all eleemosynary institutions and are made applicable by Section 8618, R. S. Mo. 1929, which reads as follows:

> "So far as applicable, and unless otherwise specially provided by law, the provisions of the foregoing sections of this aritcle shall apply to and govern all the eleemosynary institutions of this state."

However, the legislature, in 1933, Laws 1933, page 410, (S.B. 192) created a state purchasing agent. Section 2 of that act provides:

> "He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitituion of the State."

It would appear that there is a conflict between the statute originally granting to the Eleemosynary Board the power to purchase real estate, as set out above, and that part of Section 2 of the State Purchasing Act, supra, which takes away the power of the Eleemosynary Board to purchase real estate. As between the two conflicting statutes, Section 14 of the State Purchasing Act provides:

> "All acts or parts of acts inconsistent or in conflict with this Act are hereby repealed to the extent of such inconsistency or conflict."

It is, therefore, the opinion of this office that the Eleemosynary Board is without authority to purchase the real estate mentioned in your inquiry, but that the same may be purchased by the state purchasing agent for the Eleemosynary Board.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General

ELEEMOSYNARY INSTITUTIONS: Fund in hands of steward should be used according to the wishes of donor.

December 28, 1933. 12-30

FILED

Hon. W. Ed. Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge your letter which reads as follows:

> "In several of the Eleemosynary Institutions there is a small fund known as the Patient's Fund. Several of them have small credits at banks not carried on the books of the institution. It is money left over a term of years with the stewards for spending money for the patients. There has gradually accumulated several hundred dollars in several of these institutions.
>
> A number of our superintendents would like to know if it would be permissible to use this money for the purchase of talking machines for the pleasure of the patients in these institutions.
>
> If you can have an opinion rendered from this meager advice as to the state of these funds, I will appreciate it, so I can pass it on to the superintendents."

We assume that the money in the possession of the stewards belongs to individual patients. If such be the fact, then any balance on hand goes to the patient entitled to it. The steward would be in the position of a trustee and he should execute the trust according to the wishes of the person (or persons) who left

the money in his custody. A trustee should carry out the wishes and desires of the one who established the trust.

We quote from Vol. 35, Cyc., page 290, as to the "Powers, Duties, and Liabilities of Trustee in General," to-wit:

> "The rights and powers of a trustee properly qualified and appointed are derived from, and measured and limited by, the instrument creating the trust, and usually include not only general authority to possess, manage, and preserve the trust property, and to execute the trust, by distributing the property and funds among the cestuis que trustent, but specific authority to sell, mortgage, lease, and pledge the trust property, and to invest the trust funds, as well as authority to institute and defend actions for the benefit of the trust, and to incur reasonable expense in administering and executing the trust. The trustee will not be permitted to change the nature, objects, and purposes of the trust and vary the rights of the beneficiaries by applying the capital and income to purposes foreign to the trust or by other acts of his; nor will he be allowed to exercise powers conferred upon named third persons by the trust instrument; but when the trustee conforms with the provisions of the trust instrument in their true spirit and meaning, he may adopt such measures and do such acts as are implied in its general directions and are proper and reasonable means for making them effectual; and within the limits of the authority conferred upon him, the trustee has an implied and sometimes express power of discretion, which discretion will not be construed to operate upon powers withheld or to justify the trustee's refusal to act, nor to be any other than a proper and honest judgment, considering the nature and object of the trust, the amount of the trust fund, and the circumstances of the beneficiaries.
>
> By accepting the trust, a trustee becomes bound to execute it, without any further request from anybody, and he can be relieved from all or part of his duties only by the consent of all

> the beneficiaries, or by putting the administration of the trust into the hands of a court of equity. As in the case of his rights and powers, his duties are to be ascertained by an inspection of the instrument creating the trust; and as to the performance of these duties, the general requirements are that he represent and protect the interests of all the beneficiaries, that he act in good faith, and that he exercise that care and diligence which an ordinarily prudent man would exercise in the management of his own affairs. When it is shown that a trustee has been faithful and diligent, the courts will view his acts with indulgence, and will not hold him responsible for mere mistakes or errors of judgment, or for losses not attributable to any lack of fidelity or failure to exercise reasonable care and prudence; but good faith is no defense where the trustee has artitrarily overstepped the bounds of his authority, or has been guilty of such gross neglect as no reasonably intelligent person would consider proper. A trustee de san tort is held to the same liability as if he had been lawfully appointed."

We also call to your attention Section 620, R. S. Mo., 1929, and subsequent sections pertaining to the law of escheats.

If it is ascertained that money was left to be used for a particular patient and said patient is dead, then the remaining balance should be turned over to his administrator or executor, as the case may be, and absent heirs, then the money escheats to the State.

However, this may not be the situation of the fund, and if it is not, then your guess as to what should be done with it would be as good as ours and perhaps the common sense rule should be applied, that is, it was left for the patients and none in particular entitled to it or any part thereof, then perhaps the use of all for the benefit of all would come closer or nearer to carrying out the intent of the donors. However, if it is possible to divide the fund so as to show what proportionate part belongs to individual patients, then same should be expended and used for the patient for whom intended.

You appreciate that we can not intelligently advise you in a matter of this sort unless more facts are submitted to us. However, we have given you a general idea and by applying the foregoing principles to the facts as they exist you will not be far wrong in whatever is done with same.

If you have any further inquiries concerning this matter please command us.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

DEPARTMENT OF PENAL INSTITUTIONS:
MOTOR VEHICLES:

Department of Penal Institutions has right to manufacture license plates and road signs under Senate Bill 204. Laws 33

May 11, 1933

FILED
46

Honorable George C. Johnson
Superintendent of Industries
Jefferson City, Missouri

Dear Mr. Johnson:

This Department acknowledges receipt of your letter dated May 4, 1933, in which you state in part as follows:

> "It is vitally important that we know whether there is any doubt of the constitutionality of Senate Bill No. 204, which authorizes the manufacture of license plates by the Penitentiary. It is necessary that we purchase and install additional machinery for this purpose, calling for a considerable outlay of money. We dislike to proceed in the matter on an uncertainty * * * * * * * * *"

We assume your inquiry with reference to Senate Bill number 204 was prompted by the ruling of the Supreme Court in State ex rel Department of Penal Institutions, et al, v. Becker, et al, 47 S. W. (2nd) 781.

In the above case the Supreme Court held that part of the Motor Vehicle Act found in Extra Session Acts, 1921, page 76, authorizing the Motor Vehicle Commissioner to contract with the prison board for the manufacture of plates and badges to be unconstitutional, but on the ground that the part of the Act just referred to was not germane to the main purpose of the Motor Vehicle Act, but in the opinion in that case the court

clearly recognizes that if a legal statutory enactment was passed by the Legislature, then the penal board would have the right to manufacture the plates and badges referred to in the 1921 Session Acts, supra. At page 782 of the opinion the court said:

> "Relators must point to the statute authorizing the prison board to manufacture license plates and chauffeurs' badges for the state. In other words, the board must be authorized to enter into the contract in question".

House Bill Number 204 is a separate independent act. The purpose of the bill is to authorize the manufacture in the state penitentiary signs used by the State Highway Department and license plates required for motor vehicles, all of which is clearly expressed in the title to the bill and we are of the opinion if and when signed by the Governor and if and when the same goes into effect in due course, no emergency clause being attached, the Department of Penal Institutions will have a legal right to do the things they are empowered by Senate Bill number 204 to do.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

_____

Attorney General.

GL:LC

In Re: MARGINAL RELEASES IN RECORDER'S OFFICE.

May 17, 1933.

FILED
46

Mrs. Ella Jones
Circuit Clerk and Recorder
Dent County
Salem, Missouri

Dear Madam:

Your letter of May 5th requesting an opinion from this office is in words and figures as follows:

"I am writing you in regard to Sec. 3081 Revised Statutes of 1929 (1919), where notes must accompany partial Release Deeds or affidavits.

"I have a Deed of Release from the Highway Department made from the Federal Land Bank of St. Louis, which is a partial release for the Highway and they say the recorders in this division has been making or Recording the Deeds of Release without the note being presented.

"If I can do this in Highway Right of way Deeds without the notes being presented I would like to know."

Sec. 3081 Revised Statutes of Missouri, 1929, referred to in your letter has been amended by the laws of 1931 page 174, and reads as follows:

"Part of property may be released, how.— In case any person desires to release any part of the property described in any deed of trust or mortgage by marginal record or deed of release, he shall be permitted

to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits or otherwise as now or hereafter provided by law in the case of full release, and the recorder shall note the fact of such partial release on the margin of the record of such deed of trust or, if such release is made by deed of release, and of the presentation of such notes or other obligations or accounting therefor, on such notes or obligations in substantially the following form:

'See partial release dated .....

.....Recorder.'"

It is the opinion of this office, you may record this partial deed of release in Highway Right of Way Deeds without the notes being presented provided that you note the fact of such partial release on the margin of the record of such Deed of Trust that said notes were not presented to you but were accounted for as being in the possession of a certain named holder naming him on the record. Said marginal notation should also state as above " See partial release dated..... .....Recorder."

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS: TUITION REQUIRED AND ALLOWED FOR NON-RESIDENT HIGH SCHOOL PUPILS

#B664 Acct Land 73
9399-9400 R S Mo 1929

September 30, 1933.

FILED
46
50

Mr. Alvin H. Juergensmeyer,
Prosecuting Attorney, Warren County,
Warrenton, Missouri.

Dear Sir:

Your letter of August 28, 1933 to the Attorney General has been received, containing a request for an opinion as follows:

> "1. District A charges non-resident pupils $65 tuition. Directors of District B, a rural district, are willing to pay or to guarantee the sum of $15 being the expense above $50 guarantee by the state. Can a high school demand that a rural district guarantee the full $65? Will a rural district be required to pay the $15 and the additional sum not paid by the state?
>
> 2. If the rural district guarantees $15 and refuses to guarantee the balance, can a high school district refuse to allow a student from the rural district to enroll in the high school?
>
> 3. If the Board of Directors of a rural district refuse to guarantee or pay any sum to the high school, can a student from the rural district compel the rural district to guarantee or pay the tuition in the high school?"

Revised Statutes Missouri 1929, Section 9207, which is applicable to all classes of schools, provides in part as follows:

> "The board (of directors of every school district) * * * may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same:* * *"

Revised Statutes Missouri 1929, Section 9399, provides in part as follows:

> "Any town, city or consolidated school district * * *in order to receive state aid shall show * * * that it admits non-resident pupils to said high school on payment of a reasonable tuition fee * * *".

Revised Statutes Missouri 1929, Section 9400, which provides for state aid for high schools in counties not having any high school which maintains an average daily attendance of 15 pupils, so that this Section 9400 would not be applicable to your case insofar as state aid is concerned, contains the following proviso:

"It is further provided that any school district receiving aid under the provisions of this article shall admit non-resident pupils to the high school of said district on the payment of a reasonable tuition fee * * *".

It will be observed that the proviso just quoted refers to the entire article in which that section has a place (Chapter 57, Article 7, R. S. Mo. 1929) so that such proviso would be applicable to Section 9399 which is within Article 7 under which we assume the high school in question received state aid.

The three sections of the statute above quoted represented the law of this state as it stood before the 1931 Session Acts. Section 9207 made the admission of non-residents and the tuition fee which could be charged discretionary in the board of directors of the school district in which the high school attended by non-residents was located. Sections 9399 and 9400 made it compulsory upon such board of directors to allow non-residents to attend upon payment of a reasonable tuition fee, but apparently the question of determining what was a reasonable tuition fee was not assumed by the Legislature, but was left to the determination of the board of directors of the district of attendance. Such was the law before 1931.

In 1931 a new scheme was provided by statute for the attendance in high schools of non-resident pupils, such new scheme being enacted as Laws of 1931, page 334, the sections of such Act which are applicable to the present opinion being Sections 13 and 16.

Section 16 provides as follows:

$165.257

"Sec. 16. Tuition, districts to pay for high school students.- The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaing the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupil shall not be counted in determining the teaching units of the district maintaining the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the

> amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final: Provided further, that when any school district makes provision for transporting any or all of the children of such district to a central school or schools and the method of transporting and the amount paid therefor is approved by the state superintendent of schools, the amount paid in state funds for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district: Provided, the provision of this act regarding the payment of tuition and transportation shall apply if the students attend any school supported wholly or in part by state funds."

Before the enactment of Section 16 just quoted any high school receiving state aid was required to admit non-resident pupils, but the method of determining the tuition fee to be charged was only covered by the word "reasonable". However, in Section 16 a precise method of computing tuition to be charged as well as a requirement as to how and by whom it should be paid was provided, i. e., that the school district where the pupil resides must pay such pupil's tuition, with the amount of such tuition specifically provided for by the following provision:

> "But the rate of tuition paid shall not exceed the per pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term,".

A school district cannot require a pupil resident therein to pay anything as tuition. "Section 1 of Article 11 of our Constitution made it the duty of the General Assembly to establish and maintain free public schools for the gratuitous instruction of all personsiin the state, between the ages of six and twenty years. Pursuant to the mandate free public schools have been established throughout the state, and District No. 107 is one of the free public schools established for gratuitous instruction. The right of children, of and within the prescribed school age, to attend the public school established in their district for them is not a privilege dependent upon the discretion of anyone, but is a fundamental right, which cannot be denied, except for the general welfare." State ex rel Roberts v. Wilson, 221 Mo. App. 9, 297 S. W. 419, 420 (1927).

The Legislature by Section 16 of the 1931 Act above quoted has made it compulsory upon school districts to receive non-resident pupils for high schools under certain fixed conditions, and to receive them without calling upon such pupils to pay any tuition, As before that Act it was compulsory to accept resident pupils without charging them any tuition, so it is believed that the above quotation from State ex rel Roberts v. Wilson would be as applicable to non-resident high school pupils under the 1931 Act as before 1931 it was applicable to resident pupils. It is therefore clear that under the present law the district in which a non-resident pupil attends high school cannot require such non-resident pupil himself to pay any tuition.

Under Sections 9399 and 9400 R. S. Mo. 1929, quoted above, each high school receiving state aid is required to admit non-residents. Under Section 16 of the Act of 1931 quoted above, the fee for tuition which shall be paid to and charged by such high school where a non-resident attends is definitely fixed by law as the "per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term" so that the board of directors of the high school attended by such non-resident no longer has any discretion about either admitting non-residents or fixing their tuition. Furthermore, the district where such pupil resides, while it is compelled by Section 16 to pay tuition at the rate just set out, is prohibited from paying any more than the amount fixed by such section, for the statute says "but the rate of tuition paid shall not exceed" the above computation, so that it would be illegal for the school district where the pupil resides to pay more than the rate fixed by this section.

The risk of loss of the fifty dollar payment for each pupil by the state from the public school fund is put upon the district where the pupil attends because by Section 13 of the Act of 1931 it is provided as follows:

> "In the event the amount of money in the public school fund is not sufficient to pay these quotas in full the state superintendent of schools shall pay such percentage of both the equalization and attendance quotas as the amount in the public school fund will permit:* * *"

Thus, while the district of attendance can only collect, and the district of residence can only pay, tuition in the amount of the per-pupil cost of maintaining the school of attendance minus fifty dollars, Section 13, a part of which has just been quoted, contemplates that the district of attendance may receive less than fifty dollars per pupil although it is required by Section 16 to deduct this fifty dollars at the outset of the term without any allowance being made in the event less than fifty dollars is received from the state.

A word of explanation should be made regarding the provision in Section 16 as follows:

> "In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final:* * *"

Since the statute fixed the method of computation the only thing about which there could beaa disagreement within the meaning of this provision would be the per-pupil cost of maintenance of the school attended, and the power of state superintendent of schools could not be exercised to make any change in the fifty dollar deduction.

It is our opinion that any high school in this state receiving state aid must admit non-resident pupils whose tuition must be paid by the districts where such pupils reside, and that the tuition so paid must be the per-pupil

cost of maintaining the school attended less a $50.00 deduction for each pupil.

Thus the answers to your three questions would be as to the first and second, No, and as to the third No as to the refusal to pay any sum, and Yes as to the right of the student to compel the rural district to pay his tuition as above computed.

* * * * * * * * *

Your letter asked for an opinion on the construction of the statutes involved, and such an opinion is complete above. However, a discussion of the constitutionality of the non-resident high school pupil tuition law, and especially of Laws 1933 page 334 above discussed, might be appropriate, although such a discussion was not requested, and although we refrain herein from making a ruling of this department on such constitutionality. Two possible grounds of invalidity might exist (1) the fact that the taxes of the school district of residence might be construed as not being taxes for a public purpose within the meaning of Constitution of Missouri Article X Section 3 which provides that "taxes may be levied and collected for public purposes only", because such school district taxes would under the statutes be used in part to pay the tuition of individuals instead of to maintain the public schools, and (2) the fact that under such statutes, if the fifty dollars per pupil of state aid or any part thereof should not be received by the school district of attendance, the taxpayers of such school district might be paying for the education of non-residents in such a way as to discriminate against resident pupils, for the attendance of such non-residents would not be bringing to the school district of attendance their pro rata share of the expense of maintaining the school attended, and taxes to make up this difference might be regarded as a violation of the Constitution of the United States, Amendment Fourteen, providing that "No State shall * * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(1) The case of State ex rel Garth v. Switzler, 143 Mo. 287, 45 S. W. 245 (1898) suggests the first ground of doubt. In that case it was held that an inheritance tax of Missouri was unconstitutional on the ground that a part of its proceeds was to be used to provide free scholarships to Missouri students at the state university, and that such a use was not a public purpose within Article X, Section 3 of the Missouri Constitution. The tax statute in that case provided as to such scholarsthat "they shall be entitled to enter thereon free of matriculation fees any department, school or college of the university, and have paid to them in equal monthly installments while attending the university, the sum provided by the scholarship so awarded, for defraying the expenses of such attendance" 143 Mo. 321. From the language just quoted, and from the opinion of the court as a whole, it is clear that the scholarship money was to be used solely for personal expenses, such as food, lodging, clothing and general expenses, as distinguished from tuition. In a sense it is true that those expenses are a necessary part of each student's education, in that it would not be possible to get an education at a university unless some means of obtaining food, lodging, clothing etc. were available, but as far as the maintenance of a University as an institution diffusing knowledge is concerned, they are irrelevant. Money so spent enables the student physically to attend the

university, but does not at all assist the university to maintain itself, except in the sense that unless some students were able to attend it, the university could not successfully operate. Such expenses are entirely different from tuition scholarships, the entire money from which goes to the university to maintain it . The money under the statute in the Switzler case went both immediately and ultimately to the scholars, and there was no requirement under the statute that any part of it should ever reach the university. The court in the Switzler case seemed to recognize the distinction by saying at page 324:

> "It is one thing to provide for the establishment and maintenance of a State university, and a system of free public schools, the State through its own officers, agencies and municipalities constructing and owning the buildings and apparatus and employing the teachers as public functionaries, responsible under her own laws for the discharge of their duties; and a wholly different thing to support private individuals who attend the university and public schools by public taxation."
>
> * * * * * * * * *
>
> "The act under consideration endows the scholar, not the university. It provides in unmistakable terms that a fund shall be raised by taxation and paid over to students attending the university for their support while so engaged. It is a pure and simple gift of public money by the State to private individuals for their own private use in plain violation of section 46, article IV of the Constitution, which prohibits the legislature from granting 'public money to any individual, association of individuals, or other corporation whatsoever.' We hold that when the Constitution provided for the establishment and maintenance of the university, it conferred authority to support an institution belonging to the State, and this grant is not to be extended to the unlimited support of the pupils who may attend or desire to attend that school."

If the state funds in the act held invalid in the Switzler case had gone to the university for tuition, instead of for the personal support of students, it would hardly seem open to the same objection, for all state money appropriated for the universitythis generally speaking really tuition fees for the students in attendance.

The high school tuition law under consideration is not to pay for the support of any pupil. No part of the money paid as tuition ever gets into the pupils' hands, but all of it goes to the school of attendance. The district of residence is required to raise taxes to give its residents high-school educations. If a sufficient number of residents are of high-school age and qualifications, the money raised for high-school purposes is required to be spent in offering such facilitiesto them, and if a smaller number exists, the school district is likewise compelled to offer such facilities by paying a part of the

expenses of operating the school of attendance. This seems no less a public purpose than maintaining a high-school in the district of residence, and it would seem impossible for a taxpayer in the district of residence to show any damage because if the district of residence attempted to operate a high school of its own, with too few pupils to justify it, the expense would necessarily be greater.

(2) The due process and equal protection of laws objection to the statutes in question might cause some difficulty. If the district of attendance should not receive its fifty dollars per pupil from the state, then the taxpayers of such district would be supporting in part the residents of another district, which latter would be relieved to that extent from furnishing a high-school education to its residents, and this might violate both clauses of the United States Constitution just mentioned, if such a situation was forced on the district of attendance by the State. However, the statutes in question are worded so as to avoid this objection. Thus R. S. Mo. 1929, Secs. 9399 and 9400 make the admission of non-resident pupils merely a condition precedent to state aid, and Laws 1933, p. 334, Sec. 16, applies only to schools receiving state aid. Thus the high schools are not forced to accept non-resident pupils on terms dictated by the State, but are only offered state aid if they will accept such terms, and this seems not so unreasonable as to be an arbitrary condition, for the state aid of R. S. Mo. 1929 secs. 9399 and 9400 is balanced against the risk of not receiving a part or all of the fifty dollars per pupil under Laws 1933, page 334, Sec. 16.

Yours very truly,

APPROVED: ASSISTANT ATTORNEY GENERAL.

EDWARD H. MILLER

ATTORNEY GENERAL.

PROSECUTING ATTORNEY'S SALARY and Refund of sums paid in excess thereof -- Section 11314, R.S. Mo. 1929.

January 26th, 1933

FILED 47

Hon. O. A. Kamp,
Prosecuting Attorney, Montgomery County,
Montgomery City,
Missouri.

Dear Sir:

Your letter of recent date requesting an opinion of this department relative to the salary of prosecuting attorneys has been handed to the undersigned for attention. You state:

" What I wish to have is the opinion of your department,on Section 11314, R. S. 1929, regarding the salaries of prosecuting attorneys. As I understand the section it provides for the payment of salary of prosecuting attorneys, at so much per annum, depending upon the population * * * to be paid in monthly payments,* * * population to be determined by multiplying the whole number of votes cast at the last presidential election by five, until AFTER THE POPULATION OF SUCH COUNTY SHALL HAVE BEEN ASCERTAINED BY THE NEXT DECENNIAL CENSUS OF THE UNITED STATES.

"Since the ruling of the Supreme Court that the population shall be determined by the census, the question is, when should the salary be paid according to the population by the census. The statute says it shall be paid at so much per annum, which was fixed at the beginning of 1930, according to the population by the vote, then would it not be a violation of the statute to say that it should be reduced in monthly payments at any time during that year of 1930. Again the statute says to continue payment according to the population by the vote, until AFTER THE POPULATION OF SUCH COUNTY SHALL HAVE BEEN ASCERTAINED by the census.

" What I wish to have is your opinion of the construction of that statute, and when should the salary begin to be based on the population by the census. In other words when was the population ascertained for the information of the courts, it would certainly not be until AFTER the census was taken and announced. I

> am seeking to know whether a refund of any salary paid during the year 1930 to prosecuting attorneys, in your opinion, could be compelled, and whether the County Courts should require it."

As you state in your inquiry, Section 11314 in substance provides that a prosecuting attorney shall receive for his services a salary per annum to be paid out of the county treasury in all counties having a certain population, said salary to be paid monthly upon the warrant of the County Court issued in favor of the prosecuting attorney to the county treasurer * * * *, the population to be arrived at by multiplying the whole number of the votes in the last presidential election by five until after the population shall have been determined by the next decennial census of the United States. Judge Ragland writing the opinion in the case of State ex rel O'Connor v. Reidel et al, 46 S.W. (2nd) 1066, says in referring to Section 11314:

> " The section provides for two things in express terms; the multiplying of the whole number of votes cast in the last presidential election by five as a method of ascertaining the population, and termination of the use of that method upon the occurring of a designated event. When the event occurred by the census of 1930, further use of the first mentioned method could no longer be used."

Thus it will be seen that the census should be the guidance in paying the salary of a prosecuting attorney for his services after the ascertainment of the population by that method. Our next proposition is as to when the change in salary, if any, should be made effective by shifting from the multiple of the vote as in said section provided to the population of such county as and when ascertained by the next decennial census of the United States. It will be noted that said section provides that the prosecuting attorney shall receive a designated sum per annum, so placing a plain, ordinary construction upon the language used. It means annual salary for each year of his incumbency.

In the case of State ex rel Harvey v. Linville, 300 S. W. 366, the court uses this language:

> " The increase of salary which a statute permits after an election showing an increase in population is not in violation of the Constitution in that the salary is increased during the term for which the officer was elected because the law in force at the time of his election fixed a salary to be ascertained at periods as changed by the increase in population."

The Constitutional provision referred to in said opinion, Sec. 8, Art. XIV, does not place an inhibition upon a decrease in salary or fees during term of office.

The Court further in considering a statutory provision in the Linville case, supra, pertaining to annual salary, says:

> "Annual salary as used in said Section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual' as applied to salary means not the calendar years but the years of the incumbent's term, which in the case of relator begins on the first day of April each year."

The prosecuting attorney of your county was elected at the general election held in November, 1928, for a term of two years, beginning on the first day of January 1929, and ending on the 31st day of December, 1930. His salary at the beginning of his term would, therefore, have been ascertained by the method provided in Section 11314 and under the holding in the Linville case, supra would have so continued until the end of the first year of his term according to the time of year when his term should commence, which as hereinabove stated, was on January 1st, 1929 to December 31st, 1929, and again from January 1, 1930 until December 31st, 1930.

The above conclusions having been reached upon the opinions of the Supreme Court in the above cited cases, it will be unnecessary to determine at what period of the year, 1930 the decennial census of the United States became effective, and also unnecessary to determine your query with reference to a refund of any salary paid to the prosecuting attorney in that year.

As we construe Section 11314, it is applicable to prosecuting attorneys assuming the duties of office January 1, 1921. It provides as above stated that the prosecuting attorney shall be paid a salary of so much per annum, depending upon population, such population to be ascertained by multiplying the whole number of votes cast at the preceding presidential election by five. The language in that respect is clear. It appears also clear that such process of determination is to be continued with respect to prosecuting attorneys thereafter elected until after the population shall have been ascertained by the next decennial census in the United States, Upon the ascertainment of the true population as disclosed by the census of 1930, the further use of a speculative method would be unnecessary. There is nothing in the language of the section that would indicate an intention upon the part of the Legislature to resort again to the multiple method of ascertaining

population when once the true population has been been ascertained by the census. We are therefore of the opinion that the prosecuting attorney's salary from and after January 1st, 1931, should be ascertained from the census of 1930 and that such method of ascertaining the population of such county would thereafter continue until the next decennial census by the United States.

What has been above stated disposes of your inquiry relative to any duty involved upon the prosecuting attorney to make refund of any amounts paid in the year 1930. We may add however, that where a County Court erroneously but voluntarily pays a sum in excess of the amount a prosecuting attorney was entitled to receive, such action upon its part is not res adjudicata as against the county.

State ex rel v. Deimer , 255 Mo. l. c. 351;
State ex rel v. Hill, 272 Mo. l. c. 211.

It is the duty of the County Court to see that the County funds are protected and that the County obtains that to which it is entitled. If the Court paid to the prosecuting attorney a salary in excess of that to which he was entitled, after January 1st, 1931, then it is the opinion of this department that such excessive sum could be recovered by such County, and it should therefore make demand and recover such excessive amount for its general revenue fund.

Very truly yours,

CCA/N

CARL C. ABINGTON
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney General

COUNTY DEPOSITARY-- Banks in county or adjoining counties entitled thereto - Section 12189 R. S. Mo. 1929 - Preference where no bond given.

February 7, 1933.

FILED
47

Hon. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Kamp:

Your letter of February 3, 1933, directed to the Attorney General, requested an opinion of the construction of Section 12189 R. S. Mo. 1929, relating to the selection of a county depositary by the county court, has been handed the undersigned for attention. In connection with your reque t you submit the following:

> "I am writing you for your opinion of the construction of Section 12189, R. S. 1929, relating to the selection of County Depositary by the County Court, when there has been no proposal submitted by any bank or banker in the county to act as such.
>
> Said section provides that in that case the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, etc., IN THE COUNTY OR ADJOINING COUNTIES, in such sums or amounts, ****** as the court may deem advisable, ... The question is what is meant by adjoining counties? Does it mean the counties, only, that border on Montgomery County, or could a depositary in some other county be selected, in the event no banking corporation in Montgomery County or the counties adjoining thereto, can or will meet the requirements of said section 12189?
>
> In this county we have two banks in which the funds have been kept, the First National Bank and Montgomery County Bank, of Montgomery City, Mo. They

were selected under the provisions of said section 12189, and required to give bond in accordance with section 12187. However, the Montgomery County Bank has given no bond, and the First National Bank, a bond in the sum of $2500.00 is all that the surety company would write. It seems that surety companies decline such risks almost entirely.

I would like to have your opinion on the above question, for the information of our county court, and will thank you to have it to me by next Wednesday February 15th, 1933, while county court is in session, if possible.

Also would you advise that the $2500.00 bond given by the First National Bank be held, or should it be rejected, if so what procedure should be taken to have it cancelled? "

Section 12184 R. S. Mo. 1929, provides the manner to be pursued by county courts in advertising for county depositaries .

Section 12187 R. S. Mo. 1929, provides for the execution of the bond of selected depositary, by character of security thereof and the amount of such bond in accordance with the total proportion of the annual revenue as let to said depositary.

Section 12189 R. S. Mo. 1929, provides that if the banks of the county fail or refuse to submit proposals to act as county depositaries as provided for in Section 12184, supra, that the county court shall have power to deposit the funds in banks of adjoining counties, conditioned that the banks in such adjoining counties give bond as required in the first mentioned Section.

In construing a change of venue Statute, Section 911 R . S. Mo. 1929, which reads in part as follows:

"If reasonable notice shall be given to the adverse party or his attorney of record, the court or judge, as the case may be, shall consider the application, and if it be sufficient, a change of venue will be awarded to some county in the same, adjoining or next adjoining circuit, convenient to the parties for the trial of the case and where the causes complained of do not exist ******* "

The Supreme Court in the case of Irons vs. American Express Company, 300 S. W. L. C. 287 says,

> "It may be well to state that we construe the words "next adjoining circuit" to mean a circuit adjoining a circuit adjoining a circuit in which the county in which the suit is filed is situated, and that Mississippi county was properly determined a county in the next adjoining circuit, within the meaning of the statute."

The Section of the Statute to which you refer uses the words "adjoining counties". Omitting then the word "next" and placing upon the words as used the construction of the Supreme Court in the case, supra. They should be taken in their literal sense and mean the counties bordering on and lying immediately adjacent to the county in question.

Such authority as the various county courts have with respect to the bonds required, and the banks which may be selected as county depositaries is contained in and provided for, within the provisions of Article 9, Chapter 85, R. S. Mo. 1929.

The penalty of the bond of a selected depositary, as required by Section 12187, supra, is as follows:

> "******* the penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court *******"

The county court under this section is given no discretionary power with reference to fixing the amount of the bond. The Statute fixes the amount and the county court is without authority to vary therefrom.

If the court should determine that the security as furnished by a depositary is insufficient, Section 12197 R. S. Mo. 1929, provides a way of requiring additional security or selecting another depositary.

The following authorities, as we construe them hold that a deposit of public funds without requiring the bond

prescribed by statute is in violation of law and that deposits made by officials with a depositary who has failed to execute a bond as the law required, creates and constitutes the monies so deposited a trust fund for which a preference will be allowed.

Consolidated School District vs. Bank, 21 S. W. (2nd);
Compton Company vs. Trust Company, 279 S. W. 746;
Fidelity Company vs. Bank, 44 Fed. (2nd) 19.

Section 12198 R. S. Mo. 1929, provides that,

"The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer ******* from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, ********"

If the bond accepted by the county court does not fully comply with the statutory regulations, the treasurer is liable on his own bond for the county money.

Bragg City vs. Road District, 30 S. W. (2nd) 22;
State vs. Thompson 22 S. W. (2nd) 196.

In the above we have undertaken to discuss the statutory provisions relating to your inquiry and apply the law pertaining thereto by the decisions rendered and as hereinabove quoted. From such recitals we believe your inquiry is fully covered.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney General.

APPROVED:_____
ROY McKITTRICK
Attorney General.

CCA:EG

Collector- fee for collecting delinquent Railroad taxes as construed under Section 10044 RS 1929

February 8th, 1933

FILED
47

Hon. Roy L.Kay,
Prosecuting Attorney,
Moniteau County,
California, Missouri.

Dear Sir:

Your letter of February 4th directed to the Attorney-General, and requesting an opinion upon the subject hereafter set out has been referred to the undersigned for reply. The facts set out in your letter are as follows:

> "The Missouri Pacific Railway Company has defaulted in the payment of its 1932 taxes. Our Collector has been nagging me about the amount of commissions he is entitled to charge the company on account of the delinquency. He is dissatisfidd with my judgment on the matter and so I told him I would request your opinion on the matter.
>
> The statute seems to make a different provision for the collector in the amount on delinquent for the amount to be charged and kept by the collector than that charged and kept by him in other back taxes. Section 10044 seems to me to be the determining section for the amount to be kept by the collector. Section 10035 seems to indicate that the same charges provided in other delinquent taxes must be charged and also provides for a distribution of the additional charge to be distributed to the various funds.
>
> The collector seems to think that section 10038 authorizes him to charge and keep the same amount as on other back taxes. My opinion is that this section provides a means of proceedure in the prosecution of suits to enforce collection by suit, and has no application to the remuneration for and of the collector. "

Chapter 59 of Article IX, Revised Statutes of Missouri, 1929, deals with the subject of "Delinquent and Back Taxes", and Section 9969 of said chapter and article provides for the fee to be paid the collector in reference thereto, as follows:

> " To the collector, except in *such cities, four per cent on all sums collected; in such cities two per cent on all sums collected-- such per cent to be taxed as costs and collected from the party redeeming."

Chapter 59, Article XIII deals with the subject of "Taxes of Railroad and Street Car Companies". Section 10035 provides that railroad taxes become delinquent on the first day of January, and that thereafter a penalty is to be assessed on such delinquent taxes, the same as on other delinquent taxes. The penalty on other delinquent taxes is one per cent per month. After January lst a penalty of one per cent per month attaches to delinquent railroad taxes.

Section 10037 provides for seizure of railroad property for the collection of delinquent taxes. Sections 10038 and 10039 provide for suits for the collection of such delinquent taxes. Section 10043 provides for attorneys' fees in the event special attorneys are employed for the purposes as set forth in said section, and section 10044 provides the fees to be allowedthe collector in collecting such delinquent taxes, and fixes such fee at one per cent of the sum paid without seizure of personal property, and five per cent where there is a seizure.

We are interested, for the purpose of your inquiry, in Section 10044, but recite the provisions of the other sections only for the purpose of reaching a better understanding of the provisions of said section 10044.

The first mentioned section deals with the collection of delinquent real estate and personal taxes, and so far as we know, is the only section permitting a four per cent collector's commission or penalty for the collection of delinquent taxes.

Your construction of Section 10038, in our opinion, is correct, in that it has no relation to Section 9969 or to its provisions with reference to the commission allowed for delinquent tax collections. It is dealing with another subject, namely taxation of railroads and street car companies, and, as you suggest, provides a means of proceedure rather than relating to the provisions of Section

9969 for the ascertainment of a fee for the collection of delinquent personal and real estate taxes. Section 10035 has reference to the one per cent interest penalty and not the collector's commissions. The fees of the collector for collecting the railroad tax is provided for in Section 10044 and resort should be made to that section for the ascertainment of such fees.

Very truly yours,

Carl C. Abington,
Assistant Attorney-General

Approved:

Roy McKittrick,
Attorney-General

CCA/N

CRIMINAL COST - State must pay the cost accruing on failure to convict on penitentiary charge.

March 7, 1933.

FILED
47

Hon. James H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Keith:

Answering your letter of February 21st, in which you state information was filed charging that,

> "' * * * one Oscar Payne did then and there wilfully, unlawfully and feloniously use and operate a still and worm in the process of distilling and manufacturing for sale certain intoxicating liquor, to-wit, one half pint of corn whiskey, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.'"

Then you stated the case was tried at said term and resulted in a mistrial; then after several continuances a nolle prosequi was entered. The question arises, "whether costs should be paid by the state or the county", and you further state that you thought it ought to be paid by the state.

The offense was committed under the first offense described in Section 4525 R. S. Mo. 1929, which says,

> "If any person shall use in this state any still, worm, doubler, or other distilling, or brewing equipment or utensils whatsoever, in the process of distilling, brewing, or otherwise manufacturing any intoxicating liquor for sale or transportation for sale contrary to the provisions of this article,

> he shall be deemed guilty of a felony, and, upon conviction thereof, punished by imprisonment in the state penitentiary for a term of two years, * * * * *"

This offense that the defendant was charged with, of course, he pleaded not guilty, that made the issue plain and unequivocal. (The fact that another minor offense is mentioned in the latter part of that section is utterly immaterial.)

Section 3828, R. S. Mo. 1929, states that,

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; * * * *"

These two statutes are clear and unequivocal. Under one he was charged with a felony, or a penitentiary offense, and the other says if the defendant is acquitted, the costs shall be paid by the state. The dismissal of the case against the defendant was an acquittal and in the language of Judge Graves,

> "To our mind the statute itself is clear and plain. In fixing the cases for which the State shall be liable for costs, in that it says: 'In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the State.'"

State ex rel v. Geo. Hackmann, State Auditor, 302 Mo. 273, l. c. 278 - 279.
Ring v. Vogel Paint Co., 46 Mo. Ap. 374 l. c. 377.

My opinion coincides with yours, and, it is my opinion that the state is undoubtedly liable for, and should pay, the costs in the case.

Very respectfully,

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

IN RE: Pool Halls; Requirement for license by County Court.

14372. R.S. Mo. 1929
15397 - R.S. Mo. 1939

March 11, 1933

FILED

Hon. A. P. Kelly,
Prosecuting Attorney,
Mercer County,
Princeton, Missouri.

Dear Sir:-

In your inquiry of February 13, 1933, directed to this office, you ask whether or not it is possible for a pool hall without a permit from the County Court to be operated as a club, in which a membership fee is collected to defray rent, wear and tear on the tables, etc. You then continue by saying that, in the instant case, as a matter of fact, there is no membership fee but that there is an understanding that the patrons of the hall shall "tip" the manager two and one-half cents per cue at the end of each game.

Section 14372, R. S. Mo. 1929 states:

> "COUNTY COURT TO LICENSE KEEPERS OF BILLIARD TABLES--The county courts shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, hereinbefore mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

The only exception to this is Section 14380, R. S. Mo. 1929:

> "EXCEPTIONS--This chapter shall not apply to any person having set up in his own private residence any one of such tables mentioned in section 14372, when used for his own private use, and for the use of his family, and upon which no charge is made for playing."

In the case of State v. Chotte, 130 S. W. 245, 143 Mo. A. 346, decided May 2nd, 1910 in the Kansas City Court of Appeals, the defendant was tried and convicted on an information charging him with having kept a billiard table without license. No charge was made, either directly or indirectly for the use of the billiard table. In affirming the conviction, Judge Broaddus held:

> "The fact that defendant made no charge to the patrons of his business as a merchant for the use of his table for playing games of billiards thereon was immaterial. It was permitting the playing of such games by defendant as the keeper of the tables without a license therefor tthat the statute comprehended. Had he been licensed as such keeper he would have been authorized to have chafged for the use of his tables or he could have permitted the use free of charge to his patrons although the statute is silent as to that matter. It was the business the Legislature had in view and not whether the licensee realized any profit from it, yet the presumption would be that no person would go to the expense of setting up and maintaining for use billiard tables, without he expected some compensation therefor."

This case has never been overruled and is, in our opinion, the law in Missouri today. While the statute is intended to regulate the business, it is also a revenue measure, and this fact should be kept in mind in interpreting the statute.

In the absence of Missouri cases directly deciding the point in reference to pool halls operating as clubs, decisions from other states may be illuminating.

In the case of State v. County Club, (Texas) 173 S.W. 570, syllabus No. 17:

> "Rev. St. 1911, art. 7355, sec. 8, levying an occupation tax on every pool or billiard table used for profit and providing that a table used in connection with any drinking saloon or other place of business where intoxicating liquors are sold or given away shall be regarded as used for profit, does not impose the tax on a bona fide incorporated social club, which maintains billiard tables in its clubhouse for the free use of its members and guests, since such clubhouse is not a saloon and, even though intoxicating liquors are sold therein, is not a "place of business", which in that statute means the place where one occupies his time and labor with a view of financial gain."

This decision cannot be regarded as controlling in Missouri, however because of the difference in the wording of the statutes. In fact the Court in the Texas case expressly said "keeping a billiard or pool table is not taxable unless it is used for profit". (Emphasis ours.). This is quite different from Section 14272, R. S. Mo. 1929.

The case of Union League v. Rendley 39 Pa. super. ct. 514, holding that a "social club is not required to pay a tax under the Act of May 25, 1907, P.L. 244, as a keeper of a billiard or pool room for purposes of profit" can be explained in the same manner as the

Texas case in that the statutes here also contemplated a billiard or pool room for purposes of profit.

Thecase of State ex rel. City of Friend v. Friend Recreation Club, 248 N. W. 876, 128 Neb. 740, is, however, in our opinion, directly in point. Judge Blockledge in that case held:

> "Cities of the second class have authority, under the provisions of Section 17-129, Comp. St. 1929, to enact ordinances to license, regulate or prohibit bowling alleys; and a bowling alley open to the public upon payment of a fee or charge is not exempt from the provisions of such ordinances because it is incorporated and operated under the name of guise of a "Recreation Club."

We conclude from the statement of the organization and operation of the club as here presented that it is palpably a devide to evade or avoid the requirementsfor a license and the regulatory provisions of the statute. It is the opinion of this office that unless a case came precisely within the exception provided for by Section 14080 R. S. No. 1929, keepers of billiard tables, pool halls and the like must be licensed by the County Court; and that the case presented to us by you does not come within the exception and that a license to operate is required.

We regret that we cannot give you a definite opinion as to the American Legion Hall, but you have not furnished us with sufficient facts upon which to base an opinion.

Very truly yours,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

JWH/mh

APPROVED:

ROY McKITTRICK
Attorney General

SCHOOL--Majority of TAX PAYERS voting at election under Sec. 9225 R. S. Mo. 1929, increases tax levy.

March 25, 1933

FILED
47

Mr. O. A. Kamp,
Prosecuting Attorney
% A. H. Drunert
Jonesburg, Missouri

Dear Sir:

Your letter of March 21,1933 at hand wanting an opinion relative to the construction of Section 9225 R. S. Mo. 1929, wherein the proposition to increase taxes is being suggested to the voters of said school district.

In reply will say the statute subject to the maximum provided by the construction states:

> "***shall submit to the voters of said school district who are tax payers of such school district,***whether the rate of taxation be increased as proposed by said board,***and if a majority of the voters who are taxpayers voting at such election on the proposition to increase levy shall vote in favor of such increase,***"

You will note the statute repeatedly says:

> "The majority of the tax payers voting at such elections."

Tax Payer has been defined as one who owns either real or personal property liable to assessment and taxation in the district.

The theory of the law is that his interest is so great that he will exercise his discretion in voting for the best interest of the district.

> "No strict and technical construction is to be put upon the statute involved, nor is a strict and technical compliance with it to be exacted of the "plain, honest,

worthy citizens, not specially learned in the law" in the performance of their duties under it."

State ex rel. Jones 266 Mo. l.c. 201

State ex rel. Job. 205 Mo. l.c. 34.

"The laws affecting the organization, functions, and powers of the school district are not to be strictly construed."

State ex rel. School District 238 S. W. l.c.830

State ex rel. Cornahan v. Jones, 266 Mo. 191 l.c.201.

In view of the foregoing, it is our opinion that the tax payers are the qualified voters in this instance because it limited it specifically to tax payers under that particular section 9225 R.S. Mo. 1929.

Ordinarily unless so limited, Section 11 of Article 10, of the State Constitution on a two third majority vote could increase; but as stated above this particular section cuts down the majority of the tax payers instead of "a two third vote of the people."

Respectfully yours,

Geo. B. Stuther

GEO. B. STUTHER
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

CRIMINAL COSTS: Physician's service ordered by state to examine defendant not part of State's costs.

May 5, 1933

FILED
47

Honorable Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

This is to acknowledge your letter which is as follows:

> "At a recent trial, the Circuit Judge ordered on application of the State that certain physicians go examine a defendant for the purpose of determining whether or not said defendant was able to come to court and meet the charge against him.
>
> Please advise if it is possible to allow the physicians pay for the service; and if so, how can the cost be entered so that the Auditor will allow same".

You have not stated enough facts in your letter and for that reason we will have to assume certain premises. We assume from the context of your letter the following: First: That the defendant was on bond. Second: The purpose of the examination was to ascertain his physical condition solely. Third: That the charge against him was punishment solely by imprisonment in the penitentiary. Fourth: That the defendant was convicted.

Our opinion is determined from the premises that the pay for the service should be chargeable to the State and not as part of the defendant's cost. We therefore treat it from the stand point of whether it is chargeable to the State.

We have searched the statutes and find none that permits the State to pay as costs for such service rendered as set out in your letter.

One is not entitled to a fee unless he can point to a statute expressly allowing the same. The law conferring such right must be strictly construed because of statutory origin.

In the case of State v. Union Trust Company, 70 Mo. A. l.c. 315, the court said:

> "We repeat, as we have decided in several cases, 'that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation.'
> Ring v. Vogel, 46 Mo. App. 374."

See also: State v. Wofford, 116 Mo. 320.
State ex rel, v. Oliver, 116 Mo. 188.

It is our opinion from the above and foregoing that in view of no statutory provision expressly allowing same, that it is not a proper charge for the State and thus we find no way that the cost of same may be entered so that the Auditor will allow it.

We have reached our conclusion as to the liability for the payment of this as costs in a criminal case as being strictly a statutory one, and the question of justice or injustice to the physicians in not being paid for their services is not a matter for consideration here.

Trusting this answers your inquiry, we are

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

Township Collectors must account for funds due State and County as prescribed by statute.

June 6, 1933

FILED
47

Honorable A. P. Kelly, Jr.
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Sir:

This is to acknowledge your letter of May 13th, 1933, which is as follows:

> "Three banks in Mercer county have been open under such restrictions that several township collectors are unable to with draw thereupon the amount of their collections which is now due the State and County. These men have good bondsmen, but the County Court does not deem it necessary to bring suit on the bonds of the several collectors in view of the fact that the banks in question will probably be able to pay the money within a few weeks or at least the Court will know whether said money can be paid within that time.
>
> The four collectors are willing to pay over to the State its part of the funds and the County Court is desirous of knowing whether that could be permitted and whether or not in view of the premises it could postpone action against the collectors and their bondsmen for the county funds due. Please give me your opinion on this question."

Sections 12333 and 12337 R. S. Mo. 1929, pertain to the settlements of township collectors and the procedure therefor, and provides a penalty for the failure to settle. We shall set out parts of these sections that are relevant to your inquiry.

Section 12323 provides:

> "The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school and township taxes. * * * He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. * * * If any township collector shall fail or refuse * to pay over the state and county taxes, * * the county court shall attach him until he shall * pay over the money found due from him." * * *

Section 12337 provides:

> "The township collector shall, on or before the fifth day of each month, make out and file in the office of the clerk of the county court a statement, in writing, showing the amount of taxes collected by him for state, county, school, road, township and all other purposes during the preceding month, * * * On or before the tenth day of each month the township collector shall, after deducting his commissions, pay over to the county treasurer and ex officio collector all state and county taxes collected by him during the preceding month. * * * * * * * * * * * * * * * * * * If any township collector * * * * * * * * * * shall neglect or refuse to pay over to the county treasurer and ex officio collector the state and county taxes collected by him during the previous month * * * * * * * * * * * * * * * * the county clerk shall immediately after such default, and not later than the fifteenth day of the month in which such statement was or should have been made, certify such fact to the state auditor and the prosecuting attorney of the county; and the state auditor and the prosecuting attorney shall proceed against such defaulting township collector in the same manner

> as is provided by Section 9928* * *
> Any county clerk failing to perform any of the duties devolving upon him by virtue of this section shall be liable to all the penalties inflicted by section 9928 for failing to perform the duties enumerated in sections 9927 and 9928, and it shall be the duty of the county clerk to certify a copy of such monthly statement to the state auditor.* * * **

Section 9928 R. S. Mo. 1929, reads as follows:

> "If any county collector, or ex officio county collector, shall fail or refuse to pay the taxes and licenses into the state and county treasuries, as provided in the preceding section, he shall forfeit his commissions thereon, and in addition thereto shall pay a penalty of ten per cent, on the amount thereof, and it shall be the duty of the state auditor to issue a distress warrant for such state taxes and penalties within thirty days, as provided by law. It shall be the duty of the prosecuting attorney to proceed, within thirty days, to collect such county, school, road and municipal taxes by suit on the official bond of such defaulting collector."

From the reading of these three sections it will be noted that the statutes make it mandatory upon all parties, therein mentioned, to comply with the strict provisions of same.

If the township collectors do not pay the money over as provided by the statutes, supra, then such collectors could be amenable to the penalty therein imposed. It is true that abnormal banking conditions exist and perhaps no fault of the collectors that taxes collected by them and deposited in banks and such are not now available because of same being on a restricted basis, yet the law does not provide for such an exception for their failure to account for the funds. When a township collector takes upon himself the duties of his office he must see to it that

moneys that come to him by virtue thereof, shall reach the place it is designated to go as required by statute. The duty to account for the funds is the responsibility of the township collector.

You will note that the county clerk has duties devolving upon him if the funds are not paid, and the county treasurer and ex officio collector, and the state auditor, and you also as prosecuting attorney. Thus if the statute is waived as to township collectors it would only be reasonable that the duties to be performed by the other officers, mentioned therein, should also be abrogated.

It is therefore our opinion from the above and foregoing that the statutes (being mandatory) do not permit the county or the State to wait for the funds collected by township collectors, and that collection for such should be instituted as set forth in the statutes.

Yours very truly,

JAMES L. HOUGHOSTEL,
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

JLH:HM

NEPOTISM: Public officer appointing child in office who is not appointed to an official position and who is not rendering service in an official capacity, does not violate Section 13, Article 14 by having son render personal service to him.

October 3, 1933.

10-4

FILED 47

Mr. John H. Keith,
Prosecuting Attorney,
Ironton, Missouri.

Dear Sir:

We are in receipt of your letter in which you inquire as follows:

> "I am informed that according to same newspaper item which I did not see, you have ruled that the county collector comes under the Nepotism provision of the State Constitution.
>
> The Collector in my county has his son employed in his office, or at least his son works in the office, but under the law if he pays him he does it out of his own money, as the law allows him no deputy and therefore the deputy could not be paid out of public funds.
>
> It has been my opinion that in a case like this the officer would not be violating the Nepotism provision of the Constitution.
>
> In my own case: I am as you know Prosecuting Attorney of this county. My son is my stenographer, is single, lives with me and I pay him out of my own money, not being allowed anything out of county funds for such purpose. I do not understand I would be violating the law. Will you please let me have your opinion with reference to the Collector and my office under those facts?"

Section 13, Article 14 of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity

shall thereby forfeit his or her office or employment."

Under the above Section of the Constitution, any officer who names or appoints any person within the fourth defree to render service to the State makes himself liable to forfeiture of office. We believe, however, that the proper construction to be placed upon the constitutional provision means that such person must be appointed to hold an official position existing under the laws or Constitution of this State. We do not believe that the test is whether or not the appointing officer be on a salary basis or a fee basis. The test, as we understand it, is whether or not the person is appointed to fill an official position and as such to render service to the State in such official capacity. Where a public officer has in his office a member of his family who does not occupy an official position, nor as such render service to the State, but whose services are rendered personally to the officer by reason of the family relationship, we do not believe that such situation comes within the provision of Section 13, Article 14.

The father, as such, is entitled to the services of his unemancipated children. That well recognized rule is expressed in 29 Cyc. 1623, where it is said:

> "The father is the head of the family. He is entitled to the services and earnings of the children so long as the latter are legally under his custody or control and unemancipated."

A child, therefore, performing service for his parent is performing service to which the father is legally entitled. So long, therefore, as the child is performing service for the parent and is not performing service in an official capacity to the State of Missouri, it is our opinion that such situation does not cause a violation of Section 13, Article 14.

It is therefore the opinion of this Department that if the collector of your county has his son working for him personally and not as an official and pays him out of his personal funds, the collector has not violated the said constitutional provision because said son is not rendering service to the State in an official capacity, but is rendering service to his father personally.

The same answer applies to the inquiry respecting your office. The fact that you use your son in your office as your stenographer and pay him out of your personal funds is not in violation of Section 13, Article 14 because the son is not appointed to an official position and is not

rendering service to the State of Missouri in an official capacity, but is rendering service to you personally to which service you are legally entitled.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____ .

Attorney General.

FWH:S

OFFICERS, SOLDIERS AND MARINES: Right to vote in Missouri.

November 2, 1933

10178 R S Mo 1929

FILED
47
57

Honorable Ray L. Kay
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

Your request for an opinion dated October 16, 1933, was as follows:

> "Colonel John A. Paeglo who is soon to be placed on the retired list of Officers of the United States Army has asked me if he will be entitled to vote after retiring from active Service IN the army.
>
> Does the provision, or exception, in section 10178 R. S. 1929 "That no officer, soldier or marine in the Regular army or navy of the United States, shall be entitled to vote at any election in this state" apply to officers in the Reserve Corps or Officers on the Retired list, or does it mean only those engaged in active service of the Army and Navy? I presume it all depends on the consturction placed on the word 'IN'. I also assume that officers of the Reserve Corps and on the Retired list are officers of the United States army or navy. Will you please give me your opinion on this matter."

Section 2, Article 8, of the Missouri Constitution was adopted February 26, 1924 and provides as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no

person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 9, Article 8, of the Missouri Constitution provides as follows:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

Section 10178 R. S. of Mo. 1929, provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people; First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted

> of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

Section 11, Article 8, of the Constitution of 1875 provides as follows before the 1924 amendment above set out became the law:

> "No officer, soldier or marine, in the regular army or navy of the United States, shall be entitled to vote in any election in this State."

This section of the Statutes disfranchising officers, soldiers and marines was based upon a constitutional disfranchisement of those falling in that classification prior to the 1924 amendment to the Constitution, but it is to be noticed that when the people in Missouri voted to amend the Constitution they provided in the amendment, now section 2, article 8, of said Constitution, that occupants of soldiers' and sailors' homes were bona fide electors, and also by their amendment, now section 9, article 8, of the Constitution, the people provided that electors absent from their county wherein they maintain their residence, on military or naval service, may vote an absentee ballot if the Legislature sees fit to set up the procedure.

Section 10178 R. S. Mo. 1929 was enacted pursuant to the Constitution as it existed prior to 1924 and in the exact language of the Constitution of 1875 as above set out, but since the constitutional amendment changing our fundamental law as originally enacted in 1875, this above section so far as it pertains to the disfranchisement of officers, soldiers and marines from voting in this State, is, in our opinion, unconstitutional, and our Supreme Court would so declare it, if presented with a case in point.

When the people of Missouri spoke by their ballot, amending the Constitution of 1875, which provided that officers, soldiers and marines were disfranchised along with inmates of lunatic asylums and inmates of poorhouses, the people in the amendment provided that occupants of soldiers'and sailors' homes are bona fide electors, and they further provided for the counting of absentee ballots of electors absent from their county but within the State on an election day. Since officers, soldiers and marines are electors for voting an absentee ballot, and if they are electors if residing

since

siding in soldiers' and sailors' homes, it is our opinion that they are electors for the purpose of voting a resident ballot.

It is our opinion that one engaged in any branch of the military or naval service, active, or in reserve or retired, is an elector in Missouri, and as such is entitled to vote as any other qualified elector when presenting himself at the polls for that purpose.

Respectfully submitted.

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

TAXATION: No authorithority to bring suit for delinquent taxes after July 24, 1933--Senate Bill 94.

7-26

July 22, 1933.

FILED
48

Honorable O. A. Kemp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

Your letter to General McKittrick respecting the effect of Senate Bill No. 94, upon the collection of 1 928 delinquent taxes has been referred to me for reply.

In reply thereto, I wish to advise that it is the opinion of this office that after the effective date of Senate Bill No. 94, which is July 24th, 1933, there is no authority for the institution of a suit to collect delinquent taxes. Accordingly, if it is desired that a suit be brought on 1928 taxes it will have to be brought before July 24th. The new law provides that if any suits are filed prior to its effective date which have not been reduced to judgment that it is optional with the collector whether he shall proceed to reduce said suits to judgment or whether he shall dismiss such suits and proceed under the provisions of the new law. Accordingly, if your collector desires to be sure we suggest that suits be instituted before that date.

Yours very truly

HARRY G. WALTNER, Jr.
Assistant Attorney General

HGW:H

APPROPRIATION BILLS --MAY ORIGINATE IN EITHER HOUSE

January 31, 1933

49

Hon. Michael Kinney
Speaker Pro Tem
Missouri Senate
Jefferson City, Mo.

Dear Mr. Speaker:

There has been submitted to this office the following question:

"Can an appropriation bill legally originate in the Missouri Senate or must such bill first originate in the House of Representatives?"

Section 36 of Article 4 of the Constitution of Missouri provides as follows:

"Sec. 36. Origin of bills---must be read on three days

Bills may originate in either house, and may be amended or rejected by the other; and every bill shall be read on three different days in each house."

Section 37 of Article 4 of the Constitution of Missouri provides as follows:

"Sec. 37. Bills must be reported and printed

No bill shall be considered for final passage unless the same has been reported upon by a committee and printed for the use of the members."

Section 38 of Article 4 of the Constitution of Missouri provides as follows:

"Sec. 38. Bills must contain but one subject---exceptions---title

No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

It will be observed that no exception is made in Section 38 as to appropriation bills. Reading Section 38 in connection with

Sections 36 and 37, it seems clear that the framers of the Constitution did not intend to make any distinction between the character of bills that might originate in either house but rather Section 28, above quoted, inferentially at least, contemplates that appropriation bills may originate in either house.

Section 43 of Article 4 of the Constitution provides, in part, as follows:

> "Sec. 43. Appropriations, order of, must be by law---revenue to go into treasury
>
> All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order: ....."

Again Section 43 only restricts appropriations of money by act of the General Assemblies and not by either house of the Assembly.

Section 13 of Article 5 of the Constitution is as follows:

> "Sec. 13. He may object to part of an appropriation bill
>
> If any bill presented to the Governor contain several items of appropriation of money, he may object to one or more items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and the appropriations so objected to shall not take effect. If the General Assembly be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If it be not in session, then he shall transmit the same within thirty days to the office of the Secretary of State, with his approval or reasons for disapproval."

The foregoing section eliminates any doubt as to the answer to the above question because it clearly contemplates that an appropriation bill may originate in either house.

Owing to conflicting provisions of the respective constitutions of the several states, decisions of other courts do not throw any particular light on the subject. A general statement of the applicable rule is found in 59 C.J.,Page 546,Sec. 40 as follows:

> "Sec.40: 2. Place of Introduction: "While constitutional provisions as to the place of introduction of bills of

> a particular nature must be complied with, bills not coming within the terms of such special provisions may be introduced into either house. Constitutional provisions restricting the place of introduction of bills should be construed strictly and not extended to measures which may only incidentally come within their terms."

We are, therefore, of the opinion that an appropriation bill may properly originate in either house of the General Assembly of the State of Missouri.

We are transmitting a copy of this opinion to Senator Phil M. Donnelly and a copy of the same to Hon. Willis M. Meredith, Speaker of the Missouri House of Representatives.

Yours very truly,

GILBERT LAMB,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

IN RE: Application of money refunded Buchanan County for improvements on roads built where same have been taken over by the state.

8127 R.S.Mo 1929

FILED
49

April 6, 1933.

Hon. Frank L. Kirtley,
Prosecuting Attorney - Buchanan County,
St. Joseph, Missouri.

Dear Sir:

Your letter states as follows:

"About June 1919 Buchanan County voted and issued $2,000,000 road bonds by special levy and built some paved roads; these were later taken over by the State and from time to time the County has received refunds thereon.

There are about $300,000 of this Bond Issue outstanding. $100,000 due June 1933 will be met out of the levy, and the balance will be retired the same way in due time (about two years).

The County has just received $100,000 additional refund from the State Highway Department and the controversy has arisen as to how it shall be applied. Former county courts used most of the funds thus received to build additional roads ($400,000). One allotment ($125,000) was used to take up protested warrants.

There is a large amount of unpaid warrants outstanding in the General Revenue and Special Road and Bridge Funds.

Many of the outstanding warrants were issued for road and bridge repair, maintenance and construction out of both the General Revenue and the Special Road and Bridge Funds.

Our question is: What, in your opinion, can Buchanan County legally use such State Highway refund money for or apply it to? Should the county use this money to pay outstanding warrants? If so, must it be applied to the outstanding road and bridge warrants for any specific year or years? May it be used to retire General Revenue warrants to the amount the General Revenue

> Funds were used for road purposes? Can this money be used for current 1933 expenses in either the General Revenue or the Road & Bridge Account?"

The State having taken over a part of roads of Buchanan County under constitutional amendment adopted in 1928, the first question you ask is: "What in your opinion can Buchanan County legally use such State Highway refund money for or apply it to?" Section 8127, R.S. of Mo. of 1929 provides as follows:

> "Counties or other civil subdivisions shall be reimbursed for work done in constructing such part of a road or roads including bridges, except bridges over the Mississippi, Missouri and the navigable portions of the Osage and Gasconade Rivers, which may become a part of the state highway system to the extent of the value to the state at the time taken over ***"

Your letter fails to state whether or not all the roads taken over by the state were built under the $2,000,000 Bond Issue, or whether some were built by special road districts, or by other bond issues. I will therefore answer you (1) on supposition all roads taken over by the state were built with the $2,000,000 Bond Issue; (2) part of said roads were built and paid for by special road districts under the Special Road District Law of the State; (3) part of said roads were built either by other county bond issues or by special road districts levying taxes therefor, or by special tax levies voted by the county.

The constitutional amendment under which the refund money is paid Buchanan County for what the county has spent on roads and bridges provides as follows:

> "The proceeds of the sale of the Seventy Five Millions of Dollars ($75,000,000) of *** bonds *** shall be expended *** to complete, widen, or otherwise improve the State system of primary and secondary highways ***; to <u>reimburse</u> the various <u>counties</u> and <u>civil subdivisions</u> (including road districts) of the state for <u>money expended</u> by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the State Highway System ***"

It should be noted the constitutional amendment includes repayment not only to the county, but also to the road districts. The statutory provision for refunds to counties authorize the counties to accept part or all of refund in roads or take same all in cash.

As to the $100,000 you have on hand, if all the roads taken over by the state were built by the proceeds of the 1919 Bond Issue of $2,000,000, it is my opinion that the $100,000 should be applied

to indebtedness arising from the 1919 Bond Issue as payments thereon become due. To so apply said $100,000 and any subsequent payments would be at least meeting the spirit, and I think, the intent of Section 20, Article X of the State Constitution, which provides:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

The closing language of this section, you will observe, reads: "Or to the repayment of such debt or liability, and not otherwise". The taxpayers paid for this road and now the purpose for which they paid taxes has been accomplished, but the state is legally repaying the money which the taxpayers expended for the road. The payment of the taxes was, of course, for the purpose of paying the debt created by the Bond Issue. The money received from the sale of the bonds was in reality a loan to the county by the purchasers of the bonds. The proceeds of the bonds built the road. The taxpayers for years have been paying taxes to make payments on this loan. Now the state has paid the county a certain amount of money for the improvements made by the people on this road. In other words, the state hands back to the people of Buchanan County a part,at least, of the proceeds arising from the sale of the bonds.

Suppose after the sale of the bonds and receipt of the money therefor, Buchanan County had decided it did not want to improve this road. Under the provisions of Section 20 of Article IV of the Missouri Constitution the money must only be used in two ways, first - to build the road; second, if road not built the money must be applied (I quote the language of the constitution) "To the repayment of such debt (in this case the bonds) or liability and not otherwise" (underscoring supplied). Suppose none of the bonds were yet due or had been paid and the whole $2,000,000 thereof was yet outstanding and the State came and took over the road and paid the county $2,000,000 in cash as a refund for the money the taxpayers had spent in improving the road--Under these conditions there can be no doubt the $2,000,000 should be used in the payment of the bonds as they matured and should be held as a special fund set apart by the constitution and the statutes for a particular purpose.

Here we have the case in which a part of the money, at least, which the people spent in improving this highway is returned to the people, and it occurs to me that until these bonds are all paid,the money received from the State as a refund for improvements on this road should be applied on the payment of the bonds remaining unpaid as same mature.

It is a sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation. Those who should receive

the benefit from this refund by the State are the taxpayers who have been and will be concerned in directly bearing the burden of taxation; they should receive the benefit, in my judgment, of the application of this refund from the State to the payment of the bonds remaining unpaid, thus relieving the taxpayers of $300,000 of taxes.

Of course, I have not before me a copy of the proposition submitted in 1919 and voted by the people of Buchanan County upon which vote these bonds are based, and I am assuming that the building of this specific road, and this one road only, was the subject of the bond issue.

I will now take up the second assumption of facts, to-wit: that part of these roads taken over by the State and refund made therefor had been built and paid for, or partially paid for as the case may be, by taxes upon property in a special road district. Suppose now that of the $100,000, $25,000 represented roads built by special road districts; in such event, I am of the opinion that under the provisions of the Constitution and of Section 8127 of the Statutes, the $25,000 of this $100,000 would be the property of the road district.

The constitutional amendment of 1928 expressly declares upon facts I assume the portion of the $100,000 representing the road or roads built by special district belongs to the district and not the county. The language of the Constitution is:

> "The proceeds of the sale of Seventy Five Millions of Dollars ($75,000,000) of bonds *** shall be expended *** to reimburse the various counties and civil subdivisions (including road districts) of the state for money expended by them in the construction or acquisition of roads and bridges."

In my opinion any road built by taxpayers of a special road district and taken over by the state, the money refunded by the state for said road is the property, not of the county, but of the special road district, and if county collects and fails to pay over the money to the road district or diverts the money to other purposes, the district can through the courts force the county to pay the district what is due it; and the fact, if it be a fact, that when the roads were taken over by the State no separate value was fixed on each road for purpose of the refund by the state would not in the least affect either the right or the legal remedy of the road district. In the case of

> Carthage Special Road District v. Ross et al, County Court Judges, 270 Mo. p. 76

the court held:

> "Section 3786, Revised Statutes, 1909, declaring that 'whenever there is a balance in the County treasury to the credit of any special fund, which is no longer needed for the purposes for which it was raised, the County Court may, by order of record, direct that

> said balance be transferred to the credit of the General Revenue Fund of the county, or to such other fund as may, in their judgment, be in need of such balance' is still live law as to all the revenue of the county remaining within the control of the County Court; but the road fund has by later enactments been removed from the court's control and entrusted to other agents, to be expended by them for a definite purpose."

We see, therefore, that the road funds once dedicated to a certain purpose under the laws of this state are no longer under the control of the county court as part of the General Revenue Fund of the county.

I will now deal with the third supposition of facts, that is, assuming that under another bond issue prior or subsequent to the Bond Issue of 1919 bonds had been issued and roads improved and one or more such roads were included in the roads taken over by the State Highway and for which refund is being made and of which refund the $100,000 you now have on hand is a part.

It is my opinion that if there was not made an estimate for the value of different roads individually and refund made or agreed to be made by the State as so much refund for each road, then if that condition exists and there are two or more road bond issues, portions of which issues of county bonds yet remain outstanding and unpaid, or if one or more of roads taken over have been built by special road districts, in such event the $100,000 and subsequent refunds should be prorated and paid on some fair basis of valuation of the respective roads to the respective holders of the several county bond issues and to the road district, and an action at law in nature of a suit for an accounting by any bond-holder of either of unpaid issues of bonds or by a road district would lie against the county to force a proration of the refund money paid by the state for the roads taken over.

Logan County v. Lincoln, 81 Ill., 156

and to such a suit the Statute of Limitations does not apply.

Spaulding v. Arnold, 125 N.Y., 194, 26 N.E. 295

You ask the following questions: "What, in your opinion, can Buchanan County legally use such State Highway refund money for, or apply it to? Should the county use this money to pay outstanding warrants? If so, must it be applied to the outstanding road and bridge warrants for any specific year or years? May it be used to retire General Revenue warrants to the amount the General Revenue funds were used for road purposes? Can this money be used for current 1933 expenses in either the General Revenue or the Road and Bridge Account?"

In reply to these questions I beg to say that until all payments have been made upon all outstanding bond issues for roads taken over by the state and until any special road distfict or districts have been

repaid for money spent in building any road or roads taken over by the state, all of the $100,000 you have on hand as a refund by the state for roads taken over by the State Highway Department should be used to retire any of such outstanding obligations to bond holders or road districts.

As to whether or not if a surplus should exist in the shape of money refunded by the state for roads taken over after all of the hereinabove obligations for which I consider the refund money bound have been satisfied, any of it could be applied to payment of outstanding road and bridge warrants issued by the county or to retire General Revenue warrants to the amount General Revenue funds were used for road purposes or be used for current 1933 expenses in either the General Revenue or the Road & Bridge Account, would depend on whether or not the courts will hold that where money has been set apart by the Constitution for a given purpose and that purpose has been accomplished, and the object of the creation of the fund has been realized, that a transfer of any balance remaining might under Section 12167 Revised Statutes of Missouri, 1929, be made by the County Court to the credit of the General Revenue Fund of the county, or such other fund as may, in their judgment be in need of such balance.

In the Ross case above cited, 270 Mo., p. 76, the Supreme Court seemed to express the view that the Constitution removed these funds raised under provisions of the Constitution and set apart for a particular purpose from the jurisdiction of the County Court in so far as its general authority over the funds of the county are concerned. However, no case is authority for anything beyond the actual issue decided therein, and the only questions decided in the Ross case were (1) that the special road district was the owner of the fund in controversy and (2) that the County Court could not divert the special road district fund by a transfer thereof to any other fund or use it for any county purpose.

I have answered your questions in so far as I could upon the facts within my knowledge and upon the assumption of facts which may or may not exist. If there are any other questions you desire to submit to me in this matter, I will, of course, be glad to answer same for you if I can do so.

Yours very respectfully,

WILLIAM ORR SAWYERS,
Assistant Attorney General.

APPROVED:

Attorney General

Towns, villages and cities of fourth class cannot prohibit sale of "Non-intoxicating beer" within three hundred feet of church, but can regulate and control same, and how.

HB 23 Laws 33

June 2, 1933.

FILED

Hon. J.F. Kincannon,
Mayor - City of Anderson,
Anderson, Missouri.

Dear Sir:

Your letter of May 8, 1933 has been received regarding the Baptist Church by its pastor and certain of its members urging the Mayor and Council to enact an ordinance prohibiting the sale and consumption of 3.2 per cent beer within 300 feet of the church on the ground that 3.2 per cent beer is intoxicating.

In answer to the same will say that under Sec. 4496 R.S. of Mo. 1929, intoxicating liquor is defined as follows:

> '" The phrases, 'intoxicating liquor', or 'intoxicating liquors', whenever used in this article, shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, all alcoholic liquids whether proprietary, patented or not, which contain one-half of one per centum of alcohol by volume and which are potable or capable of being used as a beverage."'

Then comes a proviso, which is as follows:

> '" Provided, however, that when the above mentioned phrases, 'intoxicating liquor', or 'intoxicating liquors' are hereafter defined in the laws of the United States, then such definition by Congress shall supersede and take the place of the definition of said phrases in this section and shall apply to the provisions of this article with the same force and effect as if the same were written herein."'

Under this proviso you will notice that if the United States by act of Congress shall define same differently, then said act of Congress and the definition thereunder shall supersede and become the definition instead of the first foregoing definition, so that when Congress recently passed what is known as the "Beer Bill", the definition given same by Congress as being "non-intoxicating" supersedes and takes the place of the first above definition of all intoxicating liquors that do not have more than 3.2 per cent of alcohol by weight.

Then also, the law in Missouri was changed by House Bill No. 23 passed by the 57th General Assembly, Sec. 13139z2 of which reads as follows:

> '" The phrase 'non-intoxicating beer' as used in this article shall be construed to refer to and to mean any beer manufactured from pure hops or pure extract of hops, and pure barley malt or other wholesome grains or cereals, and wholesome yeast, and pure water, and free from all harmful substances, preservatives and adulterants, and having an alcoholic content of more than one-half of one per cent (1/2 of 1%) by volume and not exceeding 3.2 per cent by weight."'

So that under the present law, if the beverage does not exceed 3.2 per cent of alcohol by weight, it has <u>been by LAW declared to be non-intoxicating</u>.

Under Sec. 2 of said House Bill No. 23 last above referred to, all laws and parts of laws in this state in conflict with the provisions of House Bill No. 23 in so far as such laws and parts of laws are so in conflict are repealed.

It is our opinion, however, that under the <u>general police power</u>, cities of your class have the right to regulate and control, but not absolutely prohibit, the sale of the beer herein referred to within 300 feet of the church (in the usual travelled way). Your city would also have the power and right to <u>regulate</u> and prevent and/or control in a general way so that the handling of same would not become a <u>nuisance</u> (in which event it could be <u>abated entirely</u>,) either under the "<u>Common Law</u>"or under "<u>Statute</u>", as well as under <u>police regulating power</u>.

(Honl J.F. Kincannon)

In City of Sturgeon v. Wabash Ry. Co. et al, 17 S.W. (2d) 616, l.c. 619, the court said:

> "The nuisance need not affect everybody, in order to be a public one, if it affects all those who are using a right which is in common to all."

See also: Secs. 7071 and 7097 R.S. of Mo. 1929.

Yours very truly,

GEORGE B. STROTHER,
Assistant Attorney General

Approved:

ROY McKITTRICK,
Attorney General

GBS:AH

Elections; Absentee voter.

August
Seventh,
1 9 3 3.

8-10

FILED
49
39

Honorable Edwin L. Kies,
Clerk of the County Court,
Jackson, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 4th, wherein you request an opinion on a matter relating to the absentee votes in the repeal election.

Your letter is quoted below:

> "In a newspaper article relative to the Repeal Election, I notice that in an opinion which you gave Walter G. Stillwell, Prosecuting Attorney of Marion County, you mentioned among other things that 'The opinion also held that absentee votes cannot be case in the repeal election.'
>
> Would you be kind enough to refer me to the Section under Laws of Missouri, 1933, upon which this opinion was based."

We cannot refer you to any section, as the original opinion to Mr. Stillwell was not based on any section of the statutes, but we have held this to be true in our opinion, for the reason that this, in a strict sense, is not an election under the primary or general election laws of Missouri. It is an election in which delegates are selected to later convene in convention and there ratify the repeal of the Eighteenth Amendment, or refuse to ratify, it depending upon the views of the successful delegates on August 19th.

The convention is directed to be held by the Congress of the United States, and the Week's Bill provides the machinery for the convention. It provides that the election shall be conducted in accordance with the election laws, as far as practicable.

Absentee votes are in nowise connected with the conducting of an election.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

IN RE: WHAT CONSTITUTES THE MEANING OF RETAIL DRUGGIST AS REFERRED TO IN MISSOURI STATUTES.

13140 R S Mo 1929 8.22

August 18, 1933.

FILED 49 39

Hon. Frank L. Kirtley
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

Your letter of August 12 reads as follows:

> "Section 17 of Regulations 11 of the U. S. Treasury Department says in part, 'A pharmacist employed by any person other than a retail druggist may not fill a prescription for spiritous or vinous liquors * * * *.
>
> Local druggists have been advised by the supervisor of permits of district 9 at St. Louis that the interpretation of what constitutes a retail druggist must be determined by the State and the permits from that office will be issued in accordance with the State law.
>
> "I would appreciate your opinion as to whether a retail druggist as referred to in the above section means a licensee in pharmacy, or any person who might call his place a drug store."

This department has not a copy of Section 17 of Regulations 11 of the United States Treasury Department. We note the quoted portion thereof and your statement that the Supervisor of Permits of District 9 of Saint Louis notifies you his department will accept the interpretation of what constitutes a retail druggist within the meaning of the laws of Missouri.

Section 13140, R. S. Mo. 1929, provides:

> "It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, * * * *,

then follow several exceptions to the above broad provision and the section then concludes as follows:

> "Provided further, that nothing in this section shall be so construed as to prevent any person, firm or corporation from owning a pharmacy, drug or chemical store or apothecary shop, providing such pharmacy, drug or chemical store or apothecary shop shall be in charge of a licensed pharmacist."

The Court of Appeals decided in State v. Ryan, 217 M. A. 538, that this chapter is not repealed by Chapter 31, R. S. Mo. 1929, which is the state-wide prohibition law enacted in 1919.

Insofar as this department can ascertain, there is no specific statutory definition of what should constitute a "druggist". At one time there was a statutory definition which, this department thinks, was a sound definition. The statute containing this statutory definition of a "druggist" was enacted in 1879 (see Session Laws of Missouri, 1879, page 166.) The definition contained in that law was as follows:

> "No person shall be deemed a dealer of drugs and medicines within the meaning of this chapter and as such authorized to sell or give away any intoxicating liquor as herein specified unless he shall have, or maintain

> a store or known place of business, shall have complied with the provisions of the law relating to merchants' license and shall have at all times on hand at said store or place of business a stock of goods such as are usually kept in a drug store exclusive of intoxicating liquor."

This act was held to be repealed not by express enactment but by implication on account of the enactment, in 1883, of another law upon the subject of pharmacists and druggists, which the Supreme Court held in State v. Roller, 77 Mo. 120, repealed the act of 1879 giving the above set forth definition of a druggist. This department finds no subsequent statutory enactment carrying the above set forth definition of a druggist. Webster defines a druggist as "one whose occupation is to buy and sell drugs without compounding or preparation." This definition is the ordinary English language acceptance of what constitutes a druggist, and you will observe the word "druggist" is much narrower than the word "apothecary" in the ordinary acceptation; but in our statutes, under some circumstances and some sections thereof, the words "apothecary" and "druggist" seem to be used synonymously.

In State v. O'Kelley, 258 Mo. 345, Division No. 1 of the Supreme Court held defendants' partners in a pseudo drug store, not having a pharmacist's license and having no licensed pharmacist in their employe were not druggists within the meaning of the statutes under which defendants were indicted. In 19 C. J., title "druggist" page 770, the druggist is defined as follows:

> "A person who deals in drugs and medicines."

The term includes proprietors of a drug store. For this definition, the case of State v. Clinkenbeard, 142 M. A. 146 was cited. And in State v. Chipp, 121 M. A. 556, it is held that in American the word "druggist" is synonymous with the words "dealer in drugs." Under some provisions of the Missouri Statutes, according to the above section, one must either be a licensed pharmacist (see State v. O'Kelley, 258 Mo. 345) or have a licensed pharmacist in his employe; while under other Missouri Statutes, one would be held to be a druggist even if he is not a licensed pharmacist and has no licensed pharmacist in his employe. An

An examination of these cases discloses the difference in the statutes on which these decisions were made. For instance, in the last named case, State v. O'Kelley, defendants were indicted and convicted for violation of the Local Option Law in Dade County, Missouri. They were partners in business and had a drug store and neither had a license as a pharmacist, nor did they have a licensed pharmacist in their employe. Dr. E. Spyers, a retired physician, having no license as a pharmacist, was employed by defendants. A sale was made of a quart of whiskey under what defendants claim was a prescription written by a retired physician, signed "E. S., M. D., No.--- Date 4-15." The sale was made by O'Kelley. Any sale of intoxicating liquor, except on prescription by physician under the local option law in said county was a misdemeanor. The court held that as neither was a pharmacist nor did they have a licensed pharmacist in their employe, and as they were conducting what they claimed to be a drug store that they were guilty of violating the Local Option Law and that they were not druggists.

In the case of State v. Chipp, 121 M. A. 556, the defendants were indicted and convicted under Section 3051,R. S. Mo. 1899, which provided, "Any druggis or dealer in drugs and medicines who shall suffer alcohol or intoxicating liquor to be drunk at or about his place of business shall be guilty of a misdemeanor and upon conviction shall be punished by fine and imprisonment, etc." It will be noticed that this Statute uses the words "any druggist or dealer in drugs." The State contended that a dealer in drugs need not be a druggist, while defendant contended that a dealer in drugs and druggist meant the same thing and that the terms were synonymous. The Court said, "we find no difficulty in arriving at the conclusion that an individual may be a druggist or a dealer in drugs without being or having in his employe a pharmacist." This finding, of course, was based upon the statute which made it illegal for any dealer in drugs, regardless of whether he was a pharmacist or had a pharmacist in his employe to suffer alcohol or intoxicating liquor to be drunk at or about his premises.

You will observe, the proviso to Section 13140, R. S. Mo. 1929, authorizes any person, firm or corporation to own a pharmacy, chemical store or apothecary shop, provided it is in charge of a licensed pharmacist.

Considering this statutory law and the court decisions thereon, this department is of the opinion that

insofar as the sale of intoxicating beverages, upon a prescription by a registered physician is concerned, one who sells drugs at retail cannot fill a prescription by a physician for a medical use and sell the intoxicating beverage therefor, unless either the proprietor of the store has a pharmacist's license or has in his employe a registered and licensed pharmacist. Insofar as the illegal sale of intoxicating liquor is concerned, the laws of the state may be violated either by one not having a pharmacist's license, or one running a drug store without having a pharmacist's license or having in his employe a licensed pharmacist under the different provisions of the Statutes of Missouri.

In conclusion, it is the opinion of this department that the definition of the term "druggist", as used in the various provisions of the Statutes of Missouri, may be somewhat different owing to the varying provisions of different sections of the Statutes which constitute offenses under the laws against the illegal sale of liquor.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

SCHOOLS--School districts are prohibited from insuring in Farmer's Mutual Insurance Companies where the assessment liability is unlimited, irrespective of Section 6063a, Laws of Missouri 1931, page 240, but may insure in assessment company or other company where liability is fixed and would not exceed in any year the revenue provided for such year.

FILED
49

October 21, 1933

(Filed: No. 49)

Mr. John W. Kirkbride
Ravenwood, Missouri.

Re-instated 9-18-56

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"It is the desire of the Ravenwood School Board to take liability insurance on school children transported to and from our school. At a special meeting held last night there were two different insurance companies represented, one an old line company and the other the State Farm Mutual Company.

The representative of the old line company informed the Board that they were not allowed to insure with a Mutual Company such as the one I have mentioned. The one representing the Mutual Company told them that there was nothing to prevent them from insuring in his Company if they desired to do so.

The Board feels that they would like to get insurance as reasonable as possible, but at the same time they want to insure in a reliable company. The Mutual Insurance would be quite a saving to them if it is a reliable company and if there is nothing to prevent them from insuring in a Mutual Company.

I would be very grateful to you if you would write me your decision in regard to this. For your convenience I am sending you a pamphlet of the State Farm Mutual Company. An early reply would be greatly appreciated as our school starts Aug. 28, and the Board would like to have the insurance by that time."

Section 6059, R. S. Mo. 1929, provides as follows:

"The state reinsurance company herein provided for shall have the right and authority, under such restrictions and regulations as it may provide for in its constitution and by-laws, to reinsure any member of such corporation against loss upon any particular policy which has been written by said member. The board of directors shall have the right and authority to make and collect such assessments from the respective member from time to time as may be necessary for the payment of any losses under

> the terms of the policy and necessary expenses of carrying on the business of said company, as may be provided for in the constitution and by laws of said company."

Section 6063a, Laws of Missouri 1931, page 240, provides as follows:

> "All companies organized and existing under the provisions of this article, are authorized and empowered to accept as members thereof any school district of this state and to insure the real and personal property thereof as in the case of other members of such company, and any school district of this state may, by a two-thirds vote of the board of directors of such district, become a member of any such farmers mutual insurance company, and insure the real and personal property of such school district in such company as in the case of other members thereof and pay, out of the incidental funds of the district, for such insurance, and for all assessments lawfully made by such company, as in the case of other members of such company."

Under Section 6063a above, the Legislature has sought to authorize farmers mutual insurance companies to accept as members school districts of this State. Under Section 6059 above, the board of directors shall have the right to make and collect assessments from the members from time to time as may be necessary for the payment of any losses under the terms of the policy, and the necessary expenses of carrying on the business of the company.

Section 47 of Article IV of the Constitution of Missouri provides as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, * * *."

Section 12 of Article X of the Constitution of Missouri provides as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose* * *."

Under Section 6059 R. S. Mo. 1929, the board of directors may make and collect unlimited assessments against its members. If a school district were permitted to become a member of said

mutual insurance company, according to the above section of the statute, it would thereby become liable for an unlimited assessment. Whenever a school district becomes a member of such mutual insurance company, its assessment liability is for the protection and benefit of the other members of said mutual insurance company. By its very act of becoming a member it lends its credit for the benefit of its co-members, contrary to the provisions of Section 47 of Article IV. This necessarily must be true because the probability of any member being paid the amount of the loss sustained by it under these companies depends upon the solvency and credit of the other members which are liable to assessment. This potential liability on the part of the school district may become a real liability to a very serious extent, depending upon the extent of the loss sustained by the members of this company. There is no limit as to the amount of the assessments which farmers mutual insurance companies may exact from their members under the provisions of Article 15 of chapter 37, R. S. Mo. 1929. Liability of the school district as a member, therefore, could not be limited if it were a member of this insurance company any more than the liability of any individual member, except that Section 12 of Article X of the Constitution of Missouri forbids a school district to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for said year. When a school district or any individual or corporation becomes a member of such farmers mutual insurance company, it thereby lays itself liable to an unlimited and unstated liability, depending upon the amount of loss sustained by the company, unless its articles and by-laws provide for a stipulated maximum. Where the assessments are unlimited it would be in violation of the latter provision of the Constitution for a school district to become a member of a farmers mutual insurance company.

We are therefore of the opinion that in so far as Section 6063a, Laws of Missouri 1931, page 240, authorizes school districts to become members of farmers mutual insurance companies with unlimited assessment liabilities, that said statute is in conflict with the above constitutional provision. If the said farmers mutual insurance company has a fixed assessment liability and such fixed assessment liability would not, so far as the school district is concerned, result in it exceeding in any year the revenue provided for such year, then we believe it would be legal for a school district to be insured therein.

It is therefore the opinion of this Department that Section 6063a, Laws of Missouri 1931, page 240, is unconstitutional in so far as it authorizes a school district to become a member of a farmers mutual insurance company in all events. We believe that under said Section a school district may insure in a farmers mutual insurance company if the assessment for the year is fixed and the said assessment shall not result in the school district exceeding its revenue provided for such year, under the provisions of Section 12 of Article X of the Constitution; that it would be illegal for a school district, in view of the above constitutional provision, regardless of said Laws of 1931, to accept membership

in a farmers mutual insurance company where the assessment is unlimited and the amount of the assessment is dependent upon the amount of loss or conflagration occurring.

Very truly yours,

/s/Frank W. Hayes
Assistant Attorney General.

APPROVED:

_____
Attorney General.

TAXATION AND REVENUE - Assessments - False Return - statutory method of altering so as to include omitted property.

11-23

November 20, 1933.

FILED
49
60

Honorable Arch King, County Assessor,
Poplar Bluff, Missouri.

Dear Sir:

A letter has been received from you under date of November 9, 1933, such letter being a request for an opinion in the following terms:

> "Please give me a written opinion as to the legality of adding additional property to an assessment list where the person makes a false return."

Revised Statutes of Missouri 1929, Section 9762 provides a procedure where a false return has been made by a taxpayer of his property.

> "Sec. 9762. Treble assessment for making fraudulent list.-- If any person shall, with intent to defraud, deliver to any assessor a false list of his property, it shall be the duty of the assessor to give notice in writing thereof to the county board of equalization; and the said board shall, on receiving such notice, give notice thereof to the person who shall have furnished such false list, which notice shall specify the particulars in which said list is alleged to be false, and shall fix a time for a hearing of the matter, on which day the person aforesaid shall have the right to appear and defend against such charge; and if it appear that such person is not guilty as charged, the said board shall dismiss the matter; but if it appear that such person is guilty as charged, it shall be the duty of said board of equalization to ascertain the true amount and value of all property of such person subject to taxation, and to tax the same as similar property of other persons is taxed, and in addition shall, by way of penalty for furnishing such false list, treble the amount of taxes thus ascertained against such person; and such person shall be required to pay such treble amount, and shall in addition thereto be liable to be punished for perjury."

The Supreme Court of Missouri referring to that section, and defining the power of the Board of Equalization under such statute in the case of State ex rel Dalton v. Baker, 170 Mo. 383, 70 S. W. 872 (1902) said:

> "That such authority is conferred upon the board by that section under certain conditions, is, we think, clear, that is, where any person with intent to defraud, shall deliver to any assessor a false list of his property and shall be proceeded against in

accordance with the provisions of that section for so doing, and if upon investigation by the board he be found guilty of intent to defraud in failing to deliver to the assessor a correct list of his property, then it becomes the duty of the board to ascertain the true amount and value of all property of such person subject to taxation, and to tax the same as similar property of other persons is taxed, and, in addition, to add by way of penalty for furnishing such false list, treble the amount of taxes thus ascertained against such person, etc. Now, it appears from the record that the assessor did give notice in writing to the board calling their attention to the fact that plaintiffs had failed to list all of their property, but had omitted therefrom deeds of trust and mortgages compiled from the records in the office of the recorder of Butler county, covering a period of from January 1, 1896 to June 1, 1898, as relates to deeds of trust, and from January 1, 1897, to June 1, 1898, as relates to chattel mortgages; that upon the receipt by the board of said writing it caused to be made out a notice in writing to plaintiff, in which it is recited that, 'On the 19th day of April, 1899, the assessor of said county filed with the board a duly certified list of credits as shown by the record in the office of the recorder of Butler county, in which it appeared that you failed to list certain credits amounting to $11,682, and you are hereby notified to appear before said board on Wednesday, April 26, 1899, and show cause why the sum of $11,682, should not be added to your assessment for the year 1899, as provided in section 7537, Revised Statutes 1889'. (170 Mo. 391).

It is our opinion that the above statute and quotation will be self-explanatory and provide a complete scheme of procedure where a false return has been filed by a taxpayer with intent to defraud the state.

Yours very truly,

EDWARD H. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

SCHOOLS - Compelling members of school boards to publish annual reports.

November 3, 1933.

FILED
50

Mr. George W. Kriegesman,
President, St. Louis County Press Ass'n.,
104 W. Lockwood Avenue,
Webster Groves, Missouri.

Dear Sir:

A request for information under date of September 30, 1933 has been received from you as follows:

> "What steps must be taken to compel the members of the several Boards of Education of St. Louis County to comply with Sec. 11266 of the Revised School Laws of 1929 in publishing their annual statements in detail?
>
> You will note that on Page 238 of same the Attorney-General rules that the specific amount paid to each teacher must be published.
>
> As the school tax is always the largest tax paid, we have a right to have the law lived up to so that the taxpayer will know what the money is being used for. No one is objecting to the payment of the school tax, but everyone is entitled to the full and correct information as to its use.
>
> You will greatly oblige the editors of the nine papers published in St. Louis County by furnishing the information called for."

Revised Statutes of Missouri of 1929, Section 9360, provides in part as follows:

> * * * * *that it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having graded schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and of all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all school purposes for the year; which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state superintendent of public schools at Jefferson City. And any board of education or board of

directors who shall fail, refuse or neglect to order such statement to be made, and any officer of said board who shall fail, refuse or neglect to prepare such statement and publish and forward the same, as required by the foregoing provisions of this section, when ordered by such board, shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars."

One possible way of compelling compliance with the above section would be to report any violation of it to the Prosecuting Attorney of the county because by the above section violations thereof are made misdemeanors. This method would be subject to the objection that it would not necessarily secure the result desired for criminal proceedings would merely punish the offenders and would not of themselves compel compliance with the statute.

The best method for compelling obedience to the above statute would be by an action of mandamus against the members of boards violating such statute and such suit could be instituted by a private citizen and taxpayer.

"There is no ground for cavil concerning the right of the relator to this writ. He is a citizen and a qualified voter of Jefferson City. As such he is interested in the enforcement of the law and as a consequence in the welfare of the community. Possessing this right and interest he is entitled, if officials, from whatever cause, are not performing their duties, to ask the court to require them to do so. We therefore hold that, in a case of this character, mandamus is the appropriate remedy, and that the relator is a proper party as petitioner therefor." (State ex rel Faust v. Thomas, 313 Mo. 160, 165, 282 S. W. 34 (1926). Accord, State ex rel Wear v. Francis, 95 Mo. 44, 6 S. W. 1 (1888); State ex rel Kelleher v. Board of President and Directors of St. Louis Public Schools, 134 Mo. 296, 35 S. W. 417 (1896).

Very truly yours,

EDWARD H., MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

/E: MERCHANTS' LICENSE AS APPLIED TO THE BEER LAW IN MOBERLY.

May 18, 1933.

FILED
51
22

Mrs. Marion E. Lamb
City Attorney
Moberly, Missouri

Dear Madam:

Your letter dated May 3rd requesting an opinion from this office is in words and figures as follows:

"The City has for several years had a tax of $50.00 a year on Soft Drink and Near-beer Parlors. The tax on Restaurants is $30.00 a year. Now since this new beer is legal several new places have opened up as restaurants, for the sole purpose of selling beer, they only keep enough food there to fall under the requirements of the law. Now the Near-beer Parlors are objecting to the additional $30.00 tax when these new places sell the very same thing.

"Now the City of Moberly has an ordinance as follows: 'Except as otherwise particularly provided by this or some other ordinance of the city, any person, firm or corporation that may be engaged in the city in more than one line of business at one time in one building and under the same management, shall be required to take out only one license from the city, which shall be for the highest amount prescribed for any of the lines of business so engaged in by such person, firm or corporation.' Now would it not be within the law to rule that any place that sells beer falls under the class of a Soft Drink and Near-beer Parlor, and that since under the above ordinance only the highest license must be paid, could the city not hold that any restaurant that sells beer, becomes a dual business, that of restaurant and Near-

beer Parlor, and be required to take out the highest of the two licenses, namely the $50.00 one."

It is the opinion of this office that, under the provision of the City Ordinance of Moberly, Missouri, any person, firm or corporation that sells beer for retail consumption on the premises under the provisions of the present State Beer Law falls in the class of one operating a Soft Drink and Near-beer Parlor. It follows then that any restaurant that sells beer, operates a dual business that of restaurant operator and that of a soft drink and near-beer parlor operator, and one operating such a dual business is required, under the terms of your city ordinance to take out and pay for the highest of the two licenses namely the $50.00 license.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOS/AJ

TAXATION:-Inquest fees which are deemed criminal costs may be used to offset delinquent back taxes, otherwise taxes can only b paid as provided for in S tion 9911, R. S. Mo.1929.

December 27, 1933. 12-30

FILED
57

65

Mr. E. Paul Lamb,
Coroner of Wayne County,
Piedmont, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "There is a question I would like to ask you and I will surely appreciate it if you will give me your opinion on it by return mail. The county here owes me for five inquests that I held during my term of office and they are not able to pay now and I owe them some personal tax which I am not able to pay at this time. I borrowed money to pay the real estate tax but at this time I just can't get any money to pay the personal, so I wonder if it would be possible for the county to credit me with my personal tax. I have quite a bit more coming to me than I owe and I can't see why it would not be fair to just have the court to tell the collector to credit me with what the county owes me. I think during these trying times that we should all stick together and try and help each other, and as both of these debts are honest debts that were unavoidable, I sincerely hope that they can be settled without the added put on me in the form of a tax bill."

Section 3855, R. S. Mo. 1929, provides as follows:

> "All fees due witnesses before the grand jury, and all fees due jurors in any criminal case, and all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and shall be paid in like manner and shall be subject to all the offsets herein provided for."

Under the above section all fees accruing in any inquest where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and be subject to all offsets provided for in the statute. Section 3854, R. S. Mo. 1929, provides as follows:

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures, or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant equals or exceeds the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall file with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 3853 to 3858, inclusive."

Under the above section the county treasurer is required to offset against criminal fees any amount owed the county for delinquent back taxes. If, therefore, your inquest fees are such as become criminal costs under Section 3855, and the taxes you owe are delinquent back taxes, we believe that it would be proper for the county treasurer to offset the amount of your delinquent back taxes against the amount of criminal fees which you have coming from the county.

On the other hand, if the facts are such as not to bring your case within the two sections above cited, then we believe that the county has no right to offset any indebtedness it owes you against the taxes which you owe the county. Section 9911, R. S. Mo. 1929, provides as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district

> or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

Under Section 9911 warrants of the county may be used in payment of the taxes where the warrant was issued during the year which the tax was levied, and where there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county for that year. The purpose of the above section was to put the county on a cash basis, and the above section does not provide for the offset of a debt owed by the county to an individual. It only provides that warrants issued by the county may be used to pay taxes as provided in the section.

It is therefore the opinion of this Department that the fees due you are made criminal costs under Section 3855, and that they may be offset against delinquent bank taxes, as provided in Section 3854. If the facts are such as do not bring your case within those two sections, then in view of section 9911, you are not entitled to an offset, but if you can obtain warrants for your indebtedness, such warrants may be used to pay taxes, subject to the restrictions contained in Section 9911, as above pointed out.

Very truly yours,

Frank W. Lyons

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

SCHOOL BOARDS -- Operating themselves, buses for the transportation of children to and from school, when buying directly from the manufacturer or their agent are exempt from the payment of Federal taxes, on gasoline.

March 28, 1933.

FILED
52

Mr. Chas. A. Lee
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Attention: Mr. Chas. C. Crosswhite
School Finance Division

Dear Mr. Crosswhite:

Your letter of March 22, 1933, received, wherein you say,

> "Will you kindly examine the enclosed correspondence and give me your opinion as to whether or not school boards may be exempted from payment of the Federal Tax on gasoline on all school owned motorized transportation equipment."

In reply will say, this office has heretofore rendered this opinion,

> "It is the opinion of this department, under the authority of the case of McCulloch vs. Maryland, 4 Wheat 316; 4 L.Ed. 579, that the Federal Government can not levy a tax upon any state or any of its governmental agencies, such as municipalities, school boards or other political subdivisions. A state can not levy a tax upon the agency of the Federal Government, likewise, under the same constitutional provisions, the Federal Government can not levy a tax upon it or any of its governmental agencies.
>
> "Collector vs. Day, 11 Wall. 113;
> Indian Motocicle Co. vs. U. S. 283 U.S. 570;
> Pollack vs. Farmers Loan and Trust Co.,
> 157 U. S. 429;
> Ambrosiny vs. U. S., 187 U. S. 1;
> Panhan le Oil Co. vs. Knox, 277 U. S. 218 "

We adhere to that opinion that the Federal Government can not levy a gasoline tax upon any state or any of its governmental agencies such as school districts or school boards where they, the school district or school board, operates directly buses for the transportation of children to and from school;-- but you must keep in mind, first, that this applies only when the school itself or the district itself operates the buses and, second, they should, under the ruling of the Internal Revenue Collectors of the United States, buy the gasoline direct from the refiner or the agent of the refiner, who has charge of the station.

Indian Motocycle Co. v. U. S., 283 U. S. 570;
Farmers and Merchants Bank v. Minnesota, 232 U. S. 516-536.

Trusting this will answer your inquiry satisfactorily, I am,

Very respectfully,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EO

In re: SCHOOL- Majority of TAXPAYERS voting at election under Sec. 9225 R. S. Mo. 1929, increases tax levy; and who is a tax-payer.

April 3rd, 1933

FILED
52

Hon. Chas. E. Lee,
State Sup't. of Public Schools,
Jefferson City, Missouri.

Attention: Mr. George B. John.
State Dep't. of Education.

Dear Sir:-

I have your letter of April 1st, 1933 in which you say many inquiries reach your department relative as to who may vote on the question of school tax levy.

Section 9225 R. S. Mo. 1929 provides for an increase tax levy which must be submitted to the voters. That section is as follows:

> " * * * if A MAJORITY OF THE VOTERS WHO ARE TAX-PAYERS VOTING AT SUCH ELECTION ON THE PROPOSITION TO INCREASE THE LEVY SHALL VOTE IN FAVOR OF SUCH INCREASE, the result of such vote and the rate of taxation so voted in such district shall be certified to the County Clerk * * * who shall on the receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all the taxable property, real and personal of such school district as shown by the last annual assessment for state and county purposes, including all statements, of merchants as provided by law."

Taxes on railroad property in the district would be taxable under this law.

You will note, the statute repeatedly said the majority of the tax-payers voting at such an election.

Black's Law Dictionary says that a tax-payer is defined as a person chargeable with a tax.

The St. Louis Court of Appeals defines a tax-payer as a person owning property in the State subject to taxation on which he regularly pays taxes. (This definition is adopted in Pope's Legal Definitions.) Sutton v. Fassie 71 S. W. (Mo.) 745.

In the following case the party seems to have owned an automobile and was considered a tax-payer, Castilo v. State Highway Department 312 Mo. 244, l.c. 262.

In other decisions, they have defined a tax as "an enforced contribution of money or property and in accordance with some reasonable rule of apportionment by authority of a sovereign state on a PERSON OR PROPERTY within its jurisdiction for the purpose of defraying the public expense."

Balentine's Law Dictionary p. 1263
26 R. C. L. p. 13
23 R. C. L. p. 946

" 'THE LEGISLATURE MAKES, THE EXECUTIVE EXECUTES AND THE JUDICIARY CONSTRUES THE LAWS.' Cooley on Taxation p. 84.

"Chief Justice Marshall in Wayman v. Southard 10 Wheat 1, p. 46: 'The Legislature must therefore determine all questions of necessity, discretion or policy in ordering a tax and in apportioning it * * * and must decide upon the agencies by means of which collections shall be made.' "

Patton v. Brady 184 U. S. 608, l.c. 619, 621.

The last above cited opinion from the Supreme Court of the United States would indicate that a tax-payer is anyone who pays a tax on real estate, personal property, merchandise or whatnot; the conclusion would be inevitable, a man who pays poll tax (who helps keep the roads in shape for the children to go to and come from school) is a tax-payer.

Village of Mixa v. Wilson 199 Mo. Ap. 33
Castilo v. Highway 312 Mo. 344, supra.

The theory of the law is that a tax-payer's interest is so great that he will exercise his discretion in voting for the best interest of the district.

199 Mo. Ap. 33, l.c. 35, supra.
See also Sections 7879-7888 (R. S. 1929) inclusive.

"No strict and technical construction is to be put upon the statute involved, nor is a strict and technical compliance with it to be exacted of the 'plain, honest, worthy citizens, not specially learned in the law' in the performance of their duties under it."

State ex rel. Jones 266 Mo. l.c. 201.
State ex rel. Job. 205 Mo. l.c. 34.

"The laws affecting the organization, functions, and powers of the school district are not to be strictly construed."

State ex rel. School District 288 S. W. l.c. 820.
State ex rel. Cornahan v. Jones, 266 Mo. 191, l.c. 201

In view of the foregoing, it is our opinion that any tax-payer is a qualified voter in this instance, because it limited it specifically to tax-payers under that particular Section 9225 R. S. Mo. 1929.

Section 9225 expressly includes statements of merchants thereby making anyone who pays a merchant's tax unquestionably a qualified voter. Section 7880 says:

> "The county court of all counties * * * shall at the regular February term in each year LEVY * * * upon every able-bodied male inhabitant in the county over twenty-one and under sixty years of age * * * A (poll) TAX NOT EXCEEDING FOUR DOLLARS, * * *."

Sections 7879 to and including 7888 make a poll tax payer a voter as he is charged and made to pay a specific sum to be used in that district, which sum may be recovered by suit under Sections 7886 and 7887 in practically the same manner as any other tax, real, personal or mixed, can be recovered.

Yours very truly,

Geo. B. Strother,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GBS/mh

HIGH SCHOOL LEVY:- Taxpayer--Voter. (Supplemental opinion) to be attached to opinion of April 3rd 1933. "Who Is A Taxpayer.

April 13,1933

FILED
52

Honorable Chas. E. Lee,
State Sup't of Public Schools
Jefferson City, Missouri

Attention: Mr. George B. John
State Dep't of Educ.

Dear Sir:

Your letter of April 6, 1933 received, in which you ask, (First):Is a person considered a tax payer for the purpose of voting on the school levy if they have property subject to taxation even though it has not been listed by the assessor, (Second) and if the property has been listed in another person's name.

You quote Black's definition of a tax payer that I furnished to you heretofore by saying:

> 'I take this to mean a person subject to a tax, that is having property subject to being taxed, even though it has never been assessed or possibly was assessed under another person's name or with their property.'

The 'tax-payer' proposition is a broad one and is a hard one to very definitely define.

> 'The statutes bearing on the subject must not be so construed as to have unreasonable consequences, ****' 71 S. W. l.c. 746.

I will quote from different angles from decisions in Missouri in regard to who is a tax-payer.

In State ex rel. Sutton v. Fasse, 71 S. W. 745, the court said discussing who can be a director:

> 'Appellant insists the requirement that a school director must be a resident tax-payer of the district means he must have paid taxes for school purposes within the district.****'

The court then said:

> 'That contention cannot be adopted without enlarging the language of the statute and changing its intention.****'

Then the court defined a qualified voter and tax-payer:

> "A qualified voter is one who under the general laws of the state would be allowed to vote in any county for state and county officers." "If he is also a taxpayer (that is a person owning property in the state subject to taxation, and on which he regularly pays taxes), he is eligible to the office of school director."

And the court held that such a person is eligible to the office of school director whether he had in fact paid a tax within such school district or not.

In State ex rel. Circuit Attorney v. Macklin 41 Mo. A. 335, the court defined a tax payer from several angles. The court said:

> "Our duty is to declare and not to make the law."

And quoted with approval from Chief Justice Marshall in United States v. Fisher, 2 Cranch, 386:

> "Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed."
>
> "A person is not relieved from paying taxes on property owned by him, simply because it is erroneously assessed to another." "
>
> "If a person owns an interest in property and pays a tax thereon, he pays his tax regardless of the fact to whom the property is assessed." "
>
> "In determining the meaning of words and phrases used in a law, where they admit of more than one meaning, it is the duty of the courts to adopt that meaning which is in harmony with the context of the entire law, and prevents the mischief sought to be remedied;"

In the above cases the parties were considered and held to be tax-payers. State ex rel. Circuit Attorney vs. Macklin 41 Mo. A. 335 l.c. 346.

In a much more recent case, State ex rel. Bellmany vs. Menegali, 307 Mo. 447, the court went into detail as to who was a tax payer. The "tax-payers" in that case are as follows: Mrs. Menegali was elected a school director and as her name was not on the tax list a suit was brought to oust her from the office and this state of facts appear:- It was testified that on the first day of June Mrs. Menegali owned a horse, four cows a sow and one half interest on an automobile, that the property was listed and assessed for taxation in the name of Joe Menegali, her husband. She was present when the assessment was made and signed her husband's name to the assessment, and the tax was paid on her personal property. She owned a one half interest in the automobile, the horse, cows and one sow, that same was purchased with her own money, that her husband paid said taxes for her and himself, and that in December 1921 she was the owner of the property aforesaid and paid her taxes in December 1921 in the manner aforesaid.

The court quotes with approval the case of State exrel. Circuit Attorney v. Macklin, 41 Mo. A. 339:

> "If a person owns an interest in property and pays a tax thereon, he pays his tax regardless of the fact to whom the property is assessed."

If these laws were strictly construed, when new districts were formed there would be no one in that district who could serve as a director because in that district no one would have paid tax.

From the foregoing it is our opinion First, if the property has never been assessed any where, nor the taxes paid on same by any one even though it is owned by the person claiming to be a tax-payer under the rule quoted in Macklin Case (41 Mo.A. l.c. 348) he would not be considered a tax payer, but as the court has said it would be a "mere sham." Second: That a person would be considered a tax-payer if he or she has property even though it is listed in another person's name if the taxes are paid on same whether by the person or by some one in his or her behalf.

Very truly yours,

Geo B. Strother

GEORGE B. STROTHER
Assistant Attorney General.

APPROVED_____
Attorney General.

GBS:MM

State Superintendent of Schools: VOTING IN SCHOOL DISTRICTS

Question of right of employees of McCune Home, Jackson County, to vote on school affairs.

June 17th
1 9 3 3.

6-20

FILED
52
29

Honorable Charles A. Lee,
State Superintendent of Schools,
Jefferson City, Mo.

Dear Mr. Lee:-

We acknowledge receipt of your letter of May 10, 1933, as follows:

"The attached information concerns School District No. 19 in Jackson County. Mrs. Blythe was in to see me this week and also had a conference with your Assistant, Mr. Strother.

"Mrs. Blythe stated Mr. Strother suggested that I ask for an opinion relative to the employees of the McCune Home in Jackson County having the right to vote on school matters in the local district. She alleges that the home of these employees is located in other sections of the state and that for all practical purposes they are not citizens of the district, so the question is, do these employees of the McCune Home have a voice in the affairs of the local school government as expressed in the annual school meeting?"

The section of the statute dealing with the matter in the letter quoted above is Section 9287, Revised Statutes of Missouri, 1929. In line 12 of said section, it is provided that the directors who are to govern and control the school district shall be chosen by the qualified voters of the district. In line 23 of the same section the term "qualified voter" within the meaning of the entire chapter is defined as follows:

"A qualified voter within the meaning of this Chapter shall be any person who, under the laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

Article VIII, Section 2, of the Constitution of Missouri sets out the qualifications for being able to vote generally, including, of course, the eligibility to vote for state and county

officers, as follows:

> "All citizens of the United States, including occupants of soldiers and sailors homes, over the age of twenty-one years, who have resided in this state more than one year and in the county, city or town sixty days immediately preceding the election at which they offer to vote and no other person shall be entitled to vote at all elections by the people; provided no idiot, no insane person, and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

As to whether, under Section 9287 read in connection with the constitutional section above quoted, the employees of the McCune Home can vote on the election of these directors, it is a question of fact as to each employee's status and the consequent right or disability based thereon. In the present case the question of residence in the school district, thirty days under section 9287, seems to be the important factor.

The question of what constitutes "residence" is a well settled doctrine in the State of Missouri. The "intention" of the person claiming residence is for all practical purposes the controlling factor. Hope vs. Flentge, 140 Mo. 390, 41 S. W. 1002, 47 L.R.A. 806, a case often cited, holds that "whether they were residents was a question of fact into which their intention largely entered and a finding that they were would not be disturbed". The case of Northern vs. McCaw, 189 Mo. App. 362, 175, S.W. 317, holds that "since a person's residence depends entirely upon his intention an expression of that intention can be overcome only by strong circumstances to the contrary."

Whether the employees of the McCune Home are bona fide residents of School District #19, and, other things being equal, should be allowed to vote on school matters can resolve itself only into a question of fact in the individual case of each employee. If an investigation shows clearly that they are bona fide residents of another district and merely nominal residents of School District #19 their votes could be withheld.

APPROVED: Very truly yours,

Attorney-General

CHARLES M. HOWELL, Jr.
Assistant Attorney-General

CMHjr-MB

BOARD OF CURATORS:
Authority to hire and fix salaries of teachers instructors, officers and employees.

96.1 RS Mo 1929

February 1,1933

FILED
53

Executive Board,
Board of Curators,
Lincoln University,
Jefferson City, Missouri.

Attention: Mr. J. B. Coleman, Secretary.

Gentlemen:-

I acknowledge receipt of your letter of January 31st, 1933 which reads as follows:

> " The Board of Curators of Lincoln University at its meeting, December 17th, 1932 elected a man to the faculty of Lincoln University. Is there any thing in the law prohibiting the placing this man on the pay-roll at this time?"

After going over this matter with you, I see no reason why this man cannot be properly placed on the payroll of Lincoln University at this time.

From your conversation with me, I gather that the Board of Curators of the Lincoln University at a meeting of December 17th, 1932 elected this man to the faculty and provided at such meeting that the Executive Board shall as soon as possible and as soon as he assumed the duties of his position, place this man on the pay-roll of the University, at the salary set by the Curators.

Section 9621, Revised Statutes of Missouri 1929 provides that the Curators of Lincoln University shall have the same powers, duties, authority, etc. in respect to Lincoln University as the Curators of the State University have over the affairs of the State University.

Section 9633, provides that the Board of Curators of the University of Missouri shall have power and authority to appoint and remove the members of the faculty, the employees and various persons connected with the University of Missouri and shall have authority to fix their salaries.

Section 9636, provides that no relative of a Curator shall be appointed as a member of the faculty, or employee, etc.

The foregoing sections apply by reason of Section 9261 to the Board of Curators of Lincoln University.

It is my understanding that so long as your monthly expenditures for January, February and March are not more than one-twelfth of the yearly appropriation for 1932, that your expenditures will be taken care of when your appropriation is made by the Legislature. Accordingly, if the additional expense of placing this man on the faculty does not run your expenditures for February and March over the foregoing apportionment and if his appointment to the faculty and his employment is regular, there is no reason why you cannot properly place him on the pay-roll at this time.

Yours very truly,

HARRY G. WALTHER, Jr.
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney-General

HGW/mh

RE: Truckman's license and Permit for delivery of live stock.

January11, 1933

5764-70 laws 31

FILED

54

Mr. E. C. Lockwood,
Prosecuting Attorney,
Gentry County,
Albany, Missouri.

Dear Sir:-

I have your letter of December 29th, making inquiry of this office as to the construction of certain laws relating to the use of motor vehicles and the transportation of stock.

The statement of facts contained in your letter is as follows:

> "Mr. Alvin Whitten, of Albany, is an extensive live stock shipper and has contracts with various local buyers in the surrounding territory for the purchase and delivery of hogs to him at the railroad pens in South Albany.
>
> "Mr. W. F. Maudlin, of Grant City, North of here, buys on a contract with Mr. Whitten, buying in his own name, at ten cents under the Albany price, (which allows for the expense of delivery), and a commission of ten cents per head. This is for purchases of hogs. Whitton and Maudlin have daily settlements.
>
> "The trucking charge from Grant City to Albany is seven cents per cwt. Maudlin buys of the farmers, who are to deliver the hogs at this pens in Grant City, or if Mr. Maudlin sends a truck for them, the charge to the farmer is three cents per cwt.
>
> "Mr. Maudlin assembles the hogs at Grant City and sends them on to Albany, presumably each day's purchases being delivered at Albany the same day."

If Mr. Maudlin purchases and transports the hogs in his own trucks, then he is neither a motor carrier "for hire" within the meaning of Section 5264, (b), nor a contract hauler "for compensation or hire" within the meaning of Section 5264 (c), Laws 1931, p. 304, 305.

The Public Service Commission Act in this matter only provides for a "motor carrier" to obtain a certificate of convenience and necessity, 5267, 5268. It also provides that only a "contract hauler" must obtain a contract hauler's permit, 5270, 5271.

It would therefore seem that under the above sections, that Mr. Maudlin would not be required to obtain either a certificate of convenience and necessity, or a contract hauler's permit.

If Mr. Maudlin hires other trucks to transport the hogs from Grant City to Albany, and neither place is on a "regular route", 5264, (g), 5270, (e), Laws 1931, p. 305, 310, then such trucks, so hired are "contract haulers", 5264 (c) and must have a contract hauler's permit, 5271 (a). The exemption set forth in Section 5265, Laws 1931, p. 306 does not apply to such contract haulers for the reason that such motor trucks are not used in transporting farm products "from the farm, *** to warehouse, *** storage or market", Grant City to another place of storage or market.

Respectfully yours,

FRANKLIN E. REAGAN,
Asst. Attorney General

Approved:

ROY McKITTRICK
Attorney General

FER/mh

IN RE: Right of non-resident sureties to withdraw on petition from bond of county collector.

Sec 2846 to 2852 inc } RSMo
2943 to 2952 inc } 1929

February 20, 1933

FILED
54

Hon. Minor C. Livesay,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

In re: Release of Surety Co.,
Collectors Bond on removal from
county of surety.

Dear Sir:-

Your letter of February 13th, received and pertinent part thereof reads as follows:

"The facts are as follows: The County Collector gave a bond at the time of his election which was accepted by the then County Court. One of the signers of this bond was Willard Stevens. Since that time Mr. Stevens has moved to another county and now wishes to be discharged from liability on this bond. He has notified the principal of his intention but the other signers on the bond have had no notice.

"The question presented by the above facts is whether the collector is required to give a new bond, acceptable to the County Court, and thereby release the old signers including the person who has removed from the County, as provided in Sections 2846 to 2852 inclusive, or whether the person wishing to be discharged may petition the Court, without consulting the other bondsmen, for discharge under sections 2943 to 2952 inclusive and that the County Court may find that the bond is sufficient without additional bond. That is does the last above listed Missouri statutes apply to County officers or merely to public utilities etc."

The sections 2846 to 2852 and 2943 to 2952 inclusive, R.S. Mo. 1929 have in substantially the same form been on our statute books since 1872.

Sections 2846 and 2848, 2849, 2850, R. S. of Mo. of 1929, provide as follows:

"Section 2846--The sureties of all clerks, sheriffs, constables, collectors and other county officers shall be residents of the county in which the bonds to which they become parties, by reason of being sureties for any of the said officers, shall be executed."

"Section 2848--When it shall come to the knowledge of any court whose duty it is to approve the official bonds of any of the officers named in Section 2846, that a surety of any of the said officers has become a non-resident of the county in which his official bond was executed and required to be filed or has died, become insolvent or otherwise insufficient, said court shall make an order requiring the officer for whom any such surety executed the bond, on a day therein named, to appear and show cause why he should not give additional security.

"Section 2849--If upon investigation of the matter it shall appear that any surety has become a non-resident of the county in which the bond is filed, died, become insolvent or in any other wise insufficient, the court shall require the officer for whom such surety executed the bond to give additional security by a day named; and in default thereof, the said office shall be forfeited, and the same shall become vacant, and the facts shall be certified to the court or officer whose duty it is to fill such vacancy.

"Section 2850--When the additional bond is given and approved, the former sureties shall thereby be discharged from any misconduct of the principal after the approval of the bond."

The above sections 2846, 2850, are in Chapter 15, R. S. Mo. 1929.

In Chapter 16, R. S. Mo. 1929, are the following sections also referred to in your letter along with your reference to the hereinabove set forth sections 2846, 2850.

"Section 2943--Any person bound as surety in any bond given by any officer, including executors, administrators, guardians, curators, receivers, trustees and depositories, to secure the faithful performance of the duties of such officer, may, on his petition in writing addressed to the court authorized by law for the time being, to take and approve such official bond, be discharged from all future liability on such official bond.

"Section 2944--The petition shall set forth the facts upon which the application for discharge is founded, and shall be verified by the affidavit of the petitioner thereto annexed.

"Section 2945--A notice in writing of such intended application together with a copy of the petition, shall be personally served on the principal of the bond, at least fifteen days before the making of the application."

Section 2946 provides for service of notice by publication if principal cannot be personally served.

"Section 2947-- The court to whom the petition is addressed shall hear the application, and may on examination thereof, in their discretion, make an order requiring the principal in such bond to give a new bond with sureties for performance of his official duties.

"Section 2948--If such bond be given, it shall be taken, approved and filed in the same manner that the official bond of such officer is required by law to be taken, approved and filed.

"Section 2949--When such new bond is taken, approved and filed, it shall immediately operate as a discharge of all the sureties in the former bond from all liability arising from any subsequent misconduct or default of the principal therein, and such sureties shall thenceforth be liable on such bond only for such breaches thereof as shall have happened prior to the taking, approving and filing of the new bond."

Section 2950 provides if new bond not given within sixty days after order made therefor, the official's office shall from thenceforth be vacated and the court shall certify such vacancy to the court or officer having power to name said official's successor which shall be immediately done.

Section 2951 gives a surety paying money on account of his being surety on such bond the same remedy against his principal and co-sureties as is provided in this same Chapter 16, against principals and co-sureties in bonds, bills and notes for the payment of money or delivery of property.

Section 2952 provides remedies in Chapter 16 available against and by executors in all cases where same could be maintained against the executors, testators or intestates, if living.

The hereinabove set forth sections are all you refer to in your letter.

Your letter states the surety "has moved to another county and now wishes to be discharged from the bond. He has notified the principal of his intention but not the other signers on the bond."

I understand your letter above quoted to ask the two following questions:

First--Mr. Stevens, the surety having notified the county collector, his principal, he has removed from Morgan County and desires release from further liability as bondsman is the collector required to give another bond under the hereinabove quoted provisions of Sections 2846 to 2850 inclusive, Chapter 15, R.S. Mo. 1929, the same being the sections which provide on removal of a surety from the county, that the county court upon having knowledge of such removal shall require a new bond if on investigation the court finds the surety has become a non-resident; or can the surety, Mr. Stevens, without consulting the other bondsmen, secure his discharge from future liability by petitioning the county court under the provisions of Sections 2943 to 2952 inclusive of Chapter 16, R.S. Mo. 1929, which last named sections provide any person bound as surety on a bond for any officer including executors etc. etc. may by notice in writing to his principal on petition filed with proper court be discharged from future liability on said bond, if the court in its discretion makes an order requiring the principal to give a new bond.

Replying to your first part of first question, I beg to say your letter does not state whether or not the notice given the principal was in writing. But if it has not been so given in writing it can be and I will assume here in the notice was in writing. As you know, Section 2848 Chapter 15, provides,

> "When it shall come to the knowledge of any court whose duty it is to approve the official bonds of any of the officers named in Section 2846, (and county collector is named in Section 2846) that a surety of any of the said officers has become a non-resident of the county in which his official bond was executed and required to be filed * * * said court shall make an order requiring the officer for whom any such surety executed the bond on a day therein named to appear and show cause why he should not give additional surety."

and the succeeding section 2849, Chapter 15, provides if on investigation the court finds the surety has become a non-resident of the county, "the court shall require the officer for whom the surety executed the bond to give additional security etc."

In my opinion, if it comes to the knowledge of the county court of Morgan County, Mr. Stevens, a surety on your collector's bond has removed from the county it is the duty of your county court to immediately make an order, after proper notice as hereinafter suggested requiring the county collector to show cause why he should not give additional security, and I think the court, should, after investigation if it finds it is a fact the surety has become a non-resident of the county, require the county collector to give a new bond.

These sections 2846-2850, Chapter 15, provide a method of removal on initiative of the county court without waiting for a non-resident surety to return and inform the court he is a non-resident.

The two chapters, 15 and 16, above referred to conclusively show it is the policy of the State that sureties on all bonds of county officials must be residents of the county in which the bond is executed approved and filed.

Section 2846, Chapter 15, R. S. Mo. 1929, hereinabove set forth provides as one of the qualifications for suretyship on a county official bond that,

> "The sureties of all clerks, sheriffs, constables, collectors and other county officers shall be residents of the county in which the bonds to which they become parties, by reason of being sureties for any of the said officers, shall be executed."

You will observe Section 2848 is mandatory in its provisions--it uses the word "shall make an order, etc." thereby imposing a specific duty to act on the county court if and when it has knowledge of sureties removed from the county.

The mere giving of a notice by the surety to the prindipal even though in writing will not release the surety on a county collector's bond under the provisions of Section 2843, R. S. Mo. 1929.

If proceedings be initiated by the county court, care should be taken to see that all the statutory requirements are complied with and the statutory ground of removal of Mr. Stevens from the county should be set out in the order of the court as the basis for its action.

I refer to this because our Supreme Court in case of Wood Adm. vs. Williams et al, 61 Mo, 63, wherein a new Administrator's bond was given in lieu of an old one and the record did not disclose any of the statutory grounds for giving the new bond, the court held the

sureties on old bond were still bound and sureties on new bond bound because not being a statutory it was a voluntary bond and binding and in the opinion the court, 61 Mo. l.c. p. 66 said:

> "The second bond does not seem to have been given in conformity to any statute though it is evident that was the effort and intention of the parties to make a bond which would relieve Jones who intended to leave the State from any further liability as surety for Williams. The record does not disclose that any notice was given or that any of the statutory causes for this proceeding existed, * * * ********** but the existence of some one of the grounds provided by statute for taking a new bond and discharging the sureties of the old one would seem to be indispensible."

In case of State ex rel. Saline Co. vs. Sappington et al, where the county court ordered a new bond for a county Treasurer and in place of giving one bond for $20,000.00 the Treasurer gave two bonds for $10,000 each which the court accepted and the Supreme Court held both the sureties on the old and the new bond were bound because the statute provided for a single bond for $20,000 before sureties on old bond would be released from liability.

The order of the court in the last mentioned case required two bonds for Ten Thousand Dollars each and the Supreme Court said the order did not comply with the statute calling for a single bond.

Replying to second part of your first question which as I read your letter is, can the surety by complying with the provisions of Section 2943-2952, Chapter 16, R. S. Mo. 1929 procure a release from future liability on the Morgan County Collector's bond; In other words, do sections 2943-2952 apply to release of sureties on bond of a county collector.

Clearly these two Chapters 15 and 16, are a related and united part of a remedial process prescribed for qualifying sureties on official county bonds and for removal and release of sureties and therefore they should be construed each as a part of the plan prescribed by the statute for protection of sureties and of taxpayers against default or misconduct of county officials.

An examination of the statutory history of sections 2943-2952, R.S. Mo. 1929 reveals that these two sections appeared in the Revised Statutes of Mo. of 1879 in Chapter 66, thereof as Sections 3906 to 3913 inclusive in same form as now same appears as sections 2943-2952, except after word "officer" in line 2, of section 2943

R. S. Mo. 1929, and before the words "to secure" in line 5 of said section 2943, there has been inserted by amendment of the 1879 statute the following words, to-wit;

> "including executors, administrators, guardians, curators assignees, receivers, trustees and depositories"

but such amendment does not affect legally the question of statutory construction, we are now to deal with respecting the said sections 2943-2952.

The direct question is, do said sections 2943-2952 afford a method of release of surety on county collectors bond grounded on fact, surety has become a non-resident of the county? I have found only one case in Missouri bearing directly on this question. There may be others but my diligent search therefor, has been unrewarded: And I find no case in Missouri subsequent to this one citing this particular case as authority on the single question above suggested. Likewise I have been unable to find a case in Missouri overruling or criticising it on the question herein involved.

Sections 2943, 2944, 2945 and 2946, R. S. Mo. 1929 provide any person bound as surety on bond for an officer may be discharged from future liability thereon by petition addressed to court authorized to approve said bond by written notice to the principal given fifteen days before making of the application and if principal unavailable for personal service then service by publication may be had: And then 2947 provides the duty of the court in the following language:

> "Section 2947--The court to whom the petition is addressed shall hear the application, and may * * *in their discretion, make an order requiring the principal in such bond to give a new bond.* * *"

The intent of Chapters 15 and 16, R. S. of Mo. of 1929 is to protect the tax-payers from loss occasioned by default or misconduct of the county officials. To carry out this intent, the Legislature first prescribed oneemust be a resident of the county before he is qualified to sign as surety a county official's bond: Second, that if a surety on an official's bond becomes a non-resident of the county and knowledge of this fact comes to the county court, it is the duty of the county court to ascertain if surety has become a non-resident and if so to require a new bond of the official: Third, that failure of the official to furnish new bond vacates his office and on certification by county court of failure of official to give new bond, to official given power to fill vacancy, successor to the officer so removed must be appointed.

This is a summary statutory removal from office without intervention of court for sole purpose of protecting the public interest.

The policy of the State as announced in these statutory provisions is that to protect the p blic funds in custody of county officials

bonds with solvent sureties who are residents of the county must be kept in full force and effect.

The above method of protecting the public interest is by action on the initiative of the county court. Now when a bondsman comes and announces he has become a non-resident and petitions the court for release and that a new bond be required of the official, we find much the same procedure is provided: First, the statute says the county court shall hear the petitioner's application: Second, the court "may" in its discretion order a new bond to be given: Third, if and when the new bond is given and approved and filed the bondsmen is released from future liability.

It is true the literal reading of the language used in section 2947 conveys a power to county court with an apparent discretion to use it or not as they deem proper.

I am however, of opinion when a bondsman on county collector's bond removes from the county and petitions the county court to release him from future liability on ground of his non-residence, it is first: The duty of the court to give petitioner as early a hearing on his application as is possible: Second, that if on such hearing the fact is established the bondsman has become a non-resident of the county it is the duty of the county court to order the collector to give a new bond. I base my opinion on the sound principle that when the public welfare demands it then the power to act is a duty to act,

We see here the power given the county court on petition of bondsmen to require a new bond. To allow a bond to remain in force with a non-resident as one of the sureties is in direct violation of Section 2846, R. S. Mo. 1929 providing all sureties on county official's bonds must be residents of the county.

We see the next sections 2848-2849 providing if court learns of non-residence of surety, "said court shall make an order requiring **** the officers on a day named to *** show cause why he should not give additional security." And if investigation reveals non-residence of a surety, "the court shall (not may) require the officers to give additional security."

By these sections of the statute the State declared if surety becomes non-resident public welfare demands new bond be given and therefore the grant of power to county court to act when surety becomes non-resident makes it the duty of the court to act.

The same public welfare demands that in case of a bondsman petitioning for release on ground of non-residence, the county court should act and require a new bond."

The intent of the law in requiring county court to compel new bond on its initiative on learing of non-residence of a surety is to protect the public interest: The intent of the law in granting the power to the county court to require the giving of a new bond on petition of bondsmen for release on ground he has become a non-resident, is to protect the public interest.

This construction is in conosance with the authorities. Mr. Endlich in his work on statutory construction, pp. 400,401 says:

> "And when the real design of the Legislature in ordaining a statute, although it be not plainly expressed is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect even though in so doing, the exact letter of the law be sacrificed or though the construction be contrary to the letter, and this rule holds good even in criminal statutes, of course if the meaning of the Legislature is clear every techinical rule of construction must yield, and though the words used to express that meaning be not apt for the purpose they will be so construed as to serve the same."

The design of these statutes is to sureties is to have at all times sureties who are residents of the county wherein the bond is filed. And so, in case of State ex rel. Mo. Life Ins. Co. vs. King, 44 Mo. p.283, where the facts were the law of Missouri required a Life Insurance Company to have $100,000 of its capital paid in and invested in stock or bonds of the State of Missouri, ***or in notes or bonds secured by mortgages on deeds of trust on unencumbered real estate worth at least double the amount loaned thereon, etc.

> "The insurance commissioner refused to accept a first mortgage on Illinois farm as part of notes or bonds on unencumbered real estate on ground the statute required the mortgage must be on Missouri real estate although the statute was silent in regard to where the land should be situated,"

And the Supreme Court, 44, Mo. l.c. pp. 284 -285 said:

> "It must be conceded the law is indefinite in regard to where the land shall be situated. The only positive requirement is that the real estate shall be unencumbered, and worth at least double the amount loaned. But what was the intention of the law-makers? It is generally true that where words used in a statute are clear and unambiguous there is no room left for construction: But when it is plainly perceivable that a particular intention though not previsely expressed must have been in the mind of the Legislator that intention will be enforced and carried out and made to control the strict letter.".

And in Riddick vs. McNair, Gov. of Mo., 1 Mo. l.c. 150, the Court says:

> "In giving a construction to a statute one question always presents itself to the consideration of the court, viz: What was the intention of the Legislature?"

Applying these rules of construction above set forth, we find the intent of the Legislature was to have all bondsmen on official bonds resident of county wherein bond was made: Also plain intent all all officials should at all times have legally sufficient bond with legally qualified sureties ther on and one of qualificationssof sureties is local residence.

If it be held that it is the duty of county court on showing petitioner is non-resident to require a new bond there can be no possible chance for bss to the tax-payers because the retiring non-resident bondsman is liable for all breaches of bond to date new bond is approved and if county official cannot give new bond the new official when appointed must give a new bond and the old bond by the very language of the statute holds until the new one is approved. The whole object of the bond is to protect the public interest and that is best attained by making it the duty of the county court on petition for release of a non-resident surety to require a new bond.

In Steiner Vs. Franklin County, 48 Mo. p. 167, the Court said:

> "When * * * the public good requires it the word "may" used in a law should always be construed to mean "shall".

The public welfare and good demands giving a new bond when one surety becomes a non-resident of the county and these provisions of the statute herein considered in my opinion mean that shall be done no matter whether the county court moves under Sections 2848, 2849 or the non-resident bondsman moves in the matter under Section 2943, to 2952.

The Supreme Court of Missouri in State ex rel. vs. Bell, 99 Mo. p. 569 has held that a surety on a public administrator's bond may file a petition for release on the ground he has become a non-resident of the county and that the county bourt has the authority under the provisions of sections 2943, 2952, R. S. of Mo. 1929, to order a new bond given and to accept the same and after approval of the new bond the sureties on the old bond are released from future liabilities. It is true this opinion was rendered upon sections 3906-3912 inclusive of the statutes of Mo. of 1879, but these sections of the 1879 statute have been carried forward in the various revisions and now appear as Sections 2943-2952, R. S. of Mo. 1929.

The court said in above case, 99 Mo. l.c. 575,576, after setting out in full sections 3906 to 3912 inclusive R. S. of Mo. 1929:

> "That the language of these latter sections include public administrators, as well as other officers is evident at a glance unless it is affected by the provisions of law relating to the special subject of administration. Plaintiff claims that the terms of Section 307 above quoted limit sureties of a public administrator to the mode and grounds mentioned in sections 28 to 31 (R. S. 1879) in moving for a discharge from future liability on the bond and thereby exclude resort by them to the proceedings under sections 3906 to 3912 * * * we think that language does not evidence any intent of the law-makers to exclude public administrators and their sureties from the benefits of Chapter 66, Revised Statutes of 1879 (Sections 3906 and following) or to engraft an exception against them upon a rule apparently designed to apply to all public officers alike."

This is only case I find in Missouri on this particular point.

I understand your second question to be whether or not in event petition filed by surety and court finds he is a non-resident can court declare remaining sureties on bond sufficient and release the non-resident surety. In my opinion, most emphatically NO. Suppose all the remaining sureties had become insolvent and the non-resident was the only solvent one and the court could and did release him the result would be the county would be without a solvent bond given by the collector, and in case of a corrupt or careless court, the door would be opened wide for perpetrating a fraud upon the tax-payers by allowing the county collector to remain in office with practically no bond and in violation of the express terms of the statute.

The court in the Nolan case in 99 Mo,l.c. 577, expressly said this could not be done. The court said:

> "It is next asserted that the approval of the new bond (which the statute makes essential to release the old sureties) was void because made at a special term of the probatecCourt."

In my opinion it was and is one of the outstanding intentions of Chapters 15 and 16, R. S. Mo. 1929, that a surety on county collector's bond can only be released by giving, accepting and approving and filing of a new bond by an orderof the county court."

It is my opinion on county court finding on petition of non-resident surety that petitioner is a non-resident of county that county court has but one course to pursue and that is to order a new

bond given by the county collector.

I have replied to your letter as I understand same. If any further information you wish, will be glad to give it if within my power.

Respectfully,

EDWARD C. CROW

MH

APPROVED:

ROY MCKITTRICK
Attorney General

TAXATION: Collection of delinquent taxes of cities of the fourth class provided for in Section 6695, R. S. Mo. 1929, not affected by Senate Bill 94 or 96 amending Chapter 59. Cross reference under delinquent taxes of cities of the fourth class

6695 R.S. Mo. 1929
9970 Laws 33

June 27th, 1933

FILED
54

Hon. Minor C. Livesay,
Prosecuting Attorney,
Versailles, Missouri.

Dear Sir:

We herewith acknowledge receipt of your letter of June 10th, wherein you request an opinion of this Office which request reads as follows:

> " The following question arises under the law, passed at the last session of the Missouri State Legislature, regarding the delivery of the City Tax records to County Collector on the 1st of March each year for collection. The question is:
>
> Shall the City now deliver the list of taxes to the County Collector? The City of Versailles has been using a special tax attorney for the collection of these taxes. Is there any other method of collecting other than delivering to County for collection? "

In approaching this question, we must keep in mind that the City of Versailles is a City of the fourth class. The manner of collecting delinquent city taxes for cities of the fourth class is governed by the provisions of Section 6995, Revised Statutes of Missouri 1929 and the succeeding cited Sections. It is undoubtedly under the authority of these Sections that your City Collector has been referring the delinquent taxes to a tax attorney for collection instead of certifying them to the County Collector as provided by Section 9970 of the Revised Statutes of Missouri 1929.

The law to which you refer as having passed the last session of the Legislature regarding the delivery of city tax records to the County Collector, we assume is the amended Section 9970 Revised Statutes of Missouri 1929. The only amendment made or change made was the change of "first day of May" to "first Monday in March" and aside from this change, Section 9970 as amended by Senate Bill 96 is identical with Section 9970 as is found in the Revised Statutes of Missouri 1929.

As to whether or not this amendment would require your City Collector to forward delinquent lists to the County Collector under this provision or to continue under the practice of forwarding these delinquent and unpaid taxes to a tax attorney is the question to be determined by this opinion.

It seems that the Courts of this State have held that the collection of delinquent city taxes in cities of the fourth class are not governed by the provisions of 9970 but are controlled by the provisions of Section 6995 and following Sections. The Supreme Court in the case of State ex rel Duble v. Lewis, 256 Mo. 121, in considering a suit brought to enforce delinquent city taxes due a city of the fourth class, stated as follows:

> " * * *the point is made by the respondents that the action was not brought in the name of the proper party plaintiff, in this, as respondents aver, that it was brought in the name of the 'City of Princeton at the relation of the Collector', whereas respondents urge that it should have been brought in the name of the 'State of Missouri at the relation and to the Use of the City Collector of the City of Princeton'. * * *
>
> "Recurring to the objection made by respondents, and looking to the files, we find that the style of the case which is attacked, is not due to any fault of appellant. The action was correctly brought in the name and style of 'State of Missouri at the relation and to the Use of Grant Duble, Collector of the Revenue of the City of Princeton, Mercer County, Missouri, Plaintiff, v. Robert W. Lewis, * * *'. Somewhere the style of this case has been changed without the fault, so far as we are able to see, of appellant * * * We agree with learned counsel for respondents that the statute now in force requires these suits to be brought in the name of the State of Missouri at the relation and to the use of the city collector, naming him, and the city for which he sues (Sec. 9348, R. S. 1909); but since we find from an examination of the files that this precise thing was done, we must disallow this point. "

By tracing back to Section 6695, R. S. Mo. 1929, we find that it is identical with Section 9348, R. S. Mo. 1909. Accordingly, any suits brought on delinquent taxes for cities of the fourth

class should be brought under the provisions of Section 6995.

The 57th General Assembly dealt very exhaustively in the matter of delinquent taxes and enacted many statutes looking to their efficient collection. However, we find no repeal or amendment to Section 6995 and we are accordingly of the opinion that the Legislature intended no change to be made in the method of collection of delinquent taxes under that Section.

It is therefore the opinion of this Office that your City Collector is not required to deliver a list of delinquent and unpaid city taxes to your County Collector under the provision of Section 9970 as amended by the 57th General Assembly.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HGW/mh

LINCOLN UNIVERSITY: STATE UNIVERSITY: Member of Board of Curators who is editor of and stockholder in newspaper may distribute rotogravure section advertising university without compensation to the distributing paper.

9654 RS Mo 1929

August 14, 1933

8-14.

FILED
54
39

Board of Curators
Lincoln University
Jefferson City, Missouri

Dear Sirs:

This Department acknowledges receipt of your letter dated August 5, 1933, as follows:

"The Board of Curators of Lincoln University desires to publish a Rotogravure Section advertising Lincoln University in an effort to increase the enrollment at the school.

The publisher of the Rotogravure plans to distribute the Rotogravure Section through the papers of the State without charge except for the cost of stuffing and mailing.

Would the Kansas City American be eligible to participate in the distribution of this material on the same basis as the other newspapers of the State in view of the fact that Dr. W. J. Thompkins, a member of the Board of Curators, is also the editor and a member of the corporation which publishes the Kansas City American? In other words, would such participation on the part of the Kansas City American be in violation of Section 9654 R. S. 1919 or any other statute bearing on this matter?

Your opinion and ruling in this matter will be appreciated."

As we understand your letter the Board of Curators of Lincoln University intend to have published a rotogravure section for the purpose of advertising the merits of Lincoln University to the end that the enrollment in the school may be increased. We further understand that such rotogravure section is not to be published by the Kansas City American. We further understand that as and when published the rotogravure section is to be distributed to readers through the newspapers of this state and that there will be no charge for the distribution of such rotogravure section by the newspapers so distributing the same, except the distributing newspapers will pay the cost of stuffing and mailing the section so that whatever compensation is paid on account of the rotogravure section will be paid to the publisher of same and not to the newspapers making distribution thereof.

Section 9654 Revised Statutes of Missouri 1929, reads as follows:

> "If any member of the board of curators, president, professor, teacher or other officer or employe of the state university shall be directly or indirectly interested in any contract for furnishing supplies for said university or any of the departments thereof, or in any work to be done upon any of the buildings of said university or repairing of the same, or ornamenting the grounds thereof or fencing the same, or if said curators, or any one of them, or the president or any professor, teacher or other officer or employe shall keep for sale or be interested in, directly or indirectly, the sale of any school furniture or apparatus, books, maps, charts or stationery used in said university or any department thereof, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction be fined not less than two hundred dollars or imprisoned in the county jail where said offense is committed not less than three months, or by both such fine and imprisonment."

We can not find that the foregoing section has been construed by any of the courts of this state.

A member of the Board of Curators of Lincoln University by the above section is prohibited from being directly or indirectly interested in any contract for furnishing supplies for the university or any of its departments. He is also forbidden to be directly or indirectly interested in a contract for any work to be done upon any of the buildings of the university or repairing the same or ornamenting the grounds thereof or fencing such grounds and such member is further prohibited from keeping for sale or being interested in, directly or indirectly, the sale of any school furniture or apparatus, books, maps, charts or stationery used in such university or any department thereof. The distribution of the rotogravure section, as detailed in your letter, would not be furnishing supplies for the university nor would it be work done upon any of the buildings of the university or repairing same, nor ornamenting the grounds of the university or fencing such grounds, nor would it be the keeping for sale or being interested in, directly or indirectly, the sale of any school furniture or other school equipment.

The plan outlined in your letter does not come within any of the prohibited acts or contracts mentioned in Section 9654, and we are of the opinion that the distribution by the Kansas City American of the rotogravure section mentioned in your letter, and as above outlined would not be a violation of Section 9654 Revised Statutes of Missouri 1929, or any other statute, by a member of the Board of Curators of Lincoln University who is also the editor of and a stockholder in the corporation publishing the Kansas City American.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

STATE HIGHWAY REFUNDS.
ROADS AND BRIDGES.
COUNTIES.

Township is not entitled to share in the proceeds on the refund by the State Highway Commission on account of bridges built by the proceeds of a County bond issue.

8127 R S Mo 1929

11-27

October 23, 1933

FILED
54

54.

Honorable Minor C. Livesay
Prosecuting Attorney
Versailles, Missouri

Dear Mr. Livesay:

This Department acknowledges receipt of your letter dated September 27, 1933, as follows:

"On June 10 I wrote to your office requesting an opinion on the above question. June 15 you asked me for additional information. I sent this information but I have heard nothing from you so I am assuming that that letter must have been lost.

Red Line Roads as used in my letter means that the County floated a bond issue and each township was alloted its share of the money, based on its valuation, for the purpose of building roads. The particular township to which I refer used its allowance to build a bridge. This bridge was taken over by the State Highway as a part of the Farm to Market system.

This county has never been under the township organization law. This township feels that since it did not build roads with the money it received from the bond issue but built a bridge which was taken it is now entitled to a refund to be used in building roads.

It is my opinion that Sec. 8127 applies only where the township expends money and not in the case of the County

alloting them money. In other words, the County might demand a refund but not the township. However some of the citizens would like your opinion."

We did not receive a reply to my letter to you dated June 15, 1933, the same must have gone astray in the mails, hence our delay in answering your letter.

Section 44a of Article IV of the Constitution of the State of Missouri in part provides:

"The proceeds of the sale of the seventy-five million dollars ($75,000,000.00) of additional bonds herein authorized shall be expended * * * * for the following purposes: * * * * to reimburse the various counties and political or civil sub-divisions (including road districts) of the state for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the State Highway System. * * * * * * *"

Section 8127 Revised Statutes Missouri 1929, provides in part:

"Counties or other civil subdivisions shall be reimbursed for work done in constructing such part of a road or roads including bridges* * * **which may become a part of the State Highway System.* * * * Any portion or all of such reimbursement shall be made either in the form of additional roads, or in cash, at the election of the authorities of the county or civil subdivision to which reimbursement may be due.* * * * If the authorities of the county or civil subdivision elect to have all or any part of such reimbursement made in cash, all or any portion of such reimbursement made in cash may be used for the purchase of rights-of-way for state highways within such county or civil subdivision.* * * * And the counties or civil subdivisions wherein said roads are constructed or to be constructed, shall have all the benefits of this section. * * * * *"

Section 8132 defines the term "civil subdivision" as used in the State Highway Act, as follows:

> "Whenever in the preceding section the words 'civil subdvision' are used they shall be deemed and taken to mean a county, township, road district, or other political subdivision of the state or quasi public corporation having legal jurisdiction of the construction and maintenance of public roads."

Webster defines the word "reimburse" as meaning,

> "To make restoration or payment of an equivalent to; to pay back to; to re-pay."

It is clear that Section 8127 above referred to, contemplates the raising of money not only by a county as a county but by other civil subdivisions of the state within the boundary of a given county. We know as a matter of common knowledge that townships, in counties under township organization law in this state as well as special road districts, have raised and expended funds for the purpose of constructing and maintaining roads that were then, or thereafter were, parts of the state highway system. However the proceeds of the bond issue may have been allotted, the fact remains that the money received from the bonds was received from county bonds and from the county as a civil subdivision of the state. The vote on the bond issue was taken in the county as a whole and the result of the vote on the bond issue determined thereby. None of the townships within the county, strictly speaking, expended its own funds in disbursing the money that came to it from the county bond issue and therefore is not entitled to be reimbursed for something it did not pay out.

It is the opinion of this Department that any refund on account of moneys spent, the proceeds of the county bond issue, would properly go to the county as a civil subdivision of the state.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

COUNTY COURT: Right to order tax illegally collected to be re-distributed.

FILED
56

February 11, 1933

Honorable Douglas Mahnkey
Clerk of the County Court
Forsyth, Missouri

Dear Mr. Mahnkey:

We acknowledge receipt of your letter dated February 6, 1933, as follows:

> "I am writing you for advice and information which may not be pertaining to your official duty. If this will cause you any embarrassment or if you do not feel fully justified in advising me, please understand that I will not feel offended as I realize that I am "Passing the buck".
>
> A Special Road District, The Hollister-Kirbyville, of this County, thru its Board of Commissioners, levied a road tax of .25 cents above the rate set by law; this being done without a vote of the people in the district. The Missouri Pacific refused to pay said extra rate as there were no bonds outstanding. I am now convinced, after a close study of the matter that the levy is illegal, but a large amount of tax has been collected from individuals, and they are now complaining about this extra charge.
>
> There is more than enough money in the district funds collected this year to pay each taxpayer back the amount he was overcharged. I would like very much to do this if the tax is not legal. I would like to proceed in law to take over enough of the money now on hands in the treasury to repay these tax payers. What would you advise?
>
> The Prosecuting Attorney is attorney for the district, so I am informed, and I have been criticized for taking his advice in the matter, so that is why I am writing you.
>
> I only want to give everyone a fair deal."

Assuming that the tax referred to in your letter was invalid and which we can not pass on on the information contained in your letter, we do not know of any authority in any officer or in the county court to pay or authorize the money illegally collected to be re-distributed.

We think as a protection to the officer in whose hands the funds are, that a proper action should be brought and the judgment of a court of competent jurisdiction secured in the premises. We see no reason why the persons who have paid the taxes could not assign their claims to one person and save court costs in that way.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____

Attorney General.

GL:LC

COUNTY REVENUE - County court cannot issue warrants in excess of the anticipated revenue of any one year under Art. 10, Sec. 12, Mo. Const., but may transfer unused or surplus funds from one department to another.

March 18, 1933.

FILED
56

Mr. Howard R. Maness
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

Regarding your inquiry of February 22nd, 1933, wherein you ask,

> "Does the County Court have authority to issue additional warrants on the contingent fund even though they are in excess of the amount appropriated for that purpose when they are not in excess of the total expected revenue?"

Preceding the above paragraph, you state,

> "The County Court has already issued warrants in excess of the amount of funds appropriated for the contingent fund of the county. However, the warrants issued are not in excess of the total expected revenue for the year."

The Constitution, Art. X, Sec. 12, says,

> "No county,**** shall be allowed to become indebted in any manner for any purpose to an amount exceeding in any year the income and revenue provided for such year ****"

Section 12163 R. S. Mo. 1929, says,

> "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts;*******"

Section 12167, R. S. Mo. 1929, says,

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Section 12168, R. S. Mo. 1929, states that,

> "Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

Under the provisions of Section 12167, R. S. Mo. 1929, the county court can transfer unused balances, where it is done judiciously, to any funds in their judgment needing same.

The Supreme Court has said,

> "We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a "SURPLUS" ****"

within the purview of the foregoing, or what we will call the "transfer section", giving the county court large discretionary powers.

Decker v. Diemer, 329 Mo. 298 l. c. 336.

> "While the county court may in any one year draw warrants, after the revenue has been provided and the taxes levied within the scope of the levy and income for such year, (yet) it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years; **********"

Trask v. Livingston, 310 Mo. 582 l. c. 600.

The county court can also use the left-over funds from preceding years, but they cannot under any circumstances anticipate and use the funds of subsequent years.

Going back to your question,

> "Does the County Court have authority to issue additional warrants on the contingent fund even though they are in excess of the amount appropriated for that purpose when they are not in excess of the total expected revenue?",

in answer to same will say, they must keep in mind and comply with the provisions of the section hereinabove referred to, and, unless they know the funds that can be transferred under the provisions of Section 12187, R. S. Mo. 1929, can take care of these warrants, they should not issue additional warrants after the money in that fund is exhausted, unless, as stated before, they are sure that out of some of the funds received under Article X, Section 12, Mo. Const., can be transferred to the contingent fund.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:MG

OFFICERS--- Appointive - Salary - Tenure - Beginning of Term.

March 31, 1933.

FILED
56

Hon. Ira A. McBride
Supervisor
State Building and Loan Associations
Jefferson City, Missouri

Dear Mr. McBride:

Replying to your letter of March 30th, which is as follows:

> "Mr. George W. Wagner retiring Supervisor, State Building and Loan Associations, and now President of the Farm and Home Savings and Loan Association of Nevada, Missouri, filed his resignation with Governor Guy B. Park, effective March 30, 1933.
>
> On March 22 Governor Park announced my appointment to the position of Supervisor of State Building and Loan Associations succeeding Mr. Wagner. My confirmation, however, by the State Senate, was not made until March 29, 1933.
>
> Please advise me as to the date in which Mr. Wagner's pay stops and mine begins. There is no controversy about this matter, but I am merely asking for the opinion to make sure that this matter is handled in the correct way."

I beg leave to advise that Sec. 5, Art. XIV, of the Constitution of Missouri provides,

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Sec. 6, Art. XIV, of the Constitution of Missouri provides,

> "All officers, both civil and military, under the authority of this State, shall, before entering on the duties

of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

Construing these two constitutional provisions, it would appear that the office of Supervisor would not become vacant until a successor had been appointed and qualified to assume the duties thereof, and that the incumbent would hold until his successor should be appointed and qualified, even though such period was beyond the date fixed for the effectiveness of his resignation.

In the case of State ex rel v. Seay, 64 Mo. 89, the court writing the opinion states,

"The law abhors vacancies in public offices, and great precautions are taken to guard against their occurence. The policy of the law is to have someone always in place to discharge the duties of public offices, and in a doubtful case the construction of a law fixing the tenure of an office would be greatly influenced by that consideration."

In 22 R. C. L. Sec. 258, in commenting upon the purpose and effect of authorization to hold over, we find this language:

"The purpose of constitutional or statutory provisions authorizing public officers to hold over is to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office. Where a constitutional or statutory provision exists permitting or commanding an incumbent of an office to continue in the discharge of his duties until his successor is qualified, the expiration of the official term not only does not create a vacancy, but the period between the expiration of his term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory period. This is true even where a person is elected his own successor. * * * *. The practical effect of a constitutional provision directing that public officers should hold over until their successors are qualified is that a public office does not actually become vacant in the sense that there is no incumbent to fill it except in the case of death. Nevertheless it has been said that when the legal term expires, the office becomes vacant in one sense, and the incumbent is authorized to continue in the discharge of his functions until the appointment and qualification of his successor by sufferance rather than from any intrinsic title to the office (Citing State v. Williams 222 Mo. 368.)"

We are of the opinion that your salary as Supervisor would begin upon the date of your qualifying to assume the duties of this office, that is, upon the date of your taking the oath of office and the filing of such bond, if any, as may be required in connection with said office.

Sec. 18, Art. II, of the Constitution of Missouri, provides as follows:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

You do not state upon what date Mr. Wagner, the retiring Supervisor, became President of the Farm and Home Savings and Loan Association of Nevada, but we assume that it was upon the date that he requested that his resignation should become effective. If the duties of Mr. Wagner as president of this institution required such portion of his time as to materially interfer with the discharge of his duties as supervisor, and such employment as president was remunerative to him, under this constitutional provision he would not have been entitled to continue as an official under his appointment but would have been subject to ouster proceedings for the causes hereinabove suggested.

Absent any affirmative showing, as above suggested, and upon the reasoning and authority hereinabove set forth, we are of the opinion that Mr. Wagner would draw salary as Supervisor until the time that you qualified to assume the duties of this office.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA:VG

IN RE: Expenses of prosecuting attorney in change of venue cases.

11314-16 RS Mo 1929

FILED
56

May 31st, 1933

Hon. Howard R. Maness,
Prosecuting Attorney,
Ripley County,
Doniphan, Missouri.

Dear Sir:

We have your request of May 18th, 1933 for an opinion on the following matters:

"1. I would appreciate your opinion upon the following questions. What should be amount of the prosecuting attorney's salary in a county of 11,176 population as ascertained by the 1930 census.

2. Is the prosecuting attorney entitled to reimbursement for his actual expenses incurred in attending change of venue cases outside of his township and before a justice of the peace of his county.

3. Is a prosecuting attorney entitled to reimbursement for his actual expenses incurred in attending any criminal case before a justice of the peace in his county and outside of the township where the county seat is located.

4. I understand that a bill was passed in the last general assembly permitting the holders of County warrants to pool their warrants with the County Clerk in an effort to obtain a loan from the federal Government. If this is true, could you inform me as to the proper procedure."

In answer to the first proposition, we refer you specifically to Section 11314 R. S. Mo. 1929, which provides:

"On and after the 1st day of January 1921, the prosecuting attorney shall receive for his services per annum, to be paid out of the county treasury in all counties having a population * * * of 10,000 and less than 15,000 inhabitants, the sum of Eleven Hundred Dollars."

It therefore appears that your county having a population of 11,176 would entitle the prosecuting attorney to be paid under the above provision, namely Eleven Hundred Dollars per annum. In this connection, I am mailing you herewith a copy of the opinion dealing with this general subject under date of January 26th, 1933 which was prepared by Mr. Abington.

As to your second proposition, namely reimbursement for actual expenses incurred in attending cases on a change of venue, I call your attention to the following.

The jurisdiction of justice courts in misdemeanor cases is in the township where it is claimed the offense was committed. Section 3414 R. S. 1929 provides:

> "All prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed."

This statute has heretofore been construed and followed by the court. State v. Alford, 142 Mo. App. 412; State v. Taylor, 167 Mo. App. 104.

A change of venue is authorized in cases before justice courts, and such cases may, on change of venue, be sent to another township in the county. Sections 3429 and 3430 R. S. 1929.

A justice of the peace may be compelled by mandamus to grant a change of venue. State ex rel. v. Watkins, 212 Mo. App. 501. Therefore such misdemeanor cases come within the various meanings of section 11316 R. S. 1929, which provides:

> "In all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."

The above section has reference to the duties of the prosecuting attorney in such cases. The term "fees" as used in such statute includes the salary. State ex rel. O'Conner v. Heidle et al, 48 S. W. (2d) 131. Therefore by the very terms of this statute, the prosecuting attorney in all change of venue cases shall be allowed his actual expenses, in addition to the salary or fees allowed by law. However, we construe the statute to mean that only in those cases where a change of venue is taken from the township, is the prosecuting attorney entitled to his expenses because the statute uses the words "to follow", and so long as the case remains in the original court, even though another justice of the peace may be called in, the prosecuting attorney has nothing to follow. We hold

that the prosecuting attorney is entitled to such expenses as may be incurred by him in following misdemeanor cases on change of venue from one township to another.

The above provisions with reference to change of venue in misdemeanor cases are made applicable to preliminary hearings by virtue of section 3432 R. S. 1929. But before deciding whether the prosecuting attorney is entitled to his expenses in following these change of venue orders in preliminary examination, we must ascertain what is the true meaning of the term "in all cases" that is used in section 11316. While this specific term has not been construed by the court, yet a similar term "cases", as contained in section 11318 R. S. 1929, it has heretofore been held that such term did not embrace preliminary examination. Hill v. County, 195 Mo. 511. However, the phraseology of section 11318 with reference to the term "cases" is modified by the second section thereafter, namely section 11320 which provides:

> "No justice of the peace or judge of a court of record having jurisdiction shall allow any such cases as are alluded to in the two preceding sections to be tried before him, unless the prosecuting attorney shall be present."

The court in construing the term "cases", in the Hill case, supra, said that this latter section conclusively showed that the court had in mind only cases wherein the facts were to be tried and a final judgment entered. We find no such qualifying statute with reference to the term "cases" as used in section 11316 R. S. 1929. This section provides:

> "In all cases, civil and criminal, in which changes of venue may be granted,* * * he shall receive his actual expenses."

We have heretofore pointed out that changes of venue may be granted in either misdemeanor cases, or in preliminary hearings before justices of the peace. It is therefore the opinion of this office that the prosecuting attorney, in either preliminary hearings, or in misdemeanor cases, when a change of venue is taken from the justice having original jurisdiction to some other township in the county that the prosecuting attorney is entitled to his actual expenses incurred in following this change of venue.

As to your third inquiry, namely whether the prosecuting attorney is entitled to reimbursement for actual expenses incurred in attending the trial of criminal cases in justice courts in various parts of the county, we are obliged to answer this inquiry in the negative. We find no statutory authority, and no rule of a court

decision to the contrary.

It cannot be urged that the expenses incurred in conducting and attending such trials in various parts of the county is the duty and expense placed upon the prosecuting attorney for which no reimbursement provision is made by law, because the prosecuting attorney has the right and authority to file such cases directly in the circuit court at the county seat; Section 3501 R. S. 1929. For your information, I am enclosing herewith an opinion with reference to the duty of the county to furnish and provide an office and the expenses incidental thereto.

As to your fourth inquiry, we are unable to answer that at this time, due to the fact that we do not have a copy of all the acts as passed by the Legislature and signed by the Governor and such laws will not be effective until July 24th, 1938. If this question requires an answer after that time, please advise.

Yours very truly,

FRANKLIN E. REAGAN,
Assistant Attorney-General

FER/mh

APPROVED:

ROY McKITTRICK
Attorney-General

BEER BILL: A permit issued to a wholesaler permits said wholesaler to distribute from any part of the state and from as many places in the state as he so desires; provided, however, that his business is conducted from several places in good faith and not to evade the permit tax provided in House Bill No. 23.

June 22, 1933.

13139E Laws 33 9-4

FILED
56
30

Hon. Charles H. Manville,
Food & Drug Commissioner,
Jefferson City, Missouri.

Dear Sir:

We have received your request for an opinion, which is as follows:

> "The Polar Ice & Supply Co., Joplin, Missouri, intends to warehouse a car of beer at Carthage, Missouri, and another at Neosho; another one of our customers operates warehouses at Old Monroe and St. Charles. The question arises if they need the wholesale distributors permit for each warehouse or if one permit issued to the company permits it to operate at the several points."

It is the opinion of this department that the permit referred to in subsection "b" of Sec. 13139e of House Bill No. 23 is sufficient to permit any wholesaler or distributor holding such permit to wholesale or distribute beer for resale to retailers only in any part of the State of Missouri, and that such wholesalers or distributors do not have to secure a permit for each warehouse or place of business that such wholesaler or distributor operates; provided, however, that if a wholesaler or distributor operates two or more places of business, it must be a bona fide operation on the part of such wholesaler or distributor and not a subterfuge in order that two or more wholesalers may escape the permit fee or charge made in the Act.

Subsection "b" of Sec. 13139e is as follows:

> "For a permit authorizing the sale in this state by any distributor or wholesaler, other than the manufacturer or brewer thereof, of intoxicating beer, ($50.00) fifty dollars."

Your question is whether or not the above section authorizes the collection on your part of a $50.00 fee from one wholesaler for each wholesale establishment or distributing point that such wholesaler maintains. We find nothing in the above quoted part of the statute that would warrant any such assumption--in fact, it would seem clear from the language above quoted that the distributor or wholesaler is authorized to distribute or wholesale beer by the issuance of said permit to any part of the State of Missouri, and from any point therein. If we construed this Act otherwise, we would be reading something into the statute that is not there.

House Bill No. 23 in so far as the sale of permits or licenses is concerned, is a revenue statute providing for a privilege tax with a penalty therefor if said privilege tax is not paid. Under such statute it is the duty of one construing its provisions to construe same strictly, and where there is doubt, to resolve the doubt in favor of the taxpayer or licensee.

In Cooley on Taxation, Volume II, page 1114, it is said:

> "'The question regarding the revenue laws has generally been whether or not they should be construed strictly. To express it in somewhat different language, the question is whether, when a question of doubt arises in the application of a statute to its subject-matter or supposed subject-matter, the doubt is not to be solved in favor of the citizen, rather than in favor of the state upon whose legislation the doubt arises, and whether such solution is not most in accord with the general principles applied in other cases. Strict construction is the general rule in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the legislature, in making provision for such proceedings, would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases seems reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised. It has been generally supposed that the like strict construction was reasonable in the case of tax-laws.
>
> 'Statutes,' says a learned and able writer, 'made for the advancement of trade and commerce,

> and to regulate the conduct of merchants, ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of that sort the legislature would be laying a snare for the subject, and a construction which conveys such an imputation ought never to be adopted. Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any.'"

In Texas Company v. Amos, State Comptroller, et al, 81 So. 471, 77 Fla. 327, the Florida Supreme Court held that a Florida statute which provided (Sec. 596qqqq Comp. Stat. 1914) that any corporation, company, person or association owning, controlling or operating a tank car or refrigerator on or over any railroad within the state shall, on the 1st day of October, pay into the state $500 as a license fee, should, in view of a preceding section (Sec. 596a Comp. Stat. 1914) which provided "that no person, firm or corporation shall engage in or manage any business, profession or occupation mentioned in the Act unless a state license **** shall have been procured from the Comptroller," be so interpreted that an oil company that merely operated tank cars (when the railroad did not furnish them) as an incident to its business rather than its business, did not fall within the statute. Clearly this decision of the Florida Supreme Court is arrived at by a very strict construction of the statute, and the court recognized this with the following language, which we deem appropos here:

> "While we think the legislative intent clear, if there is doubt it becomes our duty to resolve such doubt in favor of the citizen and against the state.
>
> The statute is penal in its nature and the rule is that penal statutes are to be construed strictly and are never to be extended by implication. Kloss v. Commonwealth, 103 Va. 864, 49 S.E. 655."

In Bluff City Railway Co. v. Clark, 49 So. 177, 95 Miss. 689, the Supreme Court of Mississippi in construing a tax on the business of owning and operating a "wharf boat", said:

> "Laws imposing privilege taxes are liberally construed in favor of the citizens and courts will not extend the statute imposing such taxes beyond the clear meaning of the language employed."

In accordance with the above cases and principles there set out, see also the following cases:

Carney v. Hamilton, 42 So. 378, 89 Miss. 747;
Greene v. W.L. Weller & Sons, 195 S.W. 422, 176 Ky. 129;
State v. Staples, 85 Atl. 1064, 110 Me. 264.

Under the principles of the foregoing cases and authorities, it would seem clear that House Bill No. 23 should not be construed as requiring a wholesaler to pay a license fee of $50 on each wholesale establishment that such wholesaler maintains. But, of course, if several establishments or warehouses are maintained under the name of a wholesaler when in truth and in fact several wholesalers are interested in same, and the arrangement is merely a subterfuge in order to avoid the payment of permit fees provided for by House Bill No. 23, then each establishment should be required to pay the permit fee.

Contrary to the above opinion it may be argued that such cases as United States v. Cline, 26 Fed. 515, and United States v. Shriver, 23 Fed. 134, which hold that where a person has secured a license to retail liquor at one town and dispenses liquor at another town, he is guilty of violating the Federal revenue laws prohibiting the sale of liquor without a license. But an examination of the Federal statute under which the above decisions were made discloses that the permit tax in said cases referred to was created under Federal laws respecting special taxes (Title 26, Chapter IV, p. 163 USCA) and within said chapter is Sec. 184 (p. 166, Title 26 USCA), which provides that the payment of the special tax imposed in said chapter shall not exempt the payee from additional special taxes for carrying on his trade or business in other places than the one stated in the collector's register. The section last referred to was first enacted on July 13, 1866 (Sec. 9, 14 Stat. at Large 113), and was in existence at the time of the decision of the above cases; hence, the permits there involved were permits issued to a retailer permitting him to retail intoxicating liquor at a specific place, and no other.

Such cases are not in point with the question here confronting us, for in said section of House Bill No. 23 providing for a wholesaler's permit, there is no limitation made that a permit issued thereunder shall permit the wholesaler to operate only at a certain place within the state and only from one place of business. Furthermore, from the very nature of things, cases involving permits to sell liquor before the Eighteenth Amendment should not be authority for our problems governing the permits to be issued under House Bill No. 23. Those cases involved permit taxes which sought, in a measure, to place restrictions upon the sale of a product due to its health impairing qualities; whereas, House Bill No. 23 deals with a product, which, by express admonition of the Legislature,

is non-intoxicating and conducive to the health and general welfare of the people.

Respectfully submitted,

POWELL B. McHANEY,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

PBM:AH

AGRICULTURAL PRODUCTS- License required for sales under Sections 7289 and 13312 R. S. Mo. 1929.

13312-7289 RSMo 1929

March 8, 1933.

FILED

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Mr. C. P. Anderson
Commissioner
State Marketing Bureau
Jefferson City, Missouri

Dear Mr. Anderson:

In your inquiry of March 1st, directed to the undersigned, you state the following:

> "We would like to have your opinion as to whether or not the growers of apples in the State of Missouri can sell their products in any town or City in the State of Missouri without having a license regardless of the fact that the town or city may have an ordinance prohibiting same."

From the opinion rendered in the case of St. Louis v. Meyer 185 Mo. l. c. 591, a case dealing with the same subject matter to which your inquiry is directed, we find this language,

> "The mandate of organic law of this state is that the charter and amendments of municipal corporations shall always be in harmony with and subject to the constitution and laws of this state."

Chapter 96, Article I, R. S. Mo. 1929, entitled "Peddlers", requires a license for such occupation and fixes a penalty for failure to secure the same prior to engaging in such occupation. Agricultural and horticultural products are, however, specifically exempted from its provisions. Section 13312 of said article and chapter provides,

> "Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

Section 7289, R. S. Mo. 1929, restricts the jurisdiction of municipalities of this State in the passage of ordinances, requiring that such ordinances conform with the state law upon the same subject.

Construing the constitutional provision aforesaid, and what are now Sections 7289 and 13312, supra, in the above cited case, the court held that by reason of the constitutional and statutory restrictions upon municipalities they were without authority to pass an ordinance imposing a license tax upon anyone who would come within the exceptions of this general statutory provision.

In 1911, Session Act, p. 423, the Legislature passed an act pertaining to itinerant vendors and Section 1 thereof defines the words "itinerant vendor" for the purpose of said act as follows:

> "The words "itinerant vendor", for the purposes of this act, shall mean and include all persons, both principal and agents, who engage in, or conduct, in this state, either in one locality or in traveling from place to place, a temporary or transient business of selling goods, wares and merchandise with the intention of continuing in such business in any one place for a period of not more than one hundred and twenty days, and who, for the purpose of carrying on such business, hire, lease or occupy, either in whole or in part, a room, building, or other structure, for the exhibition and sale of such goods, wares and merchandise. The provisions of this act shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to any sale of goods, wares or merchandise on the grounds of any agricultural

society during the continuance of any annual fair held by such society."

Any person, firm or corporation which comes within the definition as set out in said section is required in the remaining sections of said act to take out a state license, and municipal corporations are granted the right of passing ordinances imposing upon said person a license tax. For engaging as an itinerant vendor without first having obtained a license in compliance with said provision, a penalty is provided in said act.

Sections 10103 to 10110, R. S. Mo. 1929, inclusive, are the same sections as contained in the 1911 Session Act and as hereinabove referred to.

The 1911 Act as carried into the 1929 Statute received judicial interpretation and was differentiated from the laws pertaining to peddlers hereinabove set forth, by the Kansas City Court of Appeals in the case of State v. Long 203 Mo. Ap. 427. In that case the defendant for a period of several weeks was engaged in selling apples, potatoes and cabbage from box cars on the sidetrack of a railroad in the city of Kirksville, Missouri. The facts recite that defendant procured these agricultural products from various places; that they were shipped to him at this place; that he advertised the sale in newspapers and purchasers would come to the car, buy what they wanted and take it home with them. Defendant claimed that he came within the exception of what is now Section 13312, R. S. Mo., which we have heretofore set out and underlined. The court in discussing the defense interposed says at pages 428 and 429,

> "This view rests upon the fact that section 10282, Revised Statutes 1909, in defining a peddler as one who shall deal in the selling of goods, wares and merchandise 'by going about from place to place to sell the same,' exempts 'agricultural and horticultural products.' There is no question but that apples, potatoes and cabbage, even though agricultural products, are goods, wares and merchandise. Section 10282 by expressly excepting agricultural products from the things covered by the phrase 'goods, wares and merchandise' clearly recognizes that such products are goods, wares and merchandise otherwise there would be no

no need to exclude them. But the 1911 Act has no reference to peddlers nor does it contain any such exemption as the peddler statute. The 1911 Act was passed long after the Peddler Act and if such products were to be exempted from the latter Act as in the former it would seem that the Legislature would have said so. At any rate we are not authorized to write into the statute an exemption the Legislature did not see fit to insert. The two statutes deal with two entirely different matters. The peddler statute exempts one from the necessity of taking out a license where he sells agricultural products by going from place to place to sell them; but the other and later statute requires a license for the sale of goods, wares and merchandise, without any exception, where the vendor does so at a place of business which is intended to be so temporary and transient as not to exist longer than 120 days. Defendant was doing this and he did not have a license for that purpose. He was not a peddler within the meaning of the other statute. If one brings agricultural products to town and sells them from house to house no license is required, but under the 1911 Act no one can temporarily conduct a business which in fact is the same as that of a regular retail grocer or other merchant who pays an occupation tax. No doubt it was because the temporary merchant paid no such tax, owing to the transient character of his business, that the statute was passed. If so, it was intended to abolish the unjust discrimination whereby one man could carry on a public business and by reason of its temporary character escape all tax, while another, in the same business permanently, would have to pay. But whatever was the intention of the law, it is written as above stated and when this is ascertained we have nothing to do with the intention or effect of the law but only with its application."

It seems that the only statutory provision against municipalities placing a license upon the sale of farm products, either sold by the person raising the same or not, was by reason of the provisions of the law as herein first set out. The act of 1911 according to the holding in State v. Long, repealed this exception insofar as it conflicted with the new enactment.

The provisions of the new enactment, Section 10103, R. S. Mo. 1929, excepts hawkers on the street and peddlers from its operation.

Except, insofar, as Section 13312, R. S. Mo. 1929, is in conflict with the latter statute passed in 1911, as aforesaid, said section is still in force.

If the apple growers, therefore, travel from place to place, as the "peddler" statute provides he may, or sell from sample for future delivery, or from vehicles as provided in said Section 13312, it is our opinion that a tax could not be imposed, but should the manner of sale come within the definition of "itinerant vendor", then, in our opinion, a license tax could be imposed, notwithstanding the fact it is an agricultural product produced upon the seller's own farm.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA:EG

1. Salary of County Judges, Sections 11808 - 2092 - 655

2. Municipalities Cities of the 4th Class quorum when mayor can vote.

FILED
58

February 1st, 1933

Hon. Thomas A. Matthews,
Prosecuting Attorney, St. Francois County,
Farmington, Missouri

Dear Sir:

Your letter addressed to the Attorney-General has been handed the undersigned for attention. You request an opinion and in connection therewith state the following facts:

> " I would appreciate it very much if you would give me an opinion with reference to the pay of Judges of the County Courts in Missouri during the past two years and beginning of the present term of Associate Members of our County Court.
>
> I have prepared an opinion, however, before finally submitting same to our County Court, would like to have your opinion or concur with me if you find that I am correct in the premises. I submit a copy of my search of the law in this connection.
>
> I have an additional matter that I would like for you to give me your opinion and it is as follows:
>
> The City of Elvins, St. Francois County, Missouri, is a city of fourth class having a Mayor and Board of Aldermen, comprised of six members. 'On the question of passing bills and paying out money', the Ordinance of the City of Elvins provide that such things may be done by a majority vote of the Board of Aldermen, the Mayor voting only in cases where the vote may be evenly divided on that proposition.
>
> It has frequently happened that only five, and sometime only four members of the Board attend the meetings. When only five members are in attendance, a proposition may receive

three affirmative votes, two members voting in the negative. It has been held that a proposition being so voted upon is carried, since three is a majority. Others contend that to carry, the proposition must in all cases receive at least four votes, since four is a majority of the Board; and that any proposition receiving less than four votes would be lost. On these points I would ask your opinion."

You state that you have investigated the first proposition, and as a result of your investigation you have prepared a brief setting forth your conclusions of the law upon the subject. Which brief you were kind enough to enclose and which is as follows:

"In regard to the method of determining the population for arriving at the salaries of various County officers. The Statutes are not in accord. Some base the method of determining the population by multiplying the number of votes cast at the last presedential election vote by three and one-half, and Section 11808, R.S. Mo. 1919, provided that the vote at the last General election shall be used, multiplied by five. Other statutes provide for other methods of arriving at the salaries of some officers.

Section 11808, R.S. Mo. 1929, is a general statute, enacted prior to most of the other sections, which are special in their nature in that they apply to specifically designated officers. For these reasons said Section 11808 should not be resorted to except when there is no other method applicable.

In the case of O'Connor v. Riedel, et al., the Supreme Court, en banc, held that effect was to be given to the law that applied to only one office, so long as it operates uniformly throughout the state as to that particular office. No attempt was made to harmonize the sections and under the ruling of the court in that case no such attempt will ever be made.

It therefore follows that so long as a statute is complete in itself, that effect will be given to all of the terms of such statute. Therefore, the words "general election" as used in Section 11808, R.S. Mo. 1929, do not mean presidential election, but have the usual meaning applied to the term, and, therefore refer to the election held every two years. Section 655, R.S. Mo. 1929, provides that the construction of all statutes of this state shall be by the rules set out in such statutes,

unless such construction is plainly repugnant to the intent of the Legislature, or the context of the statute. The sixteenth clause of the statute define "general election" as follows: 'The term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially.'"

"The vote in St. Francois County at the 1928 presidential election was approximately 13,202. In 1930 the vote was approximately 10,888.

"Section 2092, R.S. Mo. 1929, provides that in counties having 60,000 and less than 90,000, the county judges shall receive $2500 per annum. If the presidential vote of 1928 is used as a basis, then St. Francois County has more than 60,000 inhabitants within the meaning of Section 2092. If the election of 1930 is used, St. Francois County has less than 60,000 inhabitants. Therefore, the present county judges of St. Francois County during this term of office have never been entitled to $2500 each per annum, but have been entitled to only five dollars per day that the court met, and mileage.

"Furthermore, Section 2092, R.S.Mo. 1929, was amended in 1931. The 1931 Session Acts, page 190, amended said Section by providing that the $2500 per annum shall be paid only in counties having 75,000 inhabitants. Therefore, at this time, even if the presidential election vote of 1928 is used as a basis, this county does not have 75,000 inhabitants, and, therefore, the county judges are not entitled to the $2500 per annum. Although the salary of an officer may not be increased during his term of office, it may be decreased.

"It is therefore my opinion that the present members of the County Court have never been entitled to receive $2500 each per annum, and that their compensation should be based on the election vote of 1930 multiplied by five."

We have gone over your opinion and advise that the law as therein stated and the conclusions which you draw therefrom coincide with the opinion of this department upon that subject.

Answering your second inquiry, we find in 43 Corpus Juris, 502, the following fundamental declarations of law:

"A quorum under the common law is a bare majority."

"Unless it is otherwise provided by charter or statute the majority of the governing body constitutes a quorum. In reckoning a quorum, the general rule is that in the absence of a controll-

> ing charter or statutory provision affecting the ruling, the total number of all the duly elected and qualified members of the body elected to it, is taken as the basis. If a mayor is only a presiding officer and not a component member, he is not to be reckoned in the count."

The appellate court in this state, however, in the case of John Dougherty v. City of Excelsior Springs, 110 Mo. App. 623, has, we think, answered the first division of your second inquiry and by inference and implication the second portion thereof. In that case, the Mayor of Excelsior Springs employed the plaintiff Dougherty as legal counsel in a certain damage suit, and at a regular meeting of the Board of Aldermen a bill presented by the attorney for his services was allowed and a warrant was ordered to be drawn upon the city treasury therefor. The warrant was drawn in accordance with the order made, presented to the treasurer, but not paid for lack of funds. The town of Excelsior Springs was a city of the fourth class and its Board of Aldermen consisted of four members. In the record made by the city council it appeared that for the allowance of the bill for the attorney's services, there were two votes cast in the affirmative and one in the negative. The majority opinion discussing the authority of the board is short and we are quoting it in full as follows:

> "I believe the judgement of the trial court should be affirmed. The statute applicable (Section 5907, Revised Statutes 1899) reads: 'In case a city attorney has been appointed, the mayor and board of aldermen may, if they deem it necessary, employ additional counsel and pay them reasonable compensation for any legal services demanded by the city.' As stated by Judge Smith, the board of aldermen consisted of four members and three of these were present at the meeting which allowed plaintiff's account, two of them voting 'yes' and one voting 'no'. The three being a majority of the whole body constituted a quorum, and the two voting 'yes' being a majority of that quorum made a valid action of the board of aldermen. (1 Dillon on Munic. Corp. secs. 278-282.) It is not necessary that a majority of the whole body favor a measure, unless the law governing such body so declares. On the contrary, it is only necessary that a majority of those present (if they constitute a quorum) should favor the measure."

Upon that authority we are of the opinion that when only five members of your board are in attendance that such number constitutes a quorum for the transaction of business, and that three voting at such meeting and casting their votes in the affirmative, the proposition should be declared carried.

As to the second proposition under question two, the Mayor of a city of this class is given the right to cast a vote in the event of a tie. The case above cited being authority for the right of a majority to constitute a quorum for transacting the business of the body, it is our opinion that in the event of a tie vote in the quorum present, such quorum being a majority of the board, the mayor would have a right to case the deciding vote.

Very truly yours,

Carl C. Abington,
Assistant Attorney-General

CCA/N

Approved :

Roy McKittrick,
Attorney-General

In matter of giving away cars under plan of Motor Vehicle Dealers Association of Kansas City, Mo.

February 18, 1933.

1

FILED
58

Mr. Thomas A. J. Mastin
Prosecuting Attorney
Kansas City, Missouri

Dear Sir:

In letter addressed to Attorney-General by Better Business Bureau, Inc., Kansas City, Missouri, that organization states as follows:

> "Under their method of distribution of tickets each person who enters the motor show, after being required to pay an admission charge of 40 cents, is then handed a numbered ticket. Later in the evening a drawing is held and the person holding the number corresponding to the number drawn from a barrel wins the motor car."

You ask my opinion on whether or not this plan executed would constitute a lottery. In my opinion, it would.

In State ex rel. Home Planners Association vs. Hughes, Commissioner of Finance, 329 Mo. l. c., p. 533-534, our Supreme Court said:

> "The first question argued is whether relators plan is a lottery within the meaning of Section 10, Article 14, of the Constitution which forbids organization of lotteries or gift enterprises for any purpose. The term "lottery" thus used, includes every device whereby anything of value is for a consideration allotted by chance."

Hon. Thomas A. J. Martin #3

The fact that the receiver of ticket was given it after he had paid an admission charge of 40 cents, makes no legal difference. In my opinion the plan executed would constitute a lottery and my views are, I think, supported by the following authorities:

State vs. Mumford, 73 Mo. 647;
McDonald vs. United States, 63 F. 486;
Siver vs. Investment Co., 183 Mo. 50.

Very respectfully,

EDWARD C. CROW

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC:EG

IN RE: Status Congressional Districts of Missouri with reference to circulating referendum petition under state constitution.

FILED
58

March 15, 1933.

Hon. Thomas A. Mathews,
Prosecuting Attorney,
St. Francois County,
Farmington, Missouri.

Dear Sir:

You have written me as follows:

> "I would like to have an opinion from your office as follows: 'What reference to our present Congressional Districts in the State with regard to circulating a petition referring a bill enacted by the present General Assembly', (are the old sixteen (16) Congressional Districts still in existence, or is the State as a whole one Congressional District?)

Chapter 63 R.S. Mo. 1929 divides the state into sixteen congressional districts. These provisions were carried forward from R.S. Mo. 1919. In so far as I know, this statute has not been repealed by the General Assembly of Missouri.

This statute was enacted as a general law and was not an emergency act. A congressman is a Federal and not a State officer. Section 4, Article I of the United States Constitution provides:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof."

In 1900, Congress by a statute provided if by reason of a Federal census the number of congressman provided under the congressional apportionment to the states should at any time be less than it was before, the whole number of congressmen in such state should be elected at large unless the Legislature of said state should provide otherwise.

We see, therefore, the authority of the state to divide the state into congressional districts comes from the Federal Constitution and the Acts of Congress. The Missouri Legislature after the 1930 census passed an Act redistricting the state into thirteen congressional districts and the Governor vetoed it and therefore, we elected our thirteen Congressmen at large in Missouri in 1932.

In my opinion the statute found in Chapter 63 R.S. of Mo. 1929 dividing the State into sixteen congressional districts can be repealed only by express provision of a legislative Act passed by the Missouri General Assembly, or by necessary implication. In

Homer vs. Commonwealth, 106 Pa. St. Rep. l.c. 226

the rule of law on this question is stated as follows:

> "The settled rule is that a statute can be repealed only by express provision of a subsequent law or by necessary implication."

There has been no express statute repealing the Act dividing the state into sixteen congressional districts. Has the Act dividing the state into sixteen congressional districts been repealed by implication? This brings up the question of what is a repeal by implication. Our Supreme Court has defined what constitutes both an express and an implied repeal. In the case of

City of St.Louis v. Kellman, 235 Mo. p. 687

our court said:

> "Definition of repeal - By repeal is meant the abrogation or annullment of a previously existing law by the enactment of a subsequent one, which either declares that the former law is revoked and abrogated, or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two can stand in force. The latter is repeal by implication; the former is express repeal."

There having been no law passed repealing expressly the statute dividing the state into sixteen congressional districts, and no law passed creating thirteen new congressional districts, and not mentioning the statute now on the books dividing the state into sixteen congressional districts, it is my opinion the statute creating the old sixteen districts has not been either expressly or by implication repealed.

The statute creating sixteen congressional districts could not be used in Missouri in 1932 because when the census of 1930 was taken under the ratio of apportionment by Congress of representatives to the respective states the population of Missouri authorized election of only thirteen in place of sixteen Congressmen, and as the Governor vetoed the bill redistricting the state, then under the Act of Congress we elected our thirteen Congressmen from the state at large.

Did this non-user affect repeal of the statute creating the sixteen congressional districts?

> "The law, except in a few jurisdictions, is a statute cannot be repealed by non-user unless such non-user is accompanied by the enactment

of irreconcilable statutes or the establishment of an opposite legislative policy."

Pearson v. International Distillery, 72 Iowa 348
(Affd. 128 U.S. 1
Snowden v. Snowden (Maryland) 1 Bland 550
State v. Nease, 80 Pac. 897
Hawes & Son v. Commonwealth, 106 Pa.St. 221
Gulf Refining Co v. City of Dallas, 10 S.W. (2d) 151
State v. Meek, 26 Wash. 405, 67 Pac. 76
English - Herbert v. Purchas L.R. 3 P.C. 605, 17 Reprint 468

The Legislature passed a bill creating thirteen congressional districts to replace the sixteen old districts, but the Governor vetoed it. It is true we elected only thirteen Congressmen in 1932, but the law under which they were elected was an Act of Congress, and not a statute of Missouri.

It is true the action of the Legislature in passing the Congressional Redistricting Bill evinced but did not establish a legislative policy in opposition to the statute creating the sixteen districts and this legislative opposition thus evinced failed to become a statute because the Governor vetoed the bill. The fact is the Act creating the sixteen districts is on the statute books and cannot be used for electing Congressmen, not on account of State, but Federal Legislation.

But it will be observed the Act of Congress providing where census reduces congressional representation on failure of state to redistrict in accord therewith election of Congressmen shall be at large does not attempt to create new congressional districts in the state. Does the altered condition of the state in having thirteen in lieu of sixteen Congressmen repeal the Act creating sixteen districts on the ground that the reason for and object of the statute has ceased to exist? In

Brown v. Clark, 77 N.Y., l.c. 373

the court answers this question as follows:

"But the courts cannot dispense with a statutory rule because it may appear the policy upon which it was established has ceased."

and the courts of Texas and Arizona likewise so hold.

Benson v. Hunter, 202 Pac. 233 - 23 Arizona 132
Refining Co. v. Dallas (Tex. Civ. App.) 10 S.W. (2d) 151

It is claimed three cases in other states hold when reason for statute ceases, the statute is repealed. The three cases are:

James v. Commonwealth (12 S.& R.Pa.) 220 (1824)
Watson v. Blaylock, 9 S. Car. 351
Broadwater v. Kendig, 80 Mont. 515

The later cases in Pennsylvania, in my opinion, overrule the James case

(See 106 P. St. 221). As to the South Carolina case of Watson v.Blaylock decided in 1818, the South Carolina court later in 1853 used the following language:

> "We have in South Carolina unrepealed statutes requiring registry of marriage and inhibiting any lay magistrate from joining persons in marriage under penalty. But it was never supposed that unregistered marriages were void; and the court in Watson v. Blaylock, 2 Mill. 351, declared the Act imposing penalties on lay magistrates obsolete and invalid, the only instance in our judicial history in which courts have ventured to declare the Act of the Legislature inoperative from mere non-user. "

Therefore, the South Carolina court itself puts the decision in the Blaylock case on ground of non-user and holds the statute was only declared inoperative. As the South Carolina Act was passed in 1706 and as the court in the Blaylock case said:

> "The Act was passed in 1706 and was intended as one of the means of establishing the Episcopal church in preference to all others in the then province *** but since the establishment of our free Constitution the Act is totally inapplicable to our changed situation and must therefore be considered as obsolete."

I am of the opinion the court really intended to put its decision on the ground the constitution when adopted conflicted with the statute and therefore repealed it as of course repeal of a statute can be made by Constitution as well as by another statute. But whether the court intended to rest Blaylock case on the ground it conflicted with the later adopted constitution or not, the fact is the statute was in irreconcilable conflict with the later adopted constitution if it did what the court said, that is, operated in favor of the Episcopal and against all other churches, and these facts existing, the case is not an authority for proposition that changed conditions operate as a repeal of a statute no longer applicable.

On the question of a repeal by non-user of a statute, the weight of authority is repeal does not occur. In my opinion the operation of the Act of Congress making it incumbent to elect our thirteen Congressmen at large in 1932 on failure to redistrict the state only suspends the Act creating the sixteen districts in so far as the election of Congressmen is concerned but not repealing and continuing as to all other matters in force.

It is well settled that a suspension of a statute may be based on a state of facts declared by legislative enactment theretofore made to warrant such suspension.

State v. Bentley, 164 Pac. 290, 59 C.J. p. 940 par. 553

The Act of Congress, of course, is general and applies to all the states of the union and not objectionable on the ground of discrimination. Does suspension of the Act creating the sixteen congressional districts by operation of the Act of Congress directing the thirteen Congressmen to be elected at large from Missouri on failure to redistrict the state after the census of 1930 leave the state enactment so suspended operative in other respects?

In discussing this question it should be borne clearly in mind what the distinction is between the repeal and suspension of the enactment. A repeal removes the law entirely; but when suspended it still exists and has operation in every respect except wherein it has been suspended. A repeal puts an end to the law - a suspension holds it in abeyance either for all purposes or for some particular purpose.

59 C.J. p. 899, Sec. 499
Maresca v. United States, 277 Fed. p. 727

In the case of Sturgis v. Spofford, 45 N.Y. p. 446 the action was brought by plaintiffs as commissioners of pilots to recover penalties given by the Act of the New York Legislature regulating pilotage in New York Harbor for employing a person not holding a license from the commissioners or a license under New Jersey laws to act as pilot. The case was tried before a court without jury and the court found defendant employed said person as pilot on steamers and sailing vessels outward bound from New York port; the said person so employed at the time held a license under Act of Congress of 1852; he held a license under the laws of New York passed in 1836; that he took a license under the State Board of Commissioners of Pilots in 1853 and every year thereafter until 1860. The Commissioners claimed that the pilot was suspended by the Board April 10, 1860, but continued to act as pilot, no other pilot being appointed in his place, until a new license was issued to him April 26, 1865. In the meantime he piloted the vessels in question. The Commissioners were appointed under the Act of 1853 of New York state. It was claimed that the legislation of Congress passed in 1852 superseded the New York state legislation in question and all state legislation on the subject of pilots in New York Harbor. The court in discussing the question, said:

> "It is also claimed that the Legislation of Congress has superseded the act in question, and all state legislation on this subject. It is doubtless true that the whole subject of pilotage is embraced in the power conferred upon Congress by the Constitution of the United States, to regulate commerce with foreign nations, and among the several states; but until the exercise of this power by Congress, it is competent for the states bordering upon the sea, to exercise it themselves. The jurisdiction of the states has been acquiesced in by the general government from its foundation , and has been expressly recognized by Congress. (See Act of 1789).
>
> The Act of Congress of 1852 (10 United States Statutes at Large, 61, 67) is claimed to have superseded the act of the state; but in Steamship Co. v. Joliffe (2 Wall., 450), it was held, by the Supreme Court of

the United States, that this act applied only to pilots for the voyage, and not to port pilots, and did not affect State legislation as to the latter. (Cisco v. Roberts, 36 N.Y., 262).

The act of Congress of August, 1866 (14 United States Statutes at Large, 228), is more comprehensive in its provisions, and seems to include pilotage in harbors as well as at sea. In February 1867, the Act was amended so as in substance to exempt port pilotage from its operation, and leave to the State its former power of legislation. (14 United States Statutes at Large, 411.) The penalties for which this action was brought had been incurred before the act of Congress of 1866 was passed, but the trial and judgment was afterward. The jurisdiction of Congress becomes exclusive upon its exercise, which precludes all State action and supersedes all state laws previously passed. Assuming that the act of 1866 embraced port pilotage, it is insisted that the penalties, previously incurred under the State law, became extinguished and abrogated. It is a general rule that criminal offences created by statute cannot be prosecuted or punished after the statute is repealed. (Hartung v. People, 22 N.Y., 95, and cases there cited.) And this rule has been extended to quasi criminal prosecutions for penalties. (Butler v. Palmer, 1 Hill, 330) Although a forfeiture or penalty for the benefit of the party injured is regarded as a vested right in the nature of a satisfaction (Palmer v. Conly, 4 Denio, 374), if the statute in question had been repealed by the Legislature of the state, the penalties and all power to enforce them would have gone with the law.

The repeal of the statute would have obliterated the law and all rights of action given by it. (Key v. Goodwin, 4 Moore & Payne, 341, 351.) But I do not think the act of Congress had the same effect as a repeal of the statute by the state itself. The act is not retrospective in terms. It indicates an intention from that time to assume the exercise of the power conferred by the Constitution and the state law became from that time inoperative; but it is not repealed, nor can it be presumed that any rights or interest secured or obligations incurred under it were intended to be interfered with.

The repeal of a statute indicates a change of policy on the part of the state upon the particular subject, and it would be inconsistent to enforce the provision of an act, after the state had declared it to be unwise. In this case the propriety of the state law is not even impliedly questioned. The repeal of the act of Congress would leave the state law in full force and the amendment of February 1867 produced the same effect; and there is no sound reason for depriving the state of rights secured under the law before the interference of Congress."

The court distinctly says in the cited New York case:

> "There is no sound reason for depriving the state of rights secured under the law before the interference of Congress."

This sentence contains exactly what the court decided in the New York case. Apply that rule to the situation of the initiative and referendum, the sixteen congressional districts and the right of the people to use the referendum, and we arrive at this clear result: The initiative and referendum provision in the state Constitution was a part of said instrument before 1930 census was taken and after the sixteen congressional districts had been created; the initiative and referendum amendment itself in plain language says the people shall use the sixteen congressional districts for signing and filing of petitions in exercising the supreme power of the state - the vote of the people - to enact new or approve or reject laws passed by the Legislature.

This right to use these sixteen districts as a means of setting in motion the power of the people to enact laws or reject or approve existing laws is embedded in the state Constitution by that unlimited and illimitable power which can create and destroy legislatures, the command of voters issued through their ballots.

In discussing this same question, the Federal Supreme Court in Anderson v. Pacific Coast S.S. Co., 225 U.S., l.c. 196-197, said:

> '"In 1866, Congress passed a more comprehensive statute embracing port pilotage (Act of July 25, 1866, c. 234, 14 Stat. 227). After defining the vessels subject to the navigation laws of the United States, it enacted (Sec. 9) that "every sea-going steam vessel", so subject, should "when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted." In the following year, however, this section was amended by the addition of a proviso that the act should not be construed to "annul or affect any regulation established by the existing law of any state requiring vessels entering or leaving a port in such state" to take a state pilot (act of February 25, 1867, c. 83, 14 Stat. 411). The existing state laws respecting port pilotage again became operative. Sturgis v. Spofford, 45 N.Y. 446, 451; Henderson v. Spofford, 59 N.Y. 131, 133)"'

To the same effect is:

Henderson v. Spofford, 59 N.Y., 131
Cimmino v. Clark & Son, 184 N.Y. App. Sup. C. Rep., 745

In Winterton, et al v. State, Sup. Ct. Miss., So. (3d), l.c.736 the court said:

> "A repeal makes a law as if it had never been. Suspending its operation for a time leaves it operative as to the past and in all respects

wherein it is not abrogated by the statute."

It will be seen that these decisions hold that any rights secured under the statute suspended can still be enforced provided same does not conflict with the legislation suspending the statute.

After the census of 1930, in 1931, the Missouri General Assembly passed a bill creating thirteen congressional districts, which was vetoed by the Governor. Thereafter, a proceeding by mandamus was begun in the Supreme Court by one Carroll to compel the Secretary of State to receive and file the relator's declaration of his candidacy for Congress of the United States. This case is reported in

State ex rel Carroll v. Becker, 45 S.W., 533

The petition recited Acts of Congress providing for decennial census and authorized President to submit to each state a message designating the number of members apportioned to such state in accordance with the decennial census; also compliance with said Act by the President after the census of 1930 showing Missouri entitled to thirteen representatives; that thereafter Missouri Legislature passed an Act dividing the state into thirteen districts and the Governor vetoed the same; the relator based his claim for mandamus on the proposition that as the redistricting of the state was authoritively complete when the bill passed the two houses of the Legislature, it did not need the Governor's approval and on this ground he asked for a writ of mandamus. In this decision, however, the court did say in speaking of the sixteen districts:

> "Since the number of representatives from Missouri has been reduced, former districts no longer exist."

The one and only thing decided by the Carroll v. Becker case is that the General Assembly of 1930 of Missouri failed to redistrict the state. The issue in this case was whether or not thirteen new districts had been created by the Legislature. The court decided that question and held no new districts had been created by the Legislature.

On the question of what in a Supreme Court opinion is authority for future guidance and what is not authority therein the Missouri Supreme Court en banc in

State ex rel v. St. Louis, 241 Mo. l.c. p. 238

said:

> "There is a pronounced line of demarcation between what is said in an opinion and what is decided by it - between arguments, illustrations and references on one side and the judgment rendered on the other. The language used by a judge in his opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case precisely as in every other human document. *** The case is only authority for what it actually decides. *** The maxim of stare decisis applies only to decisions on points arising and decided in causes; *** the precedent includes the conclusion only upon questions which the case contained and which were decided. That exposition has been adopted as satisfactory by this court."

Applying this rule to the language used in the opinion in the Carroll v. Becker case saying the old districts no longer existed, we find this language was not what was decided by the court, but only what was said in the opinion. What was decided in Carroll v. Becker case was that no new districts had been created by the Legislature. The fact that made the existence or non-existence of the sixteen districts not an issue and not decided in Carroll-Becker case is there were sixteen districts and only thirteen Congressmen to elect. The mere statement of this fact discloses existence or non-existence of the sixteen districts could not have been an issue in the Carroll-Becker case and was not decided and would not have determined whether or not the Legislature had redistricted the state if it had been decided.

In so far as the sixteen congressional districts might be used for purposes of nominating and electing Congressmen therefrom, the said districts could no longer be considered in connection with such state nominations and elections, but in my opinion for all other purposes than those of election of Congressman from each one of the separate sixteen districts, the said districts would exist and continue to exist because there has been no law passed either expressly or impliedly repealing the same.

The Act of Congress which became operative when the Governor vetoed the bill to redistrict the state directing election of the thirteen Congressmen at large did not repeal Chapter 63 R.S. of Mo., 1929 dividing the state into sixteen congressional districts, but only suspended the operation thereof in so far as the state Act relating to the nomination and election of Congressmen is concerned and this is on the same principle that the New York and the Federal Courts and other courts hold that a law can only be repealed by an act of legislation, either expressed or implied, and that when a statute is suspended to accomplish some one particular purpose, the statute suspended is still in force for all other purposes.

Section 57, Article IV, Constitution of Missouri, known as the Initiative and Referendum provides in general terms for initiating a proposed law by the people; a petition with more than 8% of the legal voters in each of at least two-thirds of the congressional districts shall be required and such petition shall include the full text of the measure so proposed; and for referring a law (and all laws passed by the General Assembly may be referred except those necessary for immediate preservation of public peace, health or safety, and laws making appropriations for current expenses of the state government and for maintenance of the state institutions and for support of public schools) either by petition signed by 5% of legal voters in each of two-thirds of the congressional districts in the state, or by action of the legislative assembly.

This amendment was adopted at the November election held in 1908 and consequently was part of the organic law of Missouri when the message of the President was issued, and after the census of 1930 when the congressional representation of Missouri was reduced from sixteen to thirteen. Here is the constitutional right given by the Constitution of Missouri to the voters thereof to use the congressional districts for the purpose of initiating laws or for the purpose of referring Acts to the people which the General Assembly has passed for approval or disapproval thereof by the electors at the polls. That this is a valuable right goes without saying.

If and when the Legislature of Missouri passes a bill and the Governor signs it creating thirteen districts, Chapter 63, R.S. of Mo. 1929 creating the sixteen districts will be repealed, and the new congressional districts will be available for use by the voters under the provision of Section 57, Article Iv by the Initiative and Referendum Law of the State of Missouri.

Considering the foregoing authorities, I am of the opinion that any general law passed by the General Assembly not falling within the exceptions herein enumerated and set out in Section 57, Article IV may be referred to the people under the Initiative and Referendum, and that the sixteen districts into which the state is divided under Chapter 63, R.S. of Mo. 1929 may be used for the purpose of signing petitions and filing same with the Secretary of State, and that the state as a whole cannot be so used as one congressional district for the purpose of having signed and of filing initiatory and referendum petitions with the Secretary of State.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AH

Blind Commission - Reasonable Notice Discussed

March 29,1933

FILED
58

Mrs. Blanche T. Matteson
Pension Secretary
Missouri Commission for the Blind
1722 Olive Street
St.Louis, Missouri

Dear Mrs. Matteson:

We wish to acknowledge your letter of March 22, 1933, concerning the following:

> "Mr. Abington suggested yesterday that we write to you for your opinion about the clause in the blind pension law which requires "reasonable notice" sent to a pensioner before striking his name from the pension roll. Will you please advise us as to what may be considered reasonable notice and suggest a form in which such notice may be sent so that it may meet every requirement of the law."

We find from our files that on June 6,1927, an opinion was rendered to Miss Audrey M. Hayden, Executive Secretary for the Missouri Commission for the Blind, and on July 6,1927 a further opinion was rendered to Honorable John H. Holliday, Commissioner of the Missouri Commission for the Blind, both dealing with "reasonable notice", and we quote from them:

(John H. Holliday--July 6,1927)

> "***Section 4 of the blind pension act, Laws of Missouri 1923, page 304, among other things, provides as follows:
>
> "***And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last

> known residence address, such fact shall be certified to the State Auditor and the name of such person shall be stricken from the blind pension roll.***"
> (Sec. 8896 R. S. Mo. 1929)

This language, when considered in its ordinary and usual meaning, makes clear the following points: When the commission, of its own knowledge, knows that any person whose name is on the blind pension roll is no longer qualified to receive a pension, it shall, after reasonable notice to such person, certify such fact to the state auditor, who will strike the name of such person from the blind pension roll.

We must now ascertain what constitutes the "fact" which the commission certifies to the state auditor. It is obvious that the legislature intended the commission to certify to the state auditor the date of its actual knowledge that some person on the blind pension roll was no longer qualified to receive a pension. The date upon which the commission determines the disqualification of a person whose name is on the blind pension roll, is the date upon which the law contemplates that such person shall cease to be a pensioner. It is the duty of the commission to give such pensioner reasonable notice of its decision and that unless he shows to the contrary within the time allowed as reasonable notice, the facts will be certified to the state auditor and the name of the pensioner stricken from the roll.***"

And quoting from the opinion rendered on June 6,1927:

> "The only question presented is, what would be reasonable notice in a given case? Of course, that will depend on the geographical location of the pensioner. I believe, however, that ten days notice would be reasonable notice to any person on the blind pension roll of the State of Missouri.***"

The court in three cases, hereinafter cited, had under consideration that portion of Section 8896 R. S. Mo. 1929, relative to reasonable notice. In the case of State ex rel. Palmer v. Thompson, State Auditor, 297 S. W. (2d) 62, the court after quoting that provision regarding reasonable notice from Section 8896, and quoting from Section 8893 that portion that deals with blind persons who are maintained in either public, private or endowed institutions etc., had this to say:

> "Under the 1923 act, the fact that relator is and was being maintained in a publicly supported institution automatically deprived her of the right to receive a pension. The commission certified that fact to the auditor. It thereupon became the duty of the respondent, as such auditor, to strike the name of relator from the blind pension rolls."

In this case the court held such pensioner automatically forfeited her pension, and in substance held notice was unnecessary if such pensioner was not within the requirements of Section 8893.

However, in the case of State ex rel. Fitzgerald v. Missouri Commission for the Blind, 48 S. W. (2d) 872, the court pointed out the necessity of reasonable notice to a pensioner, having this to say:

> "***Of course, payment of the pension was discontinued. We assume the commission acted on reasonable notice to Fitzgerald for the proceeding is not questioned for failure of notice.***"

Also, in the case of State ex rel. Smearing v. Thompson, State Auditor, 45 S. W. (2d) 1078, the court had this to say:

> "One is "enrolled under the provision of this article," when his name is placed on the blind pension roll by the State Auditor. Section 8900. When enrolled the pensioner is entitled to a pension from the date of the filing of his application with the probate court. An applicant's name is placed on the blind

> pension roll upon certification
> by the commission for the blind;
> it is stricken from the roll upon
> a like certification when the
> commission, after notice and hearing,
> determines that the pensioner is
> no longer qualified to receive a
> pension. Section 8896***"

It will be noted from the above two cases, that reasonable notice is necessary to a pensioner before said fact is certified to the State Auditor. We also call to your attention these words that were used in the Smearing case:

"After notice and hearing."

It being our interpretation of these words, that it was in the court's mind that before the fact was certified to the State Auditor that a person was ineligible, that a notice should be given to pensioner, and if the pensioner wanted a hearing, to give him one to present his or her side of the case. That it is in fairness to the pensioner to permit him to show to the contrary or rebut any accusations or facts from which the commission arrived at its finding.

It is therefore our opinion, in view of the foregoing, that when it comes to the knowledge of the commission, that is to say, when the commission has facts sufficient to warrant a finding that said person is no longer eligible to receive the benefit of the pension act, or is not a deserving blind person, within the meaning of the act, then said commission shall issue a formal finding from the facts, and when it does, that is the time the fact has become known to it that such person is no longer qualified, and a notice shall then be mailed to the last known residence address of such pensioner stating therein that the fact of such finding shall be certified to the State Auditor; and before thus certifying said fact, the pensioner be given a reasonable time, i.e., not less than ten days, to show to the contrary, or show that the finding should not be certified to the Auditor.

This gives the pensioner an opportunity to present his or her evidence, and in some instances the commission might be wrong in its finding, and if the commission is wrong, it would have an opportunity to reverse its former finding and do same before the State Auditor struck his or her name from the roll, without prejudice or an injustice to the pensioner.

There is no set form which the commission may use, the statute does not give one as a guide, but only provides that notice be given. We are attaching hereto, a form which the commission may use if it so desires. You are at liberty to change or amend same to suit your convenience.

Yours very truly,

JAMES. L. HORNBOSTEL
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

JLH:MM
Encl.

SCHOOLS - --RAILROAD, tax money in county treasury, when county court can distribute.

April 3, 1933.

FILED
58

Hon. Thomas A. Mathews
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Mathews:

Answering your letter of March 27, 1933, relative to the money collected last September 8th from the railroads, as to whether the county court has the right at this time to distribute or pay over to the school districts their proportionate part of this money now or to hold same until after the following September 1st.

In reply will state, that Section 10038, R. S. Mo. 1929, provides that,

"The county court * * * shall * * * ascertain and levy the taxes for state, county, municipal township, city, incorporated town and village and school purposes, * * *."

Section 10039, R. S. Mo. 1929, provides the way and means by which school taxes shall be levied, stating that,

"* * * county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes, * * * (and after receiving from the state auditor the amount for the state) the county court shall apportion the said taxes for the erection of public buildings, or for other purposes so levied and collected, among the several school districts levying such taxes, in proportion to the amount of such taxes so levied in each of said districts: * * * * * *."

Section 10030, R. S. Mo. 1929, says,

"Within ten days after the county court shall have levied the taxes on railroad property, as prescribed in the two preceding sections, the county clerk of

such county shall extend the same * * * * * * * ."

Section 10033, R. S. Mo. 1929, says,

"All taxes of whatever description, charged against any railroad company, according to the provisions of this article, due to any county, and all taxes due the state * * * and * * * school districts in such county, shall be due and payable to the county collector of such county on the first day of September of the year for which the same may be levied and charged as herein provided."

Section 10041, R. S. Mo. 1929, states,

"It shall be the duty of the collector to keep separate accounts of the railroad taxes collected by him, and render monthly statements thereof to the county clerk as in other cases. * * * * * He shall also pay into the county treasury monthly all other taxes on railroad property collected by him in such county, to be disbursed according to law."

Under the foregoing we trace the money into the county treasury, as stated in your letter in this case, took place September 8th, 1932.

Then, under Section 12162, R. S. Mo. 1929,

"The county court shall have power to audit, adjust, and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; * * * * * ."

Under Section 12161, R. S. Mo. 1929, the county clerk has,

"* * * to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with monies payable into the county treasury, * * *"

It is our opinion from the foregoing sections that when this money in due course reaches the treasurer's office, during any current year, the county court can immediately issue warrants

on same, or turn them over to the proper places, as in this instance, to the school districts to be used as may be necessary under the law.

Yours very truly,

Geo B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GB :EG

HIGH SCHOOLS - Per-Pupil Cost of Tuition; Outside High School Students, and How Arrived At, and How Paid.

Sec 16 (SB237-269-272-26-27)
Laws 31

April 5, 1933.

FILED
58

Hon. T. A. J. Mastin
Prosecuting Attorney
Kansas City, Missouri

Dear Mr. Mastin:

We wish to acknowledge your letter of March 13, 1933, enclosing two letters from Mr. McMillan, Superintendent of Schools, concerning Lee's Summit public school, wherein you request an opinion relative to "the correct way to calculate high school per-pupil cost as defined in Section 16, line 19, page 238, Revised School Laws, 1931, State of Missouri." (Sec.16, Session Acts 1931, pp. 343-344.)

To answer your inquiry it is necessary to determine two facts;

First, the cost of maintaining school attended;

Second, the proportionate part per pupil it bears to the cost of maintaining the school attended.

Section 16, pp. 343-344, Laws of Missouri, 1931, (p. 238 Revised School Laws of 1931) in part reads as follows:

"And the cost of maintaining the school attended shall be defined as the amount spent for TEACHERS' WAGES and INCIDENTAL EXPENSES."

We believe the above provision means what it says, namely, the cost of maintaining the school attended shall be the amount spent for TEACHERS' WAGES and the INCIDENTAL EXPENSES.

There is no exception EXCLUDING the amount of some teachers' wages and incidental expenses, even though same might be reimbursed from some other source (state, national or benevolent gift).

Having determined the cost of maintaining the school attended by adding TEACHERS' SALARIES and INCIDENTAL EXPENSES, we then proceed to the question (second) of cost per pupil.

To determine the cost per pupil, take the average (See Sec. 14) total number of pupils attending the school and divide it into the cost (teachers' wages and incidental expenses) of maintaining the school; THE RESULT WILL BE THE PER-PUPIL COST.

Section 16, supra, provides as follows:

> "But the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term. ******."

The rate of tuition paid for a pupil from an outside district shall not exceed the per-pupil cost less fifty dollars. Of course, this fifty dollars is added to the equalization quota and/or the teachers' quota of the district maintaining the school attended.

In conclusion, it is our opinion from the foregoing that the cost of maintaining the school attended will be the amount spent for TEACHERS' WAGES and INCIDENTAL EXPENSES and this sum divided by the average total number of pupils attending the high school gives the per-pupil cost of the school as it is then maintained; and tuition per-pupil cost of an outside pupil would be on the same basis, less fifty dollars per pupil for the entire term.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

GBS:EG

IN RE: Right of licensed druggist to sell non-intoxicating beer under Act approved March 15, 1933, legalizing manufacture and sale of beverage having not exceeding 3.2 per cent alcoholic content.

April 6, 1933.

FILED
58

Hon. Thomas A.J. Mastin,
Prosecuting Attorney - Jackson Co.,
Kansas City, Missouri.

Dear Sir:

You have submitted the following question and asked my opinion thereon:

> "Can drug stores legally authorized to sell and keep intoxicating liquors in stock for medical use and consumption under the existing state and federal laws, and also, allowed to keep and sell certain medicines having more or less alcohol as an ingredient thereof, procure a permit and legally sell non-intoxicating beer for consumption in the drug store under the Act of the Missouri General Assembly approved March 15, 1933, legalizing the manufacture, inspection, sale and transportation of beer having an alcoholic content not in excess of 3.2 per cent by weight?"

Section 13139h of the said Act of the General Assembly of Missouri approved March 15, 1933 provides as follows:

> "Before any permit authorized by this article shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath that he will not allow any intoxicating liquor of any kind or character, including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit ***"

This provision is intended to prevent intoxicating liquors from being illegally kept or stored or secreted in or on the premises of the permittee. Drug stores are legally authorized to handle intoxicating liquors for medical use and consumption under the existing state and federal prohibition laws, and also to keep and sell certain

medicines having more or less alcohol as an ingredient thereof, and the Missouri Act in my opinion is not intended to, and does not prevent the drug stores from continuing to handle as part of their regular drug business, alcohol, liquors and medicines having an alcoholic content which they were permitted to handle prior to enactment of the Missouri Non-intoxicating Beer Statute.

A licensed druggist can procure a permit to retail by the glass or by the bottle for consumption only on the premises where sold. Such permit does not authorize sale by druggist in original package of three, six, or twelve bottles, nor does it authorize sale in single bottles to be carried away from the premises.

If a druggist procures a merchant's permit to sell in original package of three, six or twelve bottles, he cannot retail by the glass or bottle for consumption on his premises; druggist must choose which permit he wishes, as he cannot have both a merchant's permit and a retailer's permit to sell for consumption on the premises during the same period of time.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AH

IN RE:

RECORDER OF DEEDS:-Recordability of instruments subordinating lien of deed of trust to easement.

See additional to this op. may 15-1933 attached

April 13th, 1933

FILED 58

Hon. Thomas A. Matthews,
Prosecuting Attorney,
Farmington, Missouri.

Dear Mr. Matthews:-

I am in receipt of an instrument entitled "Subordination of Lien of Deed of Trust" wherein the Phoenix Joint Stock Land Bank of Kansas City purports to subordinate its lien on certain real property in St. Francis County to an easement granted to Frank Sullivan and assigns on this same property. The Honorable Raymond Roberts has referred this matter to this office and requested that an opinion be rendered to you as to whether or not this instrument is subject to recording.

No suggestion has come to us of any reason why it should not be recorded. It would appear that it is an instrument undoubtedly entitled to be recorded under Section 11543, the pertinent parts of which read as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds covenants, defeasances, and other instruments of writing, of or concerning any lands and tenements which shall be proved and acknowledged according to law, * * *."

There is no question but that this is an instrument in writing of and concerning land. The acknowledgement is apparently in proper form substantially following the requirements of Section 3029, R. S. Mo. 1929. It seems that the duty of the recorder in examining instruments offered to be recorded, is to examine the acknowledgement and if the acknowledgement is in proper form it is subject to be recorded. It is interesting to note that upon the recorder's failure to receive any paper writing properly acknowledged he shall be subject to damage to any person injured thereby. This is covered by Section 11564, the pertinent parts of which read as follows:

> "LIABILITY OF RECORDER FOR NEGLECT OF DUTY.- If any recorder to whom any deed or other writing, proved or acknowledged according to law shall be delivered for record; first, neglect or refuse to make any entry thereof, or to give a receipt therefor, as required by Section 11546; or, second, neglect or refuse to record such deed or other writing within a reasonable time after receiving

> the same; * * *he shall pay to the party aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder."

Accordingly, while civil liability is placed on a recorder of deeds for refusing to receive and record any paper writing acknowledged or proved according to law which may be considered of or concerning real property, yet no liability is placed on him or his bondsmen by this section for erroneously recording in good faith an instrument which might not be, strictly speaking, subject to be recorded.

If there is some special question respecting this instrument which the foregoing does not cover, I shall be glad to hear from you further.

Yours very truly,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW/mh

RECORDER OF DEEDS--Recordability of instrument subordinating lien of deed of trust to easement--Section 3081, 1931 Session Acts, p. 174

3081 Laws 31

May 15, 1933.

FILED
58

Hon. Thomas A. Matthews
Prosecuting Attorney
Farmington, Missouri

Dear Mr. Matthews:

Since rendering you an opinion on April 19th in regard to the subordination of lien of deed of trust, I have been advised that your recorder of deeds was under the impression that the original note securing the deed of trust and the deed of trust itself should be presented along with this subordination of lien of deed of trust and that he should mark upon the margin of the record, the notes and the deed of trust the words "See partial release dated _____". I presume your recorder is acting under the authority of Section 3081 R. S. Mo. 1929, as amended in the Session Laws of 1931, at page 174. An examination of this amendment, however, indicates that it was the plain intention of the Legislature to require this notation to be made only when some part or parcel of the land secured thereby had been released from the lien of the deed of trust. The legal effect of the instrument entitled "Subordination of Lien of Deed of Trust," which I have examined, wherein the Phoenix Joint Stock Land Bank of Kansas City purported to subordinate its lien on certain real estate in St. Francois County to an easement granted to Frank Sullivan and assigns on the same property, is not to release any part or portion of the property from the lien of the deed of trust but is simply the grant or the acknowledgement of the easement right as has been given by the owners of the property and a subordination of the lien of the deed of trust to a "right" granted. So far as the title holders of the property are concerned the lien of the deed of trust is not changed in any way.

If the recorder of deeds doubts that the party making this release is the true owner of the note secured by the deed of trust he would be within his rights to require the production of the note to satisfy himself as to the right of the Phoenix Joint Stock Land Bank to make the release. However, it is the

opinion of this office the he could not be required by Section 3081 to make a marginal memorandum, "See partial release dated _____, _____ Recorder," either upon the record or upon the note or upon the deed of trust securing said note.

Trusting this clears this up in a satisfactory manner, I am,

Sincerely yours,

HARRY G. WALTNER, Jr.
Assistant Attorney-General.

APPROVED:

_____
ROY McKITTRICK,
Attorney General

HGW:EG

PEDDLERS LICENSES: Is State license good in each county of State.

13318 RSMo 1929

June 7, 1933 7-6

FILED
58

Hon. Wade W. Maupin
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

This department is in receipt of your letter of May 26th with a request for an opinion, the germane part of your letter which pertains to the request is set out as follows:

> "I would like to have the opinion of your office on the construction to be placed on state peddlers' licenses. Under Chapter 96, R. S. 1929, and particularly Sec. 13,318, the rate on peddlers' licenses so far as the state is concerned, is set out; and by that section there is also granted power to the county to levy an additional license not exceeding the amount levied for state purposes." * *
>
> Is it the opinion of your office that having paid a state license for the six months period as prescribed by Section 13,318 to the state, that thereafter he can pursue his calling in any county of the state by payment of the county license in those counties in which a license is required, or does he have to procure also an additional state license? I have been unable to find any Missouri cases on this point. I will appreciate very much your opinion on this subject."

Your query calls for the construction of Chapter 96 R. S. Mo. 1929, and particularly 13318 R. S. Mo. 1929, which section is as follows:

"There shall be levied and paid on all peddlers' licenses a state tax of the following rates:

First, if the peddler travel and carry his goods on foot, $3.00 for every period of six months.

Second, if one or more horses or other beasts of burden, $10.00 for every period of six months.

Third, if a cart or other land carriage, $30.00 for every period of six months, and such license may be renewed at the expiration of the first license for a period not greater than six months on the payment of $3.00 per month, the number of months to be specified in such license.

Fourth, if any boat or other river vessel, at the rate of $1.00 per day for any period not less than five days, and such license may be renewed at the expiration of the first license for any period not greater than six months on payment of fifty cents a day, the number of days to be specified in such license. Any county court may by an order of record require all peddlers doing business in their county to pay a license tax not greater than that levied for state purpose."

We find from the reading of the above section that the statute authorizes the State to license peddlers at certain rates as set forth in the above section. And then in the last sentence of said section discretionary power is given the county court by an order of record to require all peddlers doing business in their county to pay an additional license, which license tax may not be greater than that levied for State purposes.

Section 13314 R. S. Mo. 1929, provides for the different means of transportation the peddler may use.

Section 13315 R. S. Mo. 1929, requires the county clerk to issue the peddlers license of the several kinds and deliver same

to the county collector and charge the collector therewith.

Section 13315 R. S. Mo. 1929, provides for the manner of settlement by the county collector with the county court for the licenses issued and delivered and also:

> "* * *Said court shall cause the amount thus charged against such collector to be certified to the state auditor."

Section 13318 R. S. Mo. 1929, fixes the rate for each different means of transportation.

The county collectors of the respective counties are the authorized representatives of the state in the collection of the peddlers license tax. From the reading of the above sections and the naming of the license a <u>State tax</u>, and further making provision for county license tax in the last sentence of 13318 R. S. Mo. 1929, which provision is as follows:

> "* * *Any county court may by an order of record require all peddlers doing business in their county to pay a license tax not greater than that levied for state purposes."

It is our opinion that if a peddler pays a state license for the six months period as prescribed by Section 13318 supra, to the county collector for the State, that thereafter he may pursue his calling in each and every county of the State by complying with the additional county license tax, if the county court has exercised its discretionary powers and fixed a county rate by an order of record as provided by Section 13318. The statute does not contemplate that a peddler pay more than one state license tax for the six month period, and he is not required to pay a state license tax in each county of the State while he has a <u>state license tax</u> in full force and effect issued by the county collector of one county.

Yours very truly,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED_____
Attorney General.

CRH:MM

UNIFORM SEED LAW: Sale without labels is violation thereof.

12603 RS MO 1929

June 14, 1933 6-14

FILED
58
28

Hon. Jewell Mayes
Secretary of State Board of Agriculture
Jefferson City, Missouri

Dear Sir:

I have your letter of June 2nd, 1933 requesting an opinion as to whether or not it is a violation of the uniform seed law to sell twenty bushels of Lespedeza without having the same properly labeled.

For the purpose of this opinion, I assume that Lespedeza comes within the definition of Agricultural seed, as set forth in Section 12602 R. S. 1929, and that the containers of such seed was in excess of ten pounds.

Section 12610 R. S. 1929 defines the unlawful act of persons in the following language:

> "It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale within this state any agricultural seeds,*** for seeding purposes within this state without complying with the requirements of this article."

The article above, referred to is Article 16 of Chapter 87, R. S. of Missouri 1929. This is the article on, "Uniform Seed Law."

We call your attention to the part of the provisions Section 12611 R. S. 1929, which is as follows:

> "Every violation of the provisions of this article shall be deemed a misdemeanor punishable by a fine not exceeding one hundred dollars."

Section 12603, R. S. 1929 as set forth in Article 16, provides that all such agricultural seeds shall be properly labeled, and the statute sets out in detail what the label shall contain. This label requirement applies to all sales either, public, private or auction sales, when this seed is sold for seeding purposes, except, when such seeds are grown and sold

by the grower on his own premises or farm where the seed was grown. It also appears that the sale of this Lespedeza seed does not come within the exemption set out in Section 12606 R. S. 1929.

It, therefore, appears that the sale of the above seed, under the above conditions, was a violation of the uniform seed law. Section 12611 R. S. 1929, among other things, provides:

> "The prosecuting attorney of any county or the city attorney of any city in which formal complaint arises may file proceedings under this article."

All violations of the uniform seed law should be properly referred to the proper local authorities for prosecution.

Yours very truly,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS: Interpretation of Sections 9470 and 9474 R. S. Mo. 1929.

8-18

July 25, 1933

FILED
58
38

Hon. Thomas A. Mathews
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

This department is in receipt of your letter of July 10th, wherein you enclosed bulletin or circular sent your County Superintendent by the Honorable Charles A. Lee, State Superintendent of Schools. In order that we may have a complete record your letter is quoted as follows:

> "I inclose herewith a copy of a circular letter under date of June 16th, by Chas. A. Lee, State Superintendent of Schools, wherein he gives it as his opinion that County Superintendents are not required to endorse with examination second grade certificates from other counties in this State unless said certificates were issued on state grades. I am utterly unable to find that the Law gives Mr. Lee any authority whatever for rendering such an opinion. Under Section 9470 R. S. 1929, County Superintendents are given authority to issue second grade certificates on county grades. It is true that applicants, if they prefer, may have their papers graded by the State Superintendent, but this is purely optional with the applicant. Section 9474 reads in part as follows:
>
> 'Provided, that the County Superintendent must endorse without examination second grade certificates from other counties in this state on the payment of a fee of One Dollar and Fifty Cents, ($1.50); and such second grade certificate, when thus indorsed by the

> the County Superintendent, shall entitle the holder thereof to all the rights and privileges granted under and by a teacher's certificate issued by such superintendent under a regular examination; etc.'
>
> I am utterly unable to find any support for the State Superintendent's contention that County Superintendents are required to endorse only second grade certificates issued on so-called state grades.
>
> Unless you can see fit to issue an opinion contrary to the opinion set forth by the State Superintendent in the circular issued under date of June 16, to all County Superintendents, hundreds of applicants from the several counties in this state who have taken the examinations in good faith and have secured second grade certificates will be compelled to give up teaching positions already secured in other counties for the school year beginning next September."

The State Superintendent in his bulletin undertakes to give his interpretation on the following questions:

> "* * * 1. Is the second grade county certificate valid only in the county in which it is issued?
>
> 2. Must a second grade county certificate be indorsed in counties other than the one in which it was issued?
>
> In answer to these questions this Department advises as follows: Section 9470, Revised School Laws of Missouri 1931, in part says:
>
> "A third grade shall be valid for one year and second grade for two years in the county for which they are issued and the first grade for three years in the state."

From this statement it seems evident that the second grade certificate referred to is not valid in other counties in the state. If it were, the law would have included it in the statement along with the first grade certificate. This Department holds that the above is true when the second grade county certificate is issued on county grades.

Section 9474, Revised School Laws of Missouri 1931, says in part:

"***Provided, that the county superintendent must indorse without examination second grade certificates from other counties in this state on the payment of a fee of one dollar and fifty cents;***"

The Department holds that this section is not in conflict with Section 9470. When a person holds a second grade certificate which has been issued on state grades the above section applies, and said certificate must be endorsed in other counties than the county in which it was issued. The seeming conflict of the above sections disappear when in the one case the certificate is issued on county grades and in the other case when the certificate is issued on state grades."

In the last analysis you desire to know whether the State Superintendent is correct in his contention that the County Superintendents of other Counties are required to endorse only second grade certificates issued on state grades. To begin with we quote Section 9470 R. S. Mo. 1929, insofar as it is pertinent:

"The county superintendent of public schools shall have authority to examine teachers and grant certificates of qualification to teach in their respective counties or in the state. Three public examinations of two days each shall be held during the year on the first Fridays and the succeeding Saturdays in March, June and August, at such place or places in the county as the county superintendent of schools may designate. Said

> examinations shall be conducted by said county superintendent of public schools, or by some one duly authorized by him to conduct them. All questions given in said examination shall be prepared and furnished by the State superintendent of public schools. Certificates issued by said county superintendent of public schools shall be of three grades. Third grade shall be valid for one year and second grade for two years in the county for which they are issued and first grade for three years in the state. * * *"

We then consider Section 9471 R. S. Mo. 1929, entitled 'Grading of examination papers by state superintendent of public schools,' which is as follows:

> "The county superintendent of public schools shall, in accordance with a system prepared and submitted by the state superintendent of public schools, give each applicant writing in the examination a number by which number alone the papers of said applicant shall be marked and designated. Said county superintendent shall keep an accurate record of the number given to each applicant. Within three days after the close of each regular examination, the county superintendent of public schools shall forward to the state superintendent by express or registered mail, all the papers of all applicants for first grade certificates and of all other applicants who shall request their papers to be sent to the state superintendent. * * *"

From this section we find that the county superintendent may grade the papers or if the applicant so desires he may request that the State Department grade his papers. The supposed object of this being that in the event the applicant prefers or does not have faith in the county superintendent's ability to grade the papers or to treat him fairly, he then has the right to request

the State to grade his papers. The question arises, what advantage or what disadvantage accrues to the applicant by reason of the State grading his papers? We have examined the statutes thoroughly and we find no advantage or disadvantage in the papers being graded by the State. The County Superintendent issues a second grade certificate irrespective of whether or not he or the State Superintendentts office grades the papers. Then the holder of a second grade certificate is in the same position as the applicant whose papers have been graded by the county superintendent.

We next come to the question of reconciling that portion of Section 9470 which is as follows:

> "* * *Third grade shall be valid for one year and second grade for two years in the county for which they are issued.***"

With Section 9474 R. S. Mo. 1929, which pertinent portion reads as follows:

> "Provided, that the county superintendent must indorse without examination second grade certificates from other counties in this state on the payment of a fee of one dollar and fifty cents; and such second grade certificate, when thus indorsed by the county superintendent, shall entitle the holder thereof to all the rights and privileges granted under and by a teacher's certificate issued by such superintendent under a regular examination, and shall not be revoked*****"

In the case of State ex rel. Gorman v. Offutt, Superintendent of Public Schools, 26 S. W. (2nd) 831, wherein the question of a demurrer was raised as to the sufficiency of the petition, the Court really decided the question presented by the two sections quoted. The opinion by the court is in part as follows:

> "* * *We think an examination of the whole act discloses that the first portion of section 11362 is not, as a matter of fact, in conflict with the proviso because it only requires the county superintendent to grade the applicants for certificates to teach in the schools under his jurisdiction, or, in other words, that the

superintendent is to grade those who may apply for authority to teach in his jurisdiction or who may apply for certificates in the jurisdiction of which he is the superintendent in charge, evidently intending that the applicants need not go to some other jurisdiction where perchance they may subsequently be employed. It nowhere requires such an examination be made by the superintendent of schools located where the teacher may actually teach. This construction is borne out by the provision of section 11358 that 'the county superintendent of public schools shall have authority to examine teachers and grant certificates of qualification to teach in their respective counties or in the state.' If they have authority to examine and grant certificates of qualification in the state, how can it be said that they are limited to granting certificates to applicants who may teach within the jurisdiction of the respective superintendents? This construction is also sustained by the provision of section 11361 that second-grade certificates shall be renewed once without examination. If the respondent's contention were correct, it would make little difference whether the proviso was construed as it previously read or as it now reads, because the county superintendent within whose jurisdiction a teacher might be engaged to serve would be privileged to decline to indorse in every instance and thus render nugatory the provision for indorsement of second-grade certificates issued from other counties of the state.

The foregoing view renders the whole section harmonious, and would seem to account both for the change of 'may' to 'must' in the proviso and the additional provision that 'such second grade certificate

when thus indorsed by the county superintendent, shall entitle the holder thereof to all the rights and privileges granted under and by a teacher's certificate issued by such superintendent under a regular examination, and shall not be revoked unless specified charges be made and filed with the county superintendent, notice thereof be given and an impartial hearing be had thereon, as is fully provided for in section 11364.'

Respondent says, however, that this construction would work an absurdity, because it would of necessity require the superintendent of one county to accept, against his judgment, the judgment of the superintendent of another county, and therefore that it is reasonable to believe that the change from 'may' to 'must' was through a clerical error. But that is entirely speculative and is not in accord with what seems to have been the intention of the Legislature when considered in the light of the other provisions of the statute. We are bound to construe statutes as written, without regard to the results of the construction or the wisdom of the law as thus construed. State ex rel. v. Wilder, 306 Mo. 541, 549, 105 S. W. 272.

But, further, the statute in section 11364 prescribes a remedy if the superintendent to whom the certificate is presented for indorsement is not satisfied as to the qualifications or moral character of the applicant.

Respondent further contends that the meaning to be ascribed to the word 'must' in the proviso is that without indorsement it shall not be effective in the county where the teacher is about to engage in her work. If the respondent is correct in this contention, then the entire effect of the proviso is destroyed because in every case the superintendent to whom such certificate was presented, as we have already stated, would have the privilege of refusing to indorse the same unless the applicant took the prescribed examination under him."

From the foregoing opinion it is the opinion of this department that the County Superintendent of a county should not make any discrimination in indorsing a second-grade certificate, issued by the school superintendent in another county, insofar as the question of whether the applicant's examination papers have been graded by the State or a County Superintendent.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:MM

BEER BILL: Wine containing 3.2% alcohol can not be legally sold in Missouri.

8-10

August 3, 1933

FILED
58

Honorable Thomas A. J. Mastin
Prosecuting Attorney
Kansas City, Missouri

Dear Mr. Mastin:

This Department acknowledges receipt of your letter dated June 23, 1933, as follows:

> "Mr. Lawrence Goodwin, of this city, has made inquiry of this office as to the legality of the sale of wine containing 3.2 per cent alcohol.
>
> Would you please give us your opinion as to whether or not it would be legal to sell 3.2 per cent wint in the State of Missouri."

As of July 28, 1933, this Department issued an opinion addressed to Dr. M. O. Raine, Food and Drug Supervisor, Jefferson City, Missouri, in which it was held that wine containing 3.2 per cent alcohol can not now be legally sold in the State of Missouri, except for medicinal and sacramental purposes under a permit to make such sale, a copy of which opinion we are inclosing you herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC
Inclosure

COUNTY COLLECTOR: May not collect over-payment of taxes from County Court.

FILED
58

October 4, 1933

10/7

Honorable Thomas A. Mathews
Prosecuting Attorney
St. Francois County,
Farmington, Missouri

Dear Sir:

This Department is in receipt of your letter of September 29, in which you request an opinion from this office as to the following state of facts:

"I am herewith inclosing an agreed statement of facts with reference to a claim of Ed. Brewer, former Collector of this County, for the sum of $1319.23, which is the amount found to be due him according to the statement of facts and audit supplied.

I would like very well to have an opinion from your Office, advising me as to whether or not the County Court should pay or settle this claim with Ed. Brewer.

I would like to have this opinion by October 7, 1933, and at which time I would ask that you return the inclosed statement of facts together with the audit.

Thanking you, I remain,"

According to theagreed statement of facts in this case the claimant, J. Ed. Brewer, as county collector over-paid the State of Missouri the proportionate part of the taxes collected in St. Francois County during his term of office, the sum of $1,319.23 and that said over-payment to the state was not discovered until the filing of the audit by the State Auditor in the office of the county clerk.

Section 9935 R. S. Mo. 1929, provides for the collector's commissions. The theory of this statute is that the collector should report his commission in his settlements and it is his privilege and duty to retain the commissions allowed by law. The county court did not allow his commissions but the law allows them on his settlements and statements.

In the case here under consideration we find that the collector over-paid the State of Missouri his proportionate part of the taxes collected in St. Francois County during his term of office, the sum of $1,319.23. The question now is whether or not the county court has the power to refund this money to the collector.

In the leading case of Hethcock v. Crawford County, 200 Mo. 170, plaintiff was collector of Crawford County, his term expiring on December 19, 1902. He presented a written statement of account to the County Court of Crawford County, claiming thereby that the county was indebted to him for five per cent commission on back taxes which commission he alleged he had paid over through a "mistake of facts" and which he demanded paid back. The court held:

> "The question, then, comes to this? Having without duress, misrepresentation, or any form of imposition or fraud on the part of defendant's agent, the county court, voluntarily paid this money into the county treasury on the theory it was tax money and belonged to the county treasury - that he had but rendered unto Caesar the things that were Caesar's - can he recover it back, or must he abide the event? Courts have been extremely lenient in seeing a mistake of fact, as distinguished from a mistake of law, but plaintiff has produced no case on all-fours with this one. To the contrary, there is a live line of controlling deci-

> sions holding that under such a record, the mistake is not of fact but of law, and that money so paid voluntarily cannot be recovered back. (Claflin v. McDonough, 33 Mo. 412, and cases cited; Mathews v. Kansas City, 80 Mo. 231,and cases cited; Needles v. Burk, 81 Mo. 569; Price v. Estill,87 Mo.378; Norton v. Highleyman,88 Mo. 623; State ex rel.Scotland County v. Ewing, 116 Mo. 129,and cases cited; State ex rel v. Shipman, 125 Mo.436; Corbin v. Adair County, 171 Mo. 385; Campbell v. Clark, 44 Mo. App.249; State ex rel v. Stonestreet, 92 Mo. App. 214.) "
>
> "Here plaintiff had the money. He (misjudging the law) voluntarily parted with it without solicitation, misrepresentation, duress, fraud or undue influence, and, as he made his bed, so he must lie."

In the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, l. c. 624, the court in following the Hethcock case, said:

> "Fulks understood that $9000 was the maximum of commissions and fees he was entitled to retain in any one year. Acting on that construction he had paid to the county treasurer $4001.80, the four per cent commissions on the delinquent and back taxes for the three years, 1911-12-13. This was a voluntary payment and if he misconstrued the statute it was a mistake of law and not of fact, and he is not entitled to recover the payment from the county. The tax levy of each year is made to meet the expenditures of that particular year. Under our scheme of taxation each year's levy is made to meet 'the conditions of the county treasury and current demands of the county's business and plaintiff may not disturb the county treasury of Crawford County unless he is warranted in so doing by the strict law.' (Hethcock v. Crawford County, 200 Mo. 170, 177; Dameron v. Hamilton, 264 Mo. 103, 121.)."

In view of the foregoing, it is the opinion of this office that the former collector of St. Francois County cannot recover the over-payment of $1,319.23 from the county court, and that the county court cannot legally pay or settle this claim with the former collector.

Respectfully submitted,

JOHN W. HOFFMAN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

JWH:LC

SCHOOL DISTRICTS:--Where single owner owns land located within three different school districts, county clerk, in assessing the amount of school taxes, should take thevalue of the land located in each district, in arriving at the amount of taxes due each school district.

10-23

October 20, 1933.

FILED
58
53

Mr. Thomas A. Mathews,
Prosecuting Attorney,
Farmington, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "At the request of our County Court, Assessor and Flat River and Esther School Districts, I herewith write you with the view and purpose of obtaining an interpretation of Sections 9260, 9261, 9780, 9792, 9805 and 9876, Revised Statutes of the State of Missouri, for the year 1929. In reading those sections, two points will arise, and on which we would like to have your opinion.
>
> First: How shall the County Clerk extend and assess the amount of school taxes on receipt of the estimates of the various districts. For illustration, if a man owns 1000 acres of land, and which is assessed by the Assessor at a certain value and assessed valuation, and 200 acres of this tract of land is in school district No. 1, 300 in school district No. 2, and 500 acres in school district No. 3, should the valuation be carried out according to an acreage value or according to a real valuation of each acre in each school district.
>
> It seems that our County Assessor has arbitrarily outlined to the County Clerk, what he considered a fair valuation of the number of acres of the individual owner in each school district, and upon this certified valuation of the County Assessor to the County Clerk, that the County Clerk has used in carrying out and extending the taxes. Or should the County Clerk have carried it out according to the acreage value based upon the total assessment of the 1000 acre tract."

We have examined the sections of the statutes to which you call our attention and do not believe that any of them throw any light upon the question which you ask. You inquire as to how to assess the amount of school taxes due several school districts where the several districts together encompass

a tract of land owned by one individual.

We shall attempt to answer your inquiry by using the example given inyour inquiry. You state that if a man owns 1000 acres of land which is assessed by the Assessor at a certain value, and 200 acres of this land is in district No. 1, 300 acres in district No. 2, and 500 acres in district No. 3, should the valuation be carried out according to the acreage value or according to the real valuation of each acre in the school district. As we understand the law, each school district is entitled to the school taxes on the valuation or assessment of the land found and located within its particular district. We do not understand that any district might increase the valuation of land in this district by taking into consideration properties located outside of the district. Such being true, we are of the opinion that if there are 200 acres of land belonging to this tract in district No. 1, that the valuation upon which the school taxes for that year for that district should be assessed, would depend upon the actual value of the 200 acres located within the district.

Taking the example which you gave in your inquiry, assume that the entire 1000 acres is worth $10,000. Assume also that upon the 500 acres are located the improvements and that the 500 acres are worth $7,000.00; that the 200 acres are worth $1,000.00 and the 300 acres are worth $2,000.00. If it were possible, in making the assessment in district No. 1 for the 200 acres to include a value which was located in district Nos. 2 and 3 for the purpose of raising taxes in district No. 1, then the taxes in district No. 1 would be based upon a value which was not found within district No. 1. We must, therefore, conclude that the County Clerk, inextending and assessing the amount of school taxes due the various districts, he should base those taxes upon the actual value of the land located within the particular district. To adopt the method of apportioning the value according to the ratio which the number of acres in a particular district bears to the total number of acres in the tract would be to include within the district a value which is not in fact found therein. All of this land apparently is located within the same county and must be assessed in the name of owner according to the valuation of the tract. When it comes to the assessment, however, of school taxes for the various districts, we believe that the assessor is correct in placing a fair valuation on the number of acres of this individual owner found within each individual district.

It is therefore the opinion of this Department that where an individual owned 1000 acres of land, all of which is located within three separate school districts, that the County Clerk, in assessing the amount of school taxes, should adopt for the valuation the value of the land which is located in each individual district; that it would not be proper to adopt the valuation of the entire tract and proportion the taxes among the various districts according to the number of acres found therein.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

COUNTY COURTS - Right to compromise taxes, Section 9950, R.S.Mo.1929, Rights in correcting errors, Section 9950, R. S. Mo. 1929.
Collector's liability, acting under an unauthorized order of county court.

February 15, 1933.

Senator J. C. McDowell
Missouri Senate
Jefferson City, Missouri

Dear Mr. McDowell:

Your recent letter directed to the Attorney-General has been handed the undersigned for attention. You asked an opinion of this office upon the following questions:

"1. Section 9950 R. S. of Missouri, 1929, provides that taxes may be compromised by the county court when upon the back tax books. Under this section explain what, in your opinion, the county courts can do?

2. Under Section 9980 - county courts are given power to correct erroneous assessment of lands for taxes. What in your opinion constitutes errors that the court can correct?

(a) Can the county court reduce valuations of land as an error under this section?

(b) Can the county court legally, by general order take off all interest and penalties on back taxes, even though reduced to judgment?

(c) Can the county court reduce attorney fees and the 4% penalty allowed the collector after the same has been entered in judgment by either compromising the amount of taxes under the judgment or by reducing the penalties?

Senator J. C. McDowell #2

"Section 9946 of R. S. of Missouri provides that errors in tax books may be corrected, so in your opinion does this section authorize the county court to lower values fixed by the board of equalization upon property that they now deem too highly assessed?

In your opinion would the collector be liable on his bond where he issues a receipt for taxes under an order of the county court taking off all interests and penalities upon back taxes?

Would the collector's bond be liable - where the county court reduces the valuations of lands and orders the collector to reduce the back taxes to conform with the new valuations established by the court."

Section 9950 R. S. Mo. 1929, provides that a county court may compromise delinquent taxes when the same are charged in a back-tax book and when it appears to the court that any tract of land or town lot contained in the back-tax book is not worth the amount of taxes, interest and cost due thereon as charge in said back-tax book, or if it appears to the court that the land would not sell for the amount of such taxes, interst and cost, then the county court is authorized to compromise the taxes, interest and cost. We are of the opinion that under this section the county court is authorized to compromise the back tax and the things required to be found by the court under the section are matters of fact to be ascertained and determined by that official body.

The court is required to find one of two existing or evident facts, namely, first, that the parcel of land is not worth in value the amount of accrued taxes, penalties and costs due thereon as appears from the back-tax book or, second, that the land would not sell for the amount of such taxes, interest and cost. There is no fixed rule given for the ascertainment of either of these facts. The value could be proven as value is proven in civil cases, namely, what similar lands with like improvements in the same locality were selling for at the time,

or what the same character of property had been bringing from tax sales and what the state and county had been realizing therefrom after the payment of costs in connection with the sales could be taken into consideration under the second test of value.

This section provides that when the amount of tax has been agreed upon under the compromise, the taxpayer will pay such agreed amount to the collector. The taxpayer shall thereupon receive a certificate of redemption, which, of course, is equivalent to a receipt. The amount paid by the taxpayer will be distributed by the proper officer, (who would, of course, be the collector, he having the money and the records of the funds entitled thereto), to the various funds to which said taxes are due in proportion as the amount received bears to the whole amount charged against said tract.

While this section does not specifically authorize or permit the county court to reduce the valuation, it does unquestionably permit a compromise of the tax where the facts justify it.

The presumption in law is that officers will discharge their duties honestly and fairly. If, therefore, the proper certifications of the action of the county court were made to the collector, we are of the opinion that the collector would incur no liability for the amounts the interest and cost had been diminished through the distribution of the compromise tax to these respective funds; the compromise of taxes by the county court as provided in this section having been authorized.

Section 9980, R. S. Mo. 1929, provides that,

"the several county courts are hereby authorized and empowered to hear and determine all allegations of erroneous assessments of lands for taxes and in all cases where

> it shall appear that lands have been erroneously taxed, either by having them taxed to more persons than one, or more than once for the same year to the same person, or if the land was not subject to taxation, the said court shall order the same to be corrected on the books of the proper assessor *******. County courts are hereby prohibited from making reductions in valuations placed upon real estate by the assessor *****."

It will be noted that this section provides for three instances where the county court is authorized to determine erroneous assessments, namely:

(1) By having them taxed to more persons than one;

(2) More than once for the same year to the same person;

(3) If the land was not subject to taxation.

The section specifically prohibits the court from making reductions of valuations placed upon lands by assessors, thereby restricting and in a manner defining the power intended to be given under this particular section.

Section 9808, R. S. Mo. 1929, provides,

> "The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes; and where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the

> power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

It will be seen that this section specifically states that valuations as fixed by the assessors shall not be deemed erroneous assessments.

Section 9946, R. S. Mo. 1929, provides,

> "In all cases where the county court, or assessment board or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

This section as originally written gave authority to cities to correct errors. In Session Act 1909, p. 725, it was amended by adding thereto county court or assessment board. The section does not undertake to repeal conflicting sections.

The term "erroneously assessed" has received judicial construction and we are of the opinion that the construction placed thereon is applicable, as the term is used in Section 9980, R. S. Mo. 1929.

In Cooley, on taxation, Vol. 3, p. 2505 and 2506, we find this declaration, based upon the cases of Clay County v. Brown Lumber Co., 119 S. W. 251, and matter of Trustees of Village of Delhi, 139 N. Y. App. Div. 412, 124 N. Y. Supp. 487,

> " The term 'erroneously assessed' as used in such a statute means an assessment illegal because of a jurisdictional defect and does not include a mere error of judgment."

In the Clay County v. Brown case, supra, in dealing with and declaring the law upon a matter in many respects similar to our proposition, the court said,

> "It is urged by the appellee that an excessive valuation of property is an erroneous assessment thereof within the meaning of section 7180 of Kirby's Digest, so that a remedy is here given to one, who has paid taxes under these circumstances, by having the taxes refunded; but we do not think that the term 'erroneously assessed", as used in said section, refers to an overvaluation of the property. The term 'erroneous assessment', as there used, refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property. If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of

> Kirby's Dig., section 7180, give the owner a remedy for a refunding of such taxes thus erroneously paid; but a remedy is not given by this section to the party aggrieved by reason only of an excessive assessment or overvaluation of his property."

Construing Section 9946, R. S. Mo. 1929, in the light of the reasoning enunciated in the Arkansas case, the declaration of law contained in Cooley on Taxation, supra, and being unable to harmonize this section with Sections 9808 and 9880, R. S. Mo. 1929, wherein valuation is specifically mentioned as not to be taken as an erroneous assessment, we are indeed doubtful that under Section 9946, R. S. Mo. 1929, the county court would be authorized to lower the valuation fixed by the board of equalization upon property that they now deem too highly assessed and justify such action upon the theory that it is a correction of an erroneous assessment. Having reached that conclusion, it will not be necessary to take up subdivisions "(a), "(b)" and "(c)" under this query.

In answer to this inquiry,

> "In your opinion would the collector be liable on his bond where he issues a receipt for taxes under an order of the county court taking off all interest and penalties upon back taxes?";

the law does not authorize a county court to remit all taxes and penalties accrued upon back taxes. The only authority given to county courts in this respect is contained in the provisions of Section 9950, supra.

Until additional authority has been given to county courts, we are, as stated above, of the opinion that such courts cannot enter a general order remitting all accrued interest, penalties and costs upon back taxes. The collector would not be justified in receiving and acting upon such an order. His only authority for receiving a less amount than his tax book calls for is under and by reason of Section 9950, R. S. Mo. 1929. If he acted upon the general order of the county court, he undoubtedly would incur a personal

liability to the respective funds deprived of such interest, and costs that may have accrued upon the back tax.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CCA:SO

BUILDING AND LOAN ASSOCIATIONS: Right to engage in insurance business as insurer or agent.

May 2, 1933

FILED
59

Honorable Ira A. McBride
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

We acknowledge receipt of letter from your Department dated April 18, 1933, as follows:

> "Please note the enclosed letter received from H. C. Ferry, Agent for the New Hampshire Fire Insurance Company, in which he requests an opinion in regard to building and loan associations writing insurance on properties on which they hold a loan.
>
> Mr. Ira A. McBride, Supervisor, has had several inquiries relative to this matter, and, therefore, requests an opinion from your Department".

The authority and power of the building and loan associations in this state are controlled by the statutes authorizing the organization of such associations. Such associations possess such power and authority as is given by such statutes, together with the implied authority to do the things necessary to be done in carrying out the objects and purposes of such associations.

Section 5585 Laws of 1931, page 144, provides that any number of persons not less than twenty-five, residents of this state, who shall have associated themselves together by an agreement in writing with the intention to constitute a corporation for the purpose of assisting each other and all who may after become associated with them in

acquiring real estate, making improvements thereon and removing encumbrances therefrom by advancing to its members out of a fund accumulated by the payment of periodical installments or otherwise, and for the further purpose of accumulating the savings of its members to be returned to certain of its members, may become a corporation and on complying with the provisions of Chapter 35 Revised Statutes Missouri, 1929.

Section 5587 Laws of 1931, page 145, authorizes the supervisor of building and loan associations to certify to the Secretary of State that a building and loan association is lawfully entitled to commence the business for which it is organized and entitled under the law to conduct.

Section 5593 further provides that any association if organized in pursuance of the provisions of Chapter 35, shall have all the powers provided for in such Article and that the object of such corporation shall be the accumulation of a capital in money, to be derived from payments by its members in periodical installments or otherwise, at such time and in such manner as shall be provided in the by-laws, and from the profits and accumulation arising from the investment of such payments.

The general powers of building and loan associations are set out in 9 C. J. page 952, Section 63.

The case of Building and Loan Associations v. Barrett, et al, 160 Mo. App. 164, involved the power of building and loan associations to make general purchases of real estate and take title thereto, and on page 185 of the opinion the court said:

> "We think that by a consideration of the whole scope of powers granted to building and loan associations by this statute it must be concluded that the Legislature intended to deny to such associations the right to enter the real estate market and become real estate brokers and speculators and to hazard the accumulation of the funds of its members in real estate deals. The rule of statutory construction would apply - "Expressio unius est exclusio alterius" -

> and a proper interpretation of the statute prohibits, by implication at least, building and loan associations from making purchases in a general way of real estate; and, of course, the purchase of the twenty-acre tract of land under the theory upon which the defendants' defense was constructed in this case would be equally prohibited by the statute, although indirectly made".

But as we said above, the powers and authority of such associations are defined by statute and beyond the power given them they can not go, no authority being given in Chapter 35 authorizing building and loan associations to engage in the insurance business, either as an insurer or as an agent it necessarily follows that such associations have no such power and authority, and such power and authority could not be given such associations either by a by-law passed by such an association or by an amendment to the charter of such association.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

BUILDING AND LOAN ASSOCIATIONS: Rules and regulations that may be made by the Supervisor under Senate Bill Number 263.

SB-263 | rev 33

May 4, 1933

FILED
59

Honorable Ira A. McBride
Supervisor Building and Loan Associations
Jefferson City, Missouri

Dear Mr. McBride:

This department acknowledges receipt of your letter dated May 1, 1933, as follows:

> "This is to state that the new law, (Senate Bill Number 263) commonly known as the Enabling Act, permitting Missouri Building and Loan Associations to join the Federal Home Loan Bank and to borrow money from said Bank, states, among other things, as follows:
>
> > "and the Supervisor of Building and Loan Associations shall make any and all reasonable rules and regulations not inconsistent herewith, to accomplish the purposes of this Act."
>
> This department desires a ruling from you as to just what rules and regulations can or should be required by the Bureau of Building and Loan Supervision, in order to permit Associations to borrow from the Bank."

Senate Bill Number 263 provides that indebtedness incurred by Building and Loan Associations shall not exceed at any one time an amount equal to ten per cent of the assets of such Association as such assets are shown by the last previous semi-annual statement to the Supervisor. It being further provided that the Supervisor may under certain conditions authorize an Association to borrow money in such amount and amounts as he deems advisable, however, not to exceed twenty-five percent of the assets of the borrowing Association as

shown by its last report to your department. The bill further provides that the Association may become a member of the Federal Home Loan Bank and comply with the provisions of "The Federal Home Loan Bank Act" and subscribe for and purchase stock of the Federal Home Loan Bank and obtain advances or loans therefrom and do all things necessarily incident thereto and may invest its funds in the obligations, bonds, debentures or other securities of the Federal Home Loan Bank, provided that the consent of the Supervisor of Building and Loan Associations has been first secured to do such thing with reference to the Federal Home Loan Bank. The clause of Senate Bill Number 263 quoted in your letter is general in its terms. It is frequently difficult and sometimes impossible to tell what the legislators had in their minds in enacting particular parts of legislation.

Of course you could make no rules or regulations with reference to Building and Loan Associations becoming members of or purchasing stock in or in investing the funds of the Association in the Federal Home Loan Bank, as those details will be governed by the Federal Home Loan Bank Act and by the rules adopted and established by those administering that Act, so that so far as we can imagine the only rules and regulations with reference to the administration of Senate Bill 263 that you could promulgate would be as to the showings required to be made to you when you are required to exercise your judgment in passing on the matters which you must approve as provided in the bill, and to that end you would have a right to have showings and proofs made to you on forms prepared by yourself, which forms could require proof to be submitted in such a way and on such subjects as might enable you to wisely exercise the discretion imposed in you by House Bill 263.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

BUILDING AND LOAN ASSOCIATIONS: Fees required to be paid Supervisor for examination of "Participating Reserve Fund".

56-4 Laws 31

FILED 59

June 9, 1933

Honorable Ira A. McBride
Supervisor Building and Loan Associations
Jefferson City, Missouri

Dear Mr. McBride:

This Department acknowledges receipt of your letter dated June 7, 1933, as follows:

> "The Baltimore Avenue Building and Loan Association of Kansas City, Missouri, was formerly the Reserve Building and Loan Association. The Reserve Association was reorganized and its name changed to the Baltimore Avenue Building and Loan Association.
>
> The reorganization plans provided for the creation and establishment of a "Participating Reserve Fund" in which was placed all real estate owned by the Association and other assets of doubtful value. The entire plan of reorganization and the creating of the "Participating Reserve Fund" was subject to the approval of the Supervisor of Building and Loan Associations.
>
> Examiners for this Department have recently completed an examination of the affairs of the above mentioned Association. The officers of the

> Association refused to pay a fee for examining the assets of the "Participating Reserve Fund" which amounts to approximately $600,000.00, claiming that this fund was not under the supervision of this Department, therefore, we were not entitled to our fee as provided for in the Statutes governing this Department.
>
> We are submitting this matter to your office for an opinion and will appreciate same at your earliest convenience".

Section 5624, Missouri Laws 1931, page 161 provides, with reference to your inquiry, in substance as follows:

> "It shall be the duty of the Supervisor in person or by one or more persons by him appointed * * * to make a full and careful examination of the affairs of any and all Associations in the state as often as, in the discretion of the Supervisor, the condition of any Association may require* * * * In every such examination, inquiry should be made as to the nature and resources of the corporation generally, the mode of conducting and managing its affairs, the action of its directors, the investment of its funds, the security offered its members and those by whom its engagements are held, and whether the requirements of its charter and the law have been complied with in the administration of its affairs. * * * * The refusal of any such corporation to permit the examination of its affairs

> as required by Sections 5622 to 5628, inclusive, shall be sufficient cause for the institution of proceedings to wind up its affairs, as hereinafter provided. The expenses of each annual or special examination shall be paid by the Association examined in such amount as the Supervisor of Building and Loan Associations shall certify to be just and reasonable * * * *".

Then follows the minimum and maximum amounts that such Associations may be required to pay for an examination or examinations and providing that the aggregate sum collected from the Building and Loan Associations doing business in this state to be calculated upon a basis sufficient to cover the entire expenses of the Bureau of Building and Loan Supervision, incurred in the examination of such Associations, including their proportionate shares of the salaries of the Supervisor of Building and Loan Associations, officers, employes, deputies and examiners, and the preparation of the reports and all other expenses made necessary by such examinations.

You state in your letter that the reorganization plans provided for the creation and establishment of a "Participating Reserve Fund". This provision was doubtless made to anticipate the provisions of House Bill Number 156 if the same was signed by the Governor and if and when the same goes into effect. When House Bill Number 156 goes into effect and when the by-laws and charter of any Building and Loan Association may be amended to conform thereto, then a different question may arise. You do not state upon what ground the officers of the Baltimore Avenue Building and Loan Association refused to pay the examination fees and we can only surmise that it was upon the ground that the "Participating Reserve Fund" was a thing apart from the Association. If our assumption is correct, then the contention would have no basis as a "Participating Reserve Fund " is unknown to Chapter 35 of the Revised Statutes of Missouri, 1929, as the same now stands.

Section 5624,above quoted, commands the Supervisor to make a full and careful examination of the affairs of any Association, which means of all its affairs, which means all of its business of whatever kind or nature, the examiner has power to administer oaths; to take testimony and compel the attendance of witnesses and the production of books and papers in order that

the examination may be facilitated or may be made complete. The examiner is required to inquire into the nature of the Association and its resources, which means, of course its available assets with which it may discharge its obligations to its members; the examiner is required to investigate as to how the funds of the Association are invested which gives the examiner the right to investigate as to all of the funds which go to make up any kind or character of the assets of the Association; the examiner is required to examine into the security offered members of the Association which upon its face would require an examination into its resources and assets, as well as the manner and mode in which its business was being transacted and conducted.

We are of the opinion that the Baltimore Avenue Building and Loan Association is entitled to and by law required to pay the expenses of the examination made by your Department in such amount as you shall certify to bejust and reasonable and within the limitations provided in Section 5624.

We are returning you herewith inclosures forwarded with your letter of June 7, 1933.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures

BUILDING AND LOAN ASSOCIATIONS: Ratio or pro rata in which matured shares should be paid.

5603-04 Laws 31

FILED
59

June 9, 1933

Honorable Ira A. McBride
Supervisor Building and Loan Associations
Jefferson City, Missouri

Dear Mr. McBride:

Receipt of your letter dated June 7, 1933, is acknowledged. Your letter is as follows:

"This Department has recently received several inquiries in regard to the method associations are using in paying withdrawal notices. Briefly, the question is as follows:

A person is a holder of savings shares, prepaid or full-paid shares in a building and loan association and has made application for withdrawal and is being paid each month on a percentage basis. On April 1st the association had some savings shares that had matured by reason of the monthly payments having been completed or has permitted pre-payments to bring them to maturity. The question involved is this: Should the association pay these matured shares in full or should these matured shares be paid upon the same pro-rata basis as those other shares on which withdrawal notice has been given?

We will appreciate your opinion on the above matter at your earliest convenience".

We assume your letter has particular reference to Sections 5603 and 5604, Laws of Missouri 1931, pages 154 and 155, and we further assume that the by-laws of the

Association about which you inquire contains nothing contrary to the provisions of the above sections.

Section 5603 deals principally with matured shares of stock in a building and loan association. The latter section provides in part that whenever an unpledged share shall reach its maturity - that is when the same is paid out - all payments thereon shall cease and the holder of such stock may withdraw from the association as provided in the Building and Loan Act. If the shareholder does not withdraw the matured stock becomes fully paid up in a sum equal to the matured value of the share or shares. It is further provided in the latter section that at no time shall more than one-half of the funds in the treasury of the Association be used or applicable for or to the payment of such matured shares without the consent of the directors of the Association. It is further provided in the section that the directors of the Association may, in their discretion, under rules made by them, force the retirement or payment of all unpledged fully paid shares, or prepaid shares, at any time, and may also in like manner enforce the retirement or acceptance of the payment of the value of installment shares at any time after the expiration of three years from the date of the issue thereof. It is further provided that the matured shareholders shall be entitled to receive and shall be paid the full value of their shares at the time of the enforced retirement, less all fines and the proportionate part of any loss that may be allotted to such matured shares. It is further provided in the latter section that no stock in a building and loan association shall be matured or money paid thereon except with the consent and approval of the Supervisor of Building and Loan Associations.

From the above section it appears then that upon the maturity of any shares of stock in an Association the value thereof becomes at once due and payable, the only limitation being that at no time shall more than one-half of the funds in the treasury be applicable to the payment of such matured shares without the consent of the directors.

By which section we think the legislature meant and intended that matured stock should be paid according to its value and according to the time of its maturity, whether the same became due as a part of a series or otherwise.

Section 5604 deals with shareholders who desire to withdraw but who have not matured their shares of stock. It will be noticed that Section 5604 provides that not more than one-half of the receipts of the corporation for any fiscal month shall be applied to the demands of the withdrawing unmatured shareholders, which will likely represent quite a different sum than one-half of

the funds in the treasury of the Association which may be paid out on matured shares under Section 5603, and also Section 5604 provides that in case a corporation is indebted on matured shares of an earlier series than the series of the withdrawing and unpaid shares, then the corporation can not pay more than one-third of the receipts for any fiscal month on account of the withdrawing and unpaid shares, whereas if a corporation is not indebted on matured shares of an earlier series then it may pay one-half of the receipts for any fiscal month on account of the withdrawing and unpaid shares.

We are of the opinion that the first matured shares mentioned in the second paragraph of your letter should be first paid in full up to the extent of the funds on hand as the same are applicable as provided by law or as ordered by the board of directors and according to the dates of their maturities, and if the amount permitted or ordered to be paid on account of such matured shares be not sufficient to pay all of such first matured shares in full, then the amount permitted or ordered to be paid shall be pro rated among the first matured shares in the order of their maturities. That is, the first matured shares shall be paid first whether issued as a series or otherwise.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

BUILDING & LOAN ASSOCIATIONS: Approved form of permanent stock certificate.

June 24, 1933.

FILED
59
31

Hon. Ira A. McBride
Supervisor
Building and Loan Associations
Jefferson City, Missouri

Dear Mr. McBride:

This department acknowledges receipt of your letter dated June 21, 1933, as follows:

> "We are enclosing herewith letter from the Franklin Savings and Loan Association of Kansas City, Missouri, also, a typewritten copy of the proposed new form of permanent stock certificate.
>
> This Department respectfully requests an opinion as to whether or not the enclosed form for permanent stock meets the requirements of the Act known as House Bill No. 367, which provides for building and loan associations to issue a class of stock to be known and classified as permanent stock.
>
> We will appreciate your opinion on this matter at your earliest convenience."

We have examined the copy of proposed form of permanent stock certificate which the Franklin Savings and Loan Association of Kansas City, Missouri, proposes to issue, and in our opinion the same will conform to the provisions of House Bill No. 367, if and when the same becomes effective. In expressing this opinion, we assume

that the by-laws passed, or which may be passed, by the Franklin Savings and Loan Association will conform to the provisions of the building and loan laws of the State of Missouri, as well as House Bill No. 367, as well as the general laws of the State.

We are returning you herewith the draft of the proposed form of permanent stock certificate, which you will doubtless keep in your file for further and future reference.

Very truly yours,

GILBERT LAMB
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

GL:EG
Enc.

BUILDING AND LOAN)
ASSOCIATION)

Free shares of stock owned by borrowing shareholders may not be credited on loan or note at withdrawal value, but such free shares withdrawn and pro-rated according to the statutes.

J604 Laws-31

July 11th, 1933. 1.18

FILED
59
32

Hon. Ira A. McBride
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter of June 15th, which is as follows:

> "Please note the inclosed letter received from Hon. W. H. Meredith, requesting an opinion for the Poplar Bluff Loan and Building Association of Poplar Bluff, Missouri.
>
> Briefly the opinion requested is in regard to the rights of a borrowing shareholder, who is the owner of free shares, to have the withdrawal value of his free shares credited on his note where there are notices of withdrawal on file in such number that the association would be unable to meet the last thereof for some time.
>
> For your information, we are inclosing herewith copy of an opinion in regard to this matter given by the former attorney general. We will appreciate your opinion on this matter at your earliest convenience."

Before answering the question asked, we desire to briefly set out the status relative to shares of stock; stock that is put up as security or collateral to a loan; the payment of the loan; the foreclosure of the loan; and the withdrawal of shares of stock pledged or unpledged.

Section 5593, Laws of Missouri, 1931, page 148, provides in part as follows: (Amended in 1933 by Legislature)

> "* * * and the object of such corporation shall be the accumulation of a capital in money, to be derived from payments by its members in periodical installments or otherwise, at such time and in such manner as shall be provided in the by-laws, and from the profits and accumulation arising from the investment of such payments. The capital so accumulated by any corporation created by virtue hereof shall be divided into shares of equal value; the ultimate value of such shares shall not exceed one thousand dollars. Said capital may be issued in full paid, prepaid or installment shares, in such amounts and at such times and in such manner as may be provided in the by-laws. * * * * * * * *"

And further,

> "There shall be issued to every shareholder a certificate signed by the president and secretary of the corporation, and evidenced by its corporate seal, setting forth distinctly and clearly the class of stock for which he has subscribed, the dividends or earnings which it may draw, and the withdrawal value which it may have at any time, and also the time when the said stock shall be withdrawable. Such certificate of stock together with the by-laws and the provisions of this chapter shall at all times determine the liability of the association to the stockholders and the relations of the stockholder and the association."

Section 5594, Laws of 1931, page 149, provides in part as follows:

> "The moneys accumulated from payments on account of stock, interest, premium and fines, as aforesaid, or from any other source whatsoever, after due allowance made for necessary and proper expenses, and subject to the provisions hereinafter set forth respecting the withdrawal and cancellation of shares and accumulation of contingent fund, may, at times provided in the by-laws, be offered to such shareholders or shareholder who shall bid the highest premium for the preference or priority of right to have a loan or advance of a sum equal to the ultimate

value of one or more of his or their respective shares, etc. * * * *."

From a reading of the excerpts from the above sections it will be noted that the building and loan association sells shares of stock to individuals and such are governed by the by-laws and the statutes, and that such shareholders have a right to borrow money up to a sum equal to the ultimate value of his or their shares. We again emphasize this provision above quoted:

"Such certificate of stock together with the by-laws and the provisions of this chapter shall at all times determine the liability of the association to the stockholders and the relations of the stockholder and the association."

Stock thus held by one is governed by the by-laws and the statutes and the value of such shares, the relation of the stockholders and the liability of the association is separate and apart and independent in itself. In other words, a share of stock is a separate and complete agreement within itself.

We now proceed to a loan made by said association to an owner of such shares of stock.

Section 5597, Laws of Missouri, 1931, page 151, reads in part as follows:

"For every loan or advance made as aforesaid, a non-negotiable note or bond secured by first mortgage or deed of trust on real estate shall be given, accompanied by a transfer and pledge of the shares of stock of the member or members so obtaining a loan or advance. Said shares so transferred and pledged shall be held by (the) corporation as additional or collateral security for the performance of the agreements, covenants and conditions of said note or bond and mortgage or deed of trust. Said note or bond and mortgage or deed of trust shall recite and set forth the number of shares transferred and pledged by the particular shareholder so borrowing, and the amount of money advanced thereon, and shall be expressed to be conditioned for the payment at the stated meetings, or at such other times as may be agreed upon, to the corporation of the dues on the number of shares so pledged and advanced upon, and the interest, or interest and premium upon the loan or advance for which said shares are pledged, and said note or bond and mortgage or deed of trust given,

> together with all fines chargeable upon arrears of such payment, shall remain in full force and effect until said shares shall reach the ultimate value thereof, and until all payments of dues, interest and fines and all other liens due to such association on account of such shares and loans shall have been fully paid, or said loan shall be otherwise sooner cancelled and discharged: * * * *"

And further at page 152,

> "Provided, the association may if authorized in its by-laws, withdraw any part or all of the payments made on said stock and credit the same on the bond or note secured by said deed of trust or mortgage in reduction of said loan."

We have above set out that shares of stock one owns in an association is complete and independent in itself and that a shareholder had the right to a loan or advance equal to the ultimate value of his shares and that upon said owner applying for a loan he would have to give a non-negotiable note or bond secured by first mortgage or deed of trust on real estate and accompany same by a transfer and pledge of the shares of stock he held. It will thus be seen that the giving of the note or bond and the deed of trust is also a separate and distinct transaction. The plan or scheme in which loans are paid being thus; that a member pays into the association on his stock and if, and when, said stock is matured the amount due on such stock will offset the amount such borrower owes on his note. However, in order to effect the set-off as above set out the stock is redeemable according to provisions of the statutes which will be hereinafter set out, the money paid in on stock is never credited to the loan unless as stated in the statute, supra, to-wit:

> "Provided, the association may if authorized in its by-laws, withdraw any part or all of the payments made on said stock and credit the same on the bond or note secured by said deed of trust or mortgage in reduction of said loan."

It will thus be observed that if the payments made on the stock are not withdrawn and credited to the bond or note, then, said payment, made on such shares of stock pledged, would not be to the credit of the note.

Section 5601, Laws of Missouri, 1931, page 153, reads as follows:

> "LOANS--WHEN AND HOW CANCELED.--A shareholder may repay a loan at any time upon application to said corporation, upon such terms and conditions as may be prescribed in the by-laws of the association; if there be no such by-laws, then, on settlement of his account, such borrower shall be charged with the full amount of the loan as originally made to him, together with all installments of dues, interest, premium and fines, moneys advanced for taxes, insurance, lien claims, and other sums of money, then remaining due and unpaid, and shall receive and be given credit, if he desires to surrender his shares, for the withdrawal value of the shares pledged and transferred by him as security for said loan, in accordance with the rule hereinafter provided for the withdrawal and cancellation of shares; and where the full amount of the agreed premium bid has been deducted at that time of making the loan or advance, then the borrower shall also be credited with one one-hundred and twentieth part of the amount of the gross premium bid for every month that the series in which the loan was made lacks of being one hundred and twenty months old; and the balance found remaining due, over and above such credit, shall be received by said corporation in full satisfaction and discharge of said loan or advance: Provided, that all settlements made at periods intervening between stated meetings of the directors shall be made as of the date of the stated meeting next succeeding such settlement; and provided further, that a shareholder desiring to retain his shares and membership thereunder may, at his option, repay his loan as above provided, without claiming credit for said shares as part payment of the amount of his debt whereupon said shares ahll be retransferred to him, and he shall assume and be entitled to all privileges of non-borrowing members, free, clear and discharged of and from any claim thereon by reason of said cancelled loan or advance."

Section 5599, Laws of Missouri, 1931, page 152, reads in part as follows:

> "In case any borrowing shareholder shall become delinquent in his obligations to the association

as provided by his loan contract, in a sum equal to or exceeding three months dues and interest, the association may proceed, according to law, to foreclose the mortgage or deed of trust given by such borrower as security for the loan. Etc. * * * *"

We now proceed to the proposition as to the withdrawals by shareholders.

Section 5604, Laws of Missouri, 1931, page 155, reads as follows:

"Any shareholder, or the legal representative of a deceased shareholder, wishing to withdraw from the said corporation, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, delivered to the association at or before a stated meeting of the directors, or at such other time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter. The member so withdrawing, or, if deceased, his legal representative, shall, if his stock be withdrawable according to the terms of the certificate and by-laws of the association, be entitled to receive the amount actually withdrawable at the time of making application for withdrawal according to the by-laws of the corporation and the provisions of the certificate of stock. At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders, whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors; and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of withdrawal upon the following basis: All shares on which notice of withdrawal have been filed for a period of 30 days, shall receive their pro-rata share of the funds available for

> withdrawal at the end of the preceding fiscal month, based upon the withdrawal value of the shares at the time distribution is made. Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

The above section provides the manner of withdrawals and we call your attention particularly to the latter part of such section that provides for the pro-rating of the funds, and particularly this part,

> "Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

From the above it will be noted that shares of stock may be divided for convenience into two classes, viz., first, stock pledged to a loan, and, second, stock not pledged but called "free shares". We have set out that all (both free and pledged) shares of stock are subject to withdrawal in the manner provided in Section 5604, except, that payments made on stock pledged to a loan or advance, and if authorized in association's by-laws, may, when paid, be credited to the bond or note (Section 5597, supra).

The question presented in your letter and enclosures being: The right of a borrowing shareholder, who is the owner of free shares, to have a withdrawal value of such free shares credited on his bond or note when the funds are not available to pay such shares and payment of such is pro-rated as provided in Section 5604, shall the amount received on the pro-rated basis be credited, or shall the entire withdrawal value of such free shares be credited? We think only the pro-rated amount should be credited.

However, at first glance, it would appear that such owner of free shares would have the right of set-off for the full amount of their withdrawal value, and such was the holding of the Court of Appeals of Maryland in the case of Hennighausen and Wolff, Receivers vs. August Tischer, 50 Md. 583, (we do not find where this case was ever cited in any other Maryland case as authority), quoting from the syllabus of the case:

> "A shareholder in a building association who had made a mortgage to it, can set-off, as against the amount due by him to the association under

> the mortgage, certain claims held by him against it, these claims consisting of balances due from the association to members who had withdrawn from the association and assigned them to the mortgagor; and their being nothing in the constitution of the association which made it inequitable to allow the set-off, having due regard to the rights of others.
>
> The appellee could be both shareholder and creditor of the corporation; as shareholder he is liable for his proportion of losses, but as creditor he is entitled to recover the amount due him, independently of all losses, as the balances assigned to him by withdrawing members must be presumed to have been ascertained, after allowing all deductions to which the withdrawing members, (the assignors,) were then subject or liable."

Contrary to this is the recent holding of the Supreme Court of Louisiana of July 20th, 1932, in the case of Conservative Homestead Ass'n. v. Dreyfus, 143 So. 356, wherein the Court in its opinion, l. c. 358, held the following:

> "Relator purchased full paid stock in the association from nonborrowers. By the purchase he acquired no greater right with respect to this stock than his vendors could enforce, and their enforceable rights are clearly fixed in the provisions of law we have quoted. To hold otherwise would subordinate the rights of nonborrowing stockholders and creditors of the association to those of its borrowing members, to the great prejudice of the former and possible liquidation of the association. Such a ruling would be in conflict with the well-recognized principle that the liability of the capital and assets of every corporation is, first, to meet the demands of its creditors. The rights of its stockholders are residuary.
>
> It is shown that, when this suit was filed, there was alarge number of applications on the withdrawal register of the respondent association. These applicants followed the procedure prescribed by law for the withdrawal of membership in the association. We are of the opinion that the only way in which full paid unpledged

> stock in a Louisiana homestead building and loan association, as long as there is an unsatisfied list of withdrawals on the association's register, can be surrendered and payment thereof enforced, is by, giving the notice and having the application, as required by section 11 of Act No. 120 of 1902, placed on the association's withdrawal list, for payment in due course. Etc. * * * * * *"

If a borrowing shareholder, who is the owner of free shares, could receive by credit on his note or loan the full withdrawal value of his free shares and not the pro-rated amount nonborrowing members receive then crediting the borrowing shareholder on his note or loan would be an indirect method of paying such free shares their full withdrawal value and discriminates between the owners of such free shares as between borrowing and nonborrowing shareholders.

In the case of Bertche v. Loan & Inv. Ass'n of Mo., 147 Mo. 343 (En Banc) l. c. 359 seq., the Court in its opinion held,

> "All members must participate equally in the profits and bear the losses, if any, in the same proportion. This is the fundamental law of building and loan associations organized under the different statutes throughout the Union. The provisions in the borrower's notes and deeds of trust sought to be released, to the effect that the shares of stock pledged to secure their payment shall reach their full par value at the end of one hundred months and the securities canceled and satisfied regardless of the earnings of the association, is clearly subversive of the legislative scheme governing building and loan associations and contrary to the clear letter and spirit of our statutes. Etc. "

And further,

> "Besides it would be inequitable and unfair. The rights of the borrowers must be determined from the standpoint of their relation to the non-borrowing stockholders. The former voluntarily applied to and became members of the association, and the by-laws not repugnant to the statute are binding upon them as well as upon the other members of the association. Etc."

And further,

> "The association being organized under a mutual plan must treat all of its members equally, and any contract whereby one stockholder obtains greater share of profits than another would be violative of the principle of mutuality between the stockholders. The plainest principles of justice and honesty clearly forbid that one class of stockholders equally meritorious should be compelled to suffer that others may profit thereby. Etc. * * * *"

See also, case of Reitz, Respondent, v. James Hayward, Assignee Appellant, 100 Mo. App. 216.

From the above and foregoing, it is our opinion that shares of free stock owned by a borrowing shareholder would not be entitled to have such shares credited in the amount of their withdrawal value on his note or obligation, but that such shares owned by him would be withdrawn according to the provisons of Section 5604, supra, and the pro-rated amount realized on such shares, if withdrawn, be placed to the credit, if such borrower directs, to his loan or obligation.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED: Harry G. Walther Jr (signed)
(Acting) Attorney-General.

JLH:EG

BUILDING & LOAN: Rent for office space not chargeable to appropriations made for B. & L. supervision.

9156 R S Mo 1929
File Folder 31

8-2

July 29, 1933.

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter of July 24th, 1933, which is as follows:

"Section 5576, R. S. Missouri, 1929, states:

'The board of the permanent seat of government is hereby required to provide the supervisor of building and loan associations and the state bureau of building and loan supervision with suitable office rooms.'

This leads me to the point in question. During the last session of the legislature the Bureau of Building and Loan Supervision was moved by the permanent seat of government from the Capitol Building to the Tribune Printing Company Building in order to make room for the legislature.

The sum of $225.00 was charged by the Tribune people for rent during the time we occupied space in their building. As per our instructions, the bill for this amount was presented to the permanent seat of the government, but it appears that the permanent seat of government takes the position that this is not an item for them to pay but an item to be paid out of the funds of the Bureau of Building and Loan Supervision.

I hereby refer this matter to your Department for an opinion. We feel that the section of the law above referred to is very clear and definite

in this matter and the rent item mentioned is an item that should be paid by the permanent seat of government rather than by the Bureau of Building and Loan Supervision. We will appreciate an opinion from you on this point."

Section 9156, R. S. 1929, provides in part as follows:

"It shall be unlawful during any session of the general assembly for any state official, board, commissioner, etc. * * * * *, without the joint written consent of the presiding officers of the senate and house of representatives first had and obtained, to use, occupy, or otherwise usurp or hold any room, office or apartment in the capitol building, etc. * *. And it shall be the duty of the commissioner of the permanent seat of government on or before the opening day of each term or session of the general assembly to have all such committee rooms, offices and apartments cleared of all other occupants and open and ready for the use of the general assembly and of the several committees thereof, with all the furniture and fixtures belonging to said rooms restored thereto and in proper place therein, etc. * * * * *."

By virtue of the above statute your offices were so moved by the Permanent Seat of Government.

Section 5576, Laws of Missouri, 1931, page 142, provides:

"There is hereby created a state bureau of building and loan supervision, which shall be under the management and control of a chief officer who shall be called the supervisor of building and loan associations. The supervisor of building and loan associations shall reside in and maintain his office at the city of Jefferson and shall devote all of his time to the duties of his office. The board of the permanent seat of government in hereby required to provide the supervisor of building and loan associations and the state bureau of building and loan supervision with suitable office rooms."

You want to know if your department should pay the rent for the term of its occupancy in the Tribune Printing Company's Building? To answer your inquiry it calls for an interpretation of Statute 5576, supra.

The Supreme Court in the case of Bowers v. Kansas City Public Service Co., 41 S. W. (2d) 810 l. c. 815, stated the rule, which prevails in this State, relative to interpreting a statute; we quote from the opinion:

> "* * * In construing a statute, the court must, if possible, give effect to the whole and every part thereof, provided the interpretation is reasonable, and not in conflict with the legislative intent. * * * * *."

The Legislature in no uncertain language demands that the Supervisor of the State Bureau of Building and Loan Supervision reside and maintain his office in Jefferson City. This is mandatory. The statute is silent as to where the rooms shall be located in Jefferson City nor does it in so many words say who is to pay for their maintenance. However, the statute does provide that the Board of the Permanent Seat of Government is hereby required to provide the Supervisor with suitable office rooms. We call attention to the words, "is hereby required to provide" and look to a definition of same.

C. J. Vol. 54, Art. II, page 691, defines "required" as follows:

> "REQUIRED. allowed; called for; commanded; compelled; demanded; necessary; made necessary; needed; made an essential condition; ordered; rendered necessary or indispensable; permitted; requested; that which is necessary; to be requisite. The term as sometimes used may not be synonymous with 'caused,' 'occasioned,' or 'needed.'"

C. J. also defines the word "provide", Vol. 50, Art. I, page 828, as follows:

> "PROVIDE. A. IN GENERAL. A word of comprehensive significance, meaning to forsee; to look out for in advance; referring to material things, to supply, furnish, or make ready for use; to furnish; to furnish or supply; to furnish, procure things in advance; to furnish with supplies or prerequisites; to get, collect, or make ready for future use; to make, procure, or furnish for future use; to make ready for future use; to obtain or make ready supplies or means for future use; to obtain so as to have ready or on hand when needed; to prepare; to procure as suitable or necessary; to procure beforehand for future use; to procure or furnish supplies, means of defense, or the like; to procure

supplies or means of defense; to provide for beforehand; to put into a state of preparation; to supply; to supply, afford, contribute; to take measures for counteracting or escaping something, often followed by 'against' or 'for'; to take measures in view of an expected or possible need; referring to the terms of a contract, statute, or constitution, to stipulate or establish, as a condition; to grant, lay down, or stipulate as a condition or provision; to establish, as a previous condition."

The statute says the Board of Permanent Seat of Government is hereby required to provide the Supervisor with suitable rooms and in our opinion this is a duty imposed upon the Board of Permanent Seat of Government to so provide suitable rooms for the Supervisor and his Department and any expense entailed or necessary by such providing, such as rent, should not in our opinion be paid out of the funds of the State Bureau of Building and Loan Supervision.

The Legislature made no provision in your appropriation for the paying of rent for office rooms. Laws of Missouri, 1933, pages 94 and 95, which are the funds appropriated to your Department and it provides:

"D. FOR OPERATION:
General expense: including communication, printing and binding, travel and other general expense and Material and Supplies; consisting of stationery and office supplies . . . . . .$30,825"

If the Legislature intended rent to be paid for office room by the State Bureau of Building and Loan Supervision, it would have provided for such.

In view of the above and foregoing, it is our opinion, that the item of $225.00, charged by the Tribune people for rent during the time your Bureau occupied space in their building, is not an item to be paid out of the funds of the Bureau of Building and Loan Supervision.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

BUILDING AND LOAN ASSOCIATIONS: RIGHT TO ENTER INTO AN AGREEMENT TO EXTEND PAYMENT OF NOTE AND DEED OF TRUST.

55 94 Laws 31

8-10

FILED

59

August 4, 1933

Honorable Ira A. McBride
Supervisor Building and Loan Associations
Jefferson City, Missouri

Dear Mr. McBride:

This Department acknowledges receipt of your letter of July 19, 1933, as follows:

> "Please note the inclosed letter received from the Central Savings and Loan Association of Marshall, Missouri, inclosing an "Extension Agreement".
>
> This Department requests your opinion as to whether or not the "Extension Agreement" as submitted meets with the requirements of the statutes governing Missouri Building and Loan Associations.
>
> We will appreciate your opinion on this matter at your earliest convenience."

The draft of the extension agreement attached to your letter in paragraph One thereof provides:

> "First parties agree to and by these presents do release, cancel and surrender to third party the said certificate No._____ of the capital stock of the said Central Savings & Loan Association,

> and the third party does hereby accept the surrender of said stock, subject to the provisions of this agreement, and releases first parties from the payment of further dues thereon."

Upon the surrender of the certificate as provided for in the quoted paragraph, the borrower would become a non-member of the association and the legal effect of the extension agreement would be to make a loan to a non-member of an association.

Section 5594, Laws 1931, page 149, provides:

> "* * * The moneys accumulated from payments on account of stock, interest, premium and fines, as aforesaid, or from any other source whatsoever, after due allowance made for necessary and proper expenses, and subject to the provisions hereinafter set forth respecting the withdrawal and cancellation of shares and accumulation of contingent fund, may, at times provided in the by-laws, be offered to such shareholder or shareholders who shall bid the highest premium for the preference or priority of right to have the loan or advance of a sum equal to to ultimate value of one or more of his or their respective shares* * *."

The above section further provides:

> "In case there shall be a balance of money remaining undisposed of at any stated meeting, the directors may, at their discretion, loan the funds so remaining on hand to others than stockholders on the security of prime unincumbered real estate or invest in obligations of the United States or of the State of Missouri, and may dispose of such loans and investments at any time the said funds are needed for making loans to members or for the other purposes of the association* * *."

Treating the borrower and beneficiary of the extension agreement as a non-member borrower, the same conditions in the association would have to exist before the association would be entitled to enter into the extension agreement as are required to exist where the funds of the association are loaned to a non-member borrower or are invested in the obligations of the United States or of the State of Missouri.

We further are of the opinion that before such an extension agreement is made the association should adopt a by-law authorizing such an agreement to be made.

We are further of the opinion that in the event it is necessary to foreclose the deed of trust after the extension agreement had been made, it would be necessary to go into a court of equity to foreclose under the deed of trust and extension agreement, for the reason that the extension agreement had been made a part of the deed of trust and had somewhat altered its terms and provisions authorizing a foreclosure. That only, of course, involves a matter of expense.

There would be a small advantage to the remaining members in that the shareholder had surrendered his stock and thereafter would not be entitled to share in any pf the profits of the Association.

The general right to make extension agreements affecting deeds of trust is recognized by the Supreme Court of this state and most of the other jurisdictions. In Sturgeon v. Mudd, 190 Mo. 200-209, the Supreme Court of this state said:

> "* * * The petition does not state a cause of action, because it fails to allege that there was any consideration moving from the plaintiff to defendant to support the promises and agreements alleged. A mere promise, unsupported by a valuable consideration, to grant an extension of time for the payment of a debt, or to postpone a sale under deed of trust, is not sufficient in law to bind the person promising."

See also 41 C. J. page 808, Section 952,

Roe v. Fleming, 32 Okl. 259, 122 Pac.496.

While the foregoing is true, we call your attention to a statement of law in 41 C. J. 582, Section 545, as follows:

> "Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgagee merely on the ground of such extension, unless perhaps, in accordance with general principle, where he occupies the position of a surety for the first mortgage debt and the extension is made without his consent."

It is apparent that some situations might arise or conditions exist that would involve an association which entered into an extension agreement, with the rights of holders of deeds of trust on the property described in the first mortgage executed and recorded subsequent to the execution and recording of the first deed of trust. These are matters that the attorneys for an association would have to pass upon at the time and we express no opinion on the subject, but merely call it to your attention.

Subject to what we have said above, whether or not it would be wise for an association to enter into an extension agreement is a matter to be passed on by the association.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

BUILDING AND LOAN -- Home Owners' Loan Corporation bonds may not be accepted by B & L. Associations.

August 7, 1933.

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letters of July 12th, 1933, which read as follows:

(1)
"Numerous inquiries are coming to this Department from various building and loan associations' officials and building and loan leagues asking as to whether or not building and loan associations will be permitted to accept the bonds of the Home Owners' Loan Corporation, which is now being set up by the national government throughout the nation.

In view of the fact that this is largely a legal matter, I am hereby referring this question to your office for your opinion.

That you may better understand this question which is being raised by the building and loan associations of the state, I am enclosing letter from Mr. Paul J. Arnold, President of the Kansas City Building and Loan League, which states the question, to my way of thinking, very clearly."

(2)
"Yesterday, I submitted to Hon. Roy McKittrick, Attorney General, request for an opinion as to

whether or not Missouri Building and Loan Associations can accept the bonds of the Home Owners' Loan Corporation in exchange for the mortgages they hold.

This question was first raised by the Kansas City Building and Loan League, but this morning I have a letter from Mr. J. L. McQuie, President of the Missouri State League at 1445 Syndicate Trust Building, St. Louis, Missouri, asking that I get the General's opinion on the same question. For your information, I am inclosing a copy of Mr. McQuie's letter."

The Home Owners' Loan Act of 1933, approved June 13, 1933, is an act to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debts elsewhere, etc. The act is quite lengthy and will not be set out only in part.

Section 4, sub-section "(a)" of the act authorizes the board to create a corporation to be known as the Home Owners' Loan Corporation, which is an instrumentality of the United States. Sub-section "(b)" fixes the amount of capital stock such to be owned by the Secretary of the Treasury and directs the Reconstruction Finance Corporation to allocate and make available to the Secretary of the Treasury the sum of $200,000,000 or so much thereof as may be necessary.

Sub-section "(c)" provides in part the following:

"The Corporation is authorized to issue bonds in an aggregate amount not to exceed $2,000,000,000, which may be sold by the corporation to obtain funds for carrying out the purposes of this section, or exchanged as hereinafter provided. Etc."

Sub-section "(c)" provides that same shall bear interest at a rate not to exceed 4 per centum per annum and that they are tax exempt.

Sub-section "(d)" provides in part as follows:

"The Corporation is authorized, for a period of three years after the date of enactment

> of this act, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to the date of the enactment of this act. etc."

The act defines certain terms used in same and the term "home mortgage" is defined as such,

> "The term 'home mortgage' means a first mortgage on real estate in fee simple or on a leasehold under a renewable lease for not less than ninety-nine years, upon which there is located a dwelling for not more than four families, used by the owner as a home or held by him as his homestead, and having a value not exceeding $20,000;"

There are other sub-sections and provisions of this act which we do not deem necessary to call attention to in writing this opinion. Our comments and quotations on and from the above act were solely for the reason to give some idea of what it intends to accomplish or its purpose.

The statutes of Missouri do not provide for the exchanging of bonds of the Home Owners' Loan Corporation for mortgages of borrowing shareholders held by building and loan companies. Section 5594, Laws of Missouri, 1931, page 149, provides how surplus funds may be loaned and we quote parts of said statute as follows:

> "The moneys accumulated from payments on account of stock, interest, premium and fines, as aforesaid, or from any other sources whatsoever, etc. * * * * * * * * * Be offered to such shareholders or shareholder who shall bid the highest premium for the preference or priority of right to have a loan or advance of a sum equal to the ultimate value of one or more of his or their respective shares; etc. * * * * * * * * * * * * * In case there shall be a balance of money remaining undisposed of at any stated meeting, the directors may, at their discretion, loan the funds so remaining on hand to others

> than stockholders on the security of prime unencumbered real estate or invest in obligations of the United States or of the State of Missouri etc. "

Section 5593, Laws of Missouri, 1933, page 182, provides in part as follows:

> "* * * , and invest in shares of such land bank of the State of Missouri, not to exceed ten per centum of the resources of such association at the time of such investment,* * *, it may invest in lawfully issued obligation of such land bank of the State of Missouri; also, upon the written permission of the supervisor of building and loan associations first had and obtained, any building and loan association may loan any of its funds on hand not needed for loans to its members, or the payment of matured shares or withdrawals, to other building and loan associations of Missouri. Etc."

Section 5597, Laws of Missouri, 1931, page 151, provides in part as follows:

> "For every loan or advance made as aforesaid, a non-negotialbe note or bond secured by first mortgage or deed of trust on real estate shall be given, accompanied by a transfer and pledge of the shares of stock of the member or members so obtaining a loan or advance. Etc."

Thus, the statutes limit building and loan companies to investing and loaning its money to the security hereinbefore enumerated. Building and loan companies are creatures of statute and may do only that which the statutes authorize.

If the building and loan companies substitute or exchange their first mortgages or deeds of trust for bonds of Home Owners' Loan Corporation, it would be an indirect method of investing its money in such bonds, which the statute does not permit. It is our opinion that legislation will be necessary before bonds of

Home Owners' Loan Corporation may be accepted by building and loan companies in lieu of their first mortgages or deeds of trust and until such time the companies may not accept the bonds in exchange.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH: G

BUILDING AND LOAN: Shares pledged as security for loans not to be sold as collateral but must be withdrawn and withdrawal value applied on loans.

September 2, 1933.

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Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your recent letter which reads as follows:

> "My examiners report that a certain Missouri building and loan association is making loans to their shareholders on their stock accounts and treating the stock certificates the same as a bank treats its collateral security. In other words, the association will advance the shareholder fifty per cent of the withdrawal value of his certificate taking from him a note of obligation, and upon failure to meet the note of obligation when due, the stock is put up and sold and the association profits the difference between the note and the total amount of the certificate.
>
> This department looks with disfavor on such a practice. We believe it is illegal, but before doing anything about the matter, we desire to have your opinion.
>
> As you know, a great many associations are unable to meet the withdrawal demands of their shareholders and in most cases this is no fault of the association, however, on the other hand it is no fault of the shareholder that the association is unable to pay him the cash value of his certificate or to loan him ninety per cent of his certificate as provided for by law. We feel that since the law protects

> the association against a run in times of stress and strain such as we are just going through, that the same law, out of fairness and justice, should protect the rights of the shareholder against having to forfeit his interests in the certificate at fifty cents on the dollar.
>
> This Department will appreciate your opinion on this matter at your convenience."

The second paragraph of your letter expresses our views concerning the matter you write. We quote:

> "This department looks with disfavor on such a practice. We believe it is illegal. * * * * * *."

Section 5597, Laws of Missouri, 1931, page 151, contains this provision:

> "Provided, however, that the shares of the particular corporation without other security, may, in the discretion of the board of directors, be accepted as security for loans or advances, to an amount not exceeding nine-tenths of the withdrawal value of such shares at the time, as shown by the books of such association."

The statute, supra, provides associations may loan money to its members on shares of stock, without other security, not to exceed, however, nine-tenths of the withdrawal value of such shares. Therefore, if, and when, a loan or advance is made the shares accepted as security are impressed with a lien. You state that a certain Missouri Building and Loan Association is not treating the shares as security for the loan but as collateral and upon default sell same as collateral. The statutes relating to building and loan associations do not permit of such practice. True, an association may loan on the sole security of shares of stock which have a fixed value at the time and if default occurs the shares may be canceled to repay the loan. But they have a withdrawal value and same has not decreased since the loan was made and the loan on which shares are pledged as security may not exceed nine-tenths of their withdrawal value. Thus, there is no guess as to the value of the security and it is

always sufficient to repay the loan at all times. To permit a shareholder to be taken advantage of as you state the association is doing is unconscionable.

We call attention to various provisions of the statutes that sustain our conclusion, i. e.,that the shares of stock pledged as security shall not be sold as collateral but same be canceled by withdrawal and the withdrawal value thereof be applied as credit to the loan.

Section 5590, Laws of Missouri, 1931, page 152, provides that when a mortgage is foreclosed the withdrawal value of the shares of stock shall be credited. We quote:

> "In the event of such foreclosure, the defaulting borrower, in addition to the amount loaned, as shown by the bond and mortgage or deed of trust given by such borrower, shall be charged with all dues, etc. * * *, and shall have and be given credit for the withdrawal value of the shares pledged and transferred by him as aforesaid, in accordance with the rule hereinafter provided for the withdrawal and cancellation of shares."

Section 5601, Laws of Missouri, 1931, page 153, has this provision:

> "A shareholder may repay a loan at any time upon application to said corporation * * * and shall receive and be given credit, if he desires to surrender his shares, for the withdrawal value of the shares pledged and transferred by him as security for said loan, in accordance with the rule hereinafter provided for the withdrawal and cancellation of shares; etc."

Section 5604, Laws of Missouri, 1931, page 155, has this provision:

> "Any shareholder * * * wishing to withdraw, * * *, shall, * * * be entitled to receive the amount actually withdrawable at the time of making application for withdrawal * * *."

From the foregoing it is our opinion that upon default by a borrowing member having only shares of stock pledged as security, such shares of stock shall not be sold as collateral but shall be canceled by withdrawal and the amount received after withdrawal placed to the credit of the note or loan, and the excess, if any, be paid to the borrowing member.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General

JLH:EG

BUILDING AND LOAN SUPERVISOR: Power to appoint local attorney discussed.

September 6, 1933.

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Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter which is as follows:

"Attached is a letter from the firm of Igoe, Carroll, Higgs & Keefe of St. Louis, which is self-explanatory.

I would like to have you give this Department a ruling on the question raised by Mr. Robert J. Keefe in the inclosed letter."

The appended letter to which you refer reads:

"I mentioned in the letter which I wrote to you today, in answer to your inquiry about some matters pertaining to the Homestead Building and Loan Association, that there is some uncertainty with respect to the appointment of attorneys in a case where the receivership proceedings were instituted prior to 1931 and the attorneys for the receiver were appointed by the Court.

I do not find in the statutes as they were prior to the 1931 amendment any provision authorizing the Supervisor of the Bureau of Building and Loan Supervision to appoint attorneys to represent him as receiver. There is in the 1931 amendment (Laws of 1931, Sec. 5627, p. 163), sub-paragraph 3 (p. 165), the following provision:

> 'The supervisor shall receive a reasonable compensation for his services in managing and conducting the affairs of such association and/or for his services as receiver, which, together with his necessary expenses, including his fees as supervisor or compensation as receiver and the fees of the local attorney, if one be employed by him, together with his necessary expenses, are to be paid out of said assets and to be fixed by the court, but shall not exceed 5% of the assets of such association.'

The above reference to 'the local attorney, if one be employed by him' is the only statement I can find in the statute which might be construed as authorizing the supervisor to appoint an attorney. I am doubtful of the proposition that this authorizes the appointment of an attorney to represent the supervisor in his capacity as receiver as distinguished from his capacity in performing other duties as superintendent. Ordinarily, in receivership actions the attorneys for the receiver are appointed by, or at least approved by, the court.

I brought this matter to the attention of Mr. Igoe and he suggested that it might be well for you to obtain the opinion of the Attorney General upon this question. I believe it would be advisable to do that."

Section 5579, Laws of Missouri, 1931, p. 142, provides in part the following:

> "The state bureau of building and loan supervision and the supervisor of building and loan associations shall have charge of the execution of the laws relating to mutual savings fund, building and loan associations, etc. * * * * * The supervisor of the bureau of building and loan associations shall have the power to institute in the name of the state of Missouri and to defend suits in the courts of this state and the United States. * * * "

Section 5622, Laws of Missouri, 1931, p. 160, reads as follows:

> "It shall be the duty of the supervisor of building and loan associations of the state of Missouri to administer and enforce the provisions of this article."

Thus, as supervisor of building and loan associations you have complete charge and control. Now as supervisor do you have power to appoint an attorney or who is the attorney that represents your Department as supervisor? The statute does not provide for appointment of an attorney by you. The Bureau of Building and Loan Supervision is a department of the State and it devolves upon the Attorney-General, as part of his duties, to advise and act if you desire an attorney.

Section 11274, R. S. 1929, reads as follows:

> "When required, he shall give his opinion, in writing, without fee, to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, superintendent of public schools, warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

Section 11275, R. S. 1929, reads as follows:

> "The attorney-general shall appear, on behalf of the state, in the supreme court, and have the management of and prosecute, or defend, as the case may require, all appeals and writs of error to which the state is a party, other than those in which the name of the state is used as nominal plaintiff in the courts below."

Section 11276, R. S. 1929, reads as follows:

> "The attorney-general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite of necessary to protect

> the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

Section 11277, Laws of Missouri, 1933, p. 177, reads in part as follows:

> "The attorney-general may at the request of any officer, board, Bureau, Commission, or Institution, or agent of the State, assign an Assistant Attorney General to perform the duties prescribed by section 11275 of this article before or upon the behalf of such officer, Board, Department, Bureau, Institution or Commission or agent, and may upon request as aforesaid from time to time reassign such Assistant."

You have called upon this Department on numerous occasions for advise concerning your duties as Supervisor of the Bureau of Building and Loan Associations and, as under the statute, we have performed our duty by giving you such opinions.

Section 5624, Laws of Missouri, 1931, p. 161, provides in part as follows:

> "It shall be the duty of the supervisor, in person or by one or more persons by him appointed for that purpose, who are not officers or agents of or in any manner interested in any building and loan association, to make a full and careful examination of the affairs of any and all associations in the state as often as, in the discretion of the supervisor, the condition of any association may require etc. * * *"

Section 5626, Laws of Missouri, 1931, p. 162, provides in part as follows:

> "No association shall cease to do business or attempt to make a voluntary assignment of its assets or in any other manner to liquidate its

> affairs prior to the maturity of all of its stock, except with the consent of two-thirds of its stockholders and the approval of the supervisor of building and loan associations."

And further,

> "If any association attempts to make such an assignment, the supervisor shall upon his own initiative take charge of the association and of its assets and shall manage and conduct its business."

And further,

> "Or if it shall appear to the supervisor from any report of such associations or from any examination made or caused to be made by him, or from any knowledge or information obtained from any other source, that such association has committed a violation of its charter or is acting unlawfully, or that such association is conducting its business in an unsafe or unauthorized manner, or that the assets of any such association are insufficient to justify the continuance of business by such association, or it shall appear to the supervisor that it is unsafe or inexpedient for any such association to continue to transact business, the supervisor shall communicate the fact to the officers or directors; such officers or directors shall be allowed sixty days in which to make the assets sufficient or to correct the illegal practices."

And further,

> "In case such assets are not made sufficient, or the illegal practices corrected within a time fixed by the supervisor, or if the directors request the supervisor so to do, the supervisor shall take charge of the association and its assets and manage and conduct its business."

Section 5627, Laws of Missouri, 1931, pp. 163 and 164, provides in part as follows:

> "Upon taking charge of an association under any of the provisions of this article, the supervisor

> shall as soon as practicable, ascertain by a thorough examination of its affairs, and appraisal of its assets, its financial condition; and if from such examination and appraisal it appears to the supervisor of such association is in a condition to safely resume business, he shall return the assets and the conduct of the association to its officers and directors."

Thus, as supervisor other duties are imposed upon you relative to building and loan associations whose conditions are as those mentioned in the foregoing two sections.

Section 5626, supra, also provides:

> "The possession of the supervisor in charge of the affairs and assets of such association shall be construed as the possession of the state of Missouri and that the property is in custodia legis and the placing of said property in the hands of said supervisor by the directors and/or the taking of possession by the supervisor and his appointment as receiver of said property by the circuit court, as provided in this article, shall not be construed as a proceeding on account of insolvency or that said association has committed an act of bankruptcy; but the said supervisor shall promptly proceed and continue to collect dues and interest from the stockholders and borrowers of the association and may bring and/or defend suits in the name of the association and may authorize and direct the foreclosure of deeds of trust and/or mortgages, and pay its operating expenses and in his discretion its debts to its general creditors, employ such help as he needs to manage and operate said association, including, if necessary, a local assistant deputy to represent the supervisor in his absence from the county, and a local attorney to represent him in all legal proceedings; * * * "

Section 5627, supra, also provides:

> "The supervisor may at any time after he takes charge of the assets and the affairs of an association, institute proceedings in the circuit court in the city or county in which said association has its principal office, and have himself appointed temporary receiver, until it is determined whether or

> not such association can resume business; or appointed receiver for the purpose of winding up its affairs, and the court shall upon such application, appoint the supervisor such receiver; and as such receiver the supervisor under order of the court in such proceeding make compromise and settle with the borrowers of such association the amount of credit to be allowed any loans on account of the value of the stock held as collateral to such loans, etc."

nd further,

> "The supervisor shall receive a reasonable compensation for his services in managing and conducting the affairs of such association and/or for his services as receiver, which together with his necessary expenses, including his fees as supervisor or compensation as receiver and the fees of the local attorney, if one be employed by him, together with his necessary expenses, are to be paid out of said assets and to be fixed by the court, but shall not exceed 5 per cent of the assets of such association. Any compensation received by the supervisor and/or as receiver as provided in this article other than his actual expense incident thereto and the fee of the local attorney, if one be employed by him, shall be turned in to the state treasurer for the credit of the department of state building and loan supervision."

From a reading of the above sections it will be seen that the supervisor upon taking charge of a building and loan association may do same as supervisor or as temporary receiver or as receiver. Section 5262, supra, provides that when the supervisor takes over an association as supervisor and/or temporary receiver in order to reorganize it that he shall have the power to appoint a local attorney to represent him in all legal proceedings (hereinafter limited). And Section 5627, supra, provides the fee and limits the amount thereof, of the local attorney, if employed, shall be paid out of the assets of such association and is fixed by the court.

Section 5628, Laws of Missouri, 1931, p. 165, reads as follows:

> "ATTORNEY-GENERAL TO ACT.--Such court proceedings shall be conducted by the attorney-general of the state, and in the name of the State of Missouri as plaintiff, at the relation of said supervisor. The actual expenses of the attorney general shall be paid out of the building and loan supervision fund in carrying out the provisions of this section."

Thus, Section 5628 provides that all court proceedings necessary and incident to the taking over of a building and loan association by you as supervisor, temporary receiver or receiver, shall be instituted by the Attorney-General. And, Section 5626 provides that when you have taken over an association as supervisor and/or temporary receiver for the purpose of operating it that you have the right then only to employ a local attorney to assist you in all legal proceedings. Such legal proceedings would be for the purpose of collecting assets, payment of claims etc, and to advise the local "assistant deputy" but such local attorney may not represent you in court proceedings instituted by or against you. We again emphasize the fact that all suits are brought in the name of the State of Missouri, Section 5579, supra. A local attorney menas one living and residing where the home office of such association is located.

The law does not provide for the appointment of an attorney either local or general to represent you or do anything in your behalf when you are appointed receiver, such being required of the Attorney-General.

From the above and foregoing we have shown that you as supervisor have complete charge and control over all building and loan associations authorized to do business in Missouri; it being part of your duties to examine into their affairs to ascertain if they are complying with the statutes. If an association is not conducting its business in the menner prescribed by law then it becomes your duty to take charge of it and conduct its business for it. After taking over such association, if it is possible or advisable to reorganize it and return the management of same to its board of directors, then such is your duty. However, if such association's affairs warrant the liquidation thereof then you are appointed receiver by the court which changes your status regarding that association from supervisor to receiver. When you are appointed receiver you may not appoint an attorney to represent you as such. The statute then requires the Attorney-General to perfrom all legal matters for you. Even now any questions arising as to your receiverships you submit to us and we advise you accordingly, and the opinion requested in this instance illustrates this fact.

The enclosed letter shows that the association mentioned therein is inreceivership for the purpose of winding up its affairs and that you have been appointed receiver. Mr. Robert J. Keefe, writer of the letter addressed to you, expresses doubt as to your capacity to appoint an attorney when an association is in your custody as receiver. We quote:

> "I am doubtful of the proposition that this authorizes the appointment of an attorney to represent the supervisor in his capacity

as receiver as distinguished from his capacity in performing other duties as superintendent."

It is our opinion that (1) this Department is required to represent you as supervisor on all matters concerning the Bureau of Building and Loan Associations; (2) that when it becomes necessary for you to take charge of an association, then this Department is required to file all court proceedings necessary and incident thereto; (3) that when you take charge of an association you may appoint a local attorney to represent you and/or the local assistant deputy while a plan of reorganization is being effected or until you return the business affairs of the association to its board of directors. But the duties of such local attorney shall not be to represent you in the bringing or defending of any suit in court, as such is required of the Attorney-General; (4) That if an association is placed in your care and custody as receiver by the court, then only this Department represents you as is required by the statute. Therefore it is unnecessary to pass upon the question submitted, as to whether you appoint the local attorney or must his appointment be approved by the court, as you or the court may not do same but the statute requires such duties to be performed by the Attorney-General. We are mindful of the custom heretofore existing relative to the appointment of local attorneys when associations are in your custody as receiver, but such, in our opinion, violates the spirit as well as the letter of the statute.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

BUILDING AND LOAN: Withdrawing shareholders not entitled to subsequent dividends or earnings.

560 Laws 31

September 8, 1933.

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43.

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge receipt of your letter which reads as follows:

"A majority of the building and loan associations operating in Missouri have withdrawal notices on file in considerable amounts. Practically all of such notices have been on file for some time and are being paid on a pro-rata basis as the statutes provide.

In the ordinary course of business, it will be quite some time before the notices filed could be paid and it is possible that it would be as long as three years before the full amount of the notices on file could be paid from the usual receipts of the associations.

Section 5604 R. S. Missouri, 1931, governing withdrawals reads in part as follows:

'Many shareholders wishing to withdraw from said corporation, shall, subject to the provisions of the by-laws and its certificate of stock and the limitations hereinafter mentioned have power to do so upon giving one month's written notice * * * * the member so withdrawing * * * * shall be entitled to receive the amount actually withdrawable according to the by-laws of the corporation and the provisions of the certificate of stock.'

A large number of Missouri building and loan associations have by-laws covering the payment upon withdrawals that reads in part as follows:

> 'Upon withdrawal, the certificate holder shall be entitled to the amount paid in with all dividends that have been declared and credited and in addition thereto interest from the last dividend date to the time of withdrawal at such rate as may be fixed by the Board of Directors.'

Practically all of the officers of Missouri Associations take the position that the shareholders who have filed notices of withdrawal are not entitled to participate in the earnings of the association after the date of filing their notices. This position is also taken by the upper courts of a number of states and is generally considered fair and just.

It seems clear that most of the associations will declare at least two semi-annual dividends and possibly as many as three, four or five such dividends before the last of the notices filed could be paid from the usual receipts of the association.

A great many shareholders who have filed notice of withdrawal have written this Department complaining that the action of the officers of the association in denying them the right to participate in the earnings after the date of their notice is arbitrary and unfair. They have asked for advice as to their rights in the matter.

We will appreciate your opinion in regard to associations, confronted with withdrawal demands they will be unable to meet for a long period of time, being within their rights under the law and the by-law as quoted in denying the shareholders who have filed withdrawal notices the right to participate in such dividends as will be declared in the future while their notices of withdrawal are unpaid."

In your letter you state that "practically all of the officers of Missouri Associations take the position that the shareholders who have filed notices of withdrawal are not entitled to participate in the earnings of the association after the date of filing their notices. This position is also taken by the upper courts of a number of states and is generally considered fair and just."

On September 2nd we wrote you requesting the names and citations of the decisions of these upper courts and on September 6th, 1933, you replied thereto with this statement:

> "In reply to your letter of September 2nd, requesting citations on the matter as to whether shareholders on withdrawal in a building and loan association are entitled to dividends, I am handing you the proceedings of the Eleventh Annual Southwestern States Group Building and Loan Conference held at Denver, Colorado, July 18-19, 1933, and refer you to the speech of D. H. Theard on the subject 'Recent Building and Loan Jurisprudence "Way Down South in the Southwestern Group", which reviews this matter rather thoroughly."

We read this speech of D. H. Theard very carefully and could not find anything therein in point. However on page 105 this was said:

> "The applicable Louisiana statute contained no rule on the subject, and some associations paid dividends to members on the withdrawal list, while other associations did not.
>
> The Reliance Homestead abolished the payment of dividends to shareholders on the withdrawal list by a new by-law, and claimed the retrospective operation of this new rule."

Mr. Theard then quoted from the Louisiana Court (Orlando v. Reliance Homestead Association). We re-quote:

> "* * * . . . it seems to me that it would be going a bit too far, in the absence of clear legislative mandate, to require that he should also, in addition to these preferential rights, share in the profits made during the period

> required to accumulate a sufficient amount to retire his shares. He cannot eat his cake and have it. Where those who have invested in homestead shares, demand the return of their money, it is manifest that the homestead association must be accorded time to accumulate cash for that purpose. Etc."

And further, quoting from the speech:

> "The entire subject matter in Louisiana is now covered by a comprehensive statute on building and loan. * * * * * * * * * * * * * * * * * * *"

We have not been able to find any case in other jurisdictions in point on the subject stated in your letter. It must always be borne in mind that the statutes of Missouri determine the limitations of a building and loan association, consequently if a decision of another court is referable to a statute in that State such decision would not be applicable to Missouri building and loan associations. Missouri's statute covers the point in inquiry. Your letter, however, confuses withdrawing shareholders with that of shareholders who have filed notice of withdrawal.

At the outset we desire to call your attention to Section 5604, Laws of Missouri, 1931, page 155, which provides the time one becomes a withdrawing member:

> "Any shareholder * * * wishing to withdraw * * *, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, * * * or at such other time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter."

The above fixes the time one is placed on the withdrawal list and such would be construed and considered the time of making application for withdrawal.

We state the premise upon which this opinion is written, namely, whether or not a withdrawing shareholder is entitled to dividends or earnings of a building and loan association when the withdrawal amount thereof is pro-rated because of insufficient funds on hand applicable to their payment and the withdrawing

shareholder will not be paid until long after he has withdrawn. Above we have defined what constitutes a withdrawing shareholder and this definition should be borne in mind with reference to the premise above stated.

Section 5604, supra, provides in part:

> "The member so withdrawing, * * *, shall, if his stock be withdrawable according to * * * be entitled to receive the amount actually withdrawable at the time of making application for withdrawal etc. "

And further,

> "Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

Section 5593, Laws of Missouri, 1933, page 183, in dealing with who is entitled to dividends and earnings has this provision:

> "There shall be issued to every shareholder a certificate signed by the president and secretary of the corporation, and evidenced by its corporate seal, setting forth distinctly and clearly the class of stock for which he has subscribed, the dividends of earnings which it may draw, and the withdrawal value which it may have at any time, and also the time when the said stock shall be withdrawable. Such certificate of stock together with the by-laws and the provisions of this chapter shall at all times determine the liability of the association to the stockholders and the relations of the stockholder and the association."

Therefore, only shareholders receive dividends and earnings.

The United States District Court in the case of In Re Puget Sound Savings and Loan Ass'n. 49 F. (2d) 922, l. c. 925, said:

> "The shareholders are bound by the statutory provisions and by-laws not inconsistent with the statute."

The Kansas City Court of Appeals in the Appeal of Powell and Doyle, 93 Mo. App. 296, l. c. 300, said:

> "The defendant (Equitable Savings and Loan Association) is purely a creation of the statute, having only such powers as the statute gives and such as are necessarily implied. But we have not seen any authority which in the least lends countenance to the suggestion, that when a corporation is clothed with certain limited powers, guarded with the most explicit directions for the manner of their exercise, that it is in the province of such corporation to depart from such direction in the conduct of its business."

Thus, a building and loan association may not have any by-laws that are contrary to the statute and their business shall be conducted in conformity thereto. We look to the statute then to see what a shareholder is entitled to receive when he becomes a withdrawing member. Section 5604, supra, page 155, in part provides:

> "The member so withdrawing, * * *, shall, if his stock be withdrawable according to * * * be entitled to receive the amount actually withdrawable at the time of making application for withdrawal etc."

The quoted parts of sections 5593 and 5604, supra, definitely fix the amount a withdrawing member (shareholder) receives, to-wit, "the amount actually withdrawable at the time of making application for withdrawal." For the purpose of argument, assume that a building and loan association has sufficient funds applicable to pay withdrawals and a member withdraws and is paid. Does such withdrawing member receive any further dividends or earnings after he has been paid? Certainly not. Then why should a withdrawing member receive any dividends or earnings simply because the association does not have funds on hands in which to pay him, but, as is required by law, the association must pro-rate the payments.

It is true that a withdrawing member never becomes a creditor of the association but his status remains that of a shareholder, Section 5604, supra. However, such withdrawing member is not a shareholder in the sense that it entitles him to subsequent dividends or earnings but is classified as a "withdrawing" shareholder entitling him to the rights and privileges of such. Thus, when members withdraw the association would have withdrawing and non-withdrawing shareholders. The latter would be entitled to subsequent dividends and earnings for the reason that such members would continue to pay into the association on their dues and obligations and would not have the preferential rights of withdrawing members. Therefore, a withdrawing shareholder is not entitled to earnings or dividends because:

first, when one withdraws, his dues and obligations cease and he puts no more money in the association; second, he becomes preferred over non-withdrawing members as to the funds on hand for payment of withdrawal; third, he would be entitled to share in the profits made during the period required to accumulate a sufficient amount to retire his shares. Thus, to prohibit members from participating in the dividends or earnings after withdrawal, Section 5684, supra, was written into the law limiting such withdrawing shareholders to only "the amount actually withdrawable at the time of making application for withdrawal". If withdrawing members were not restricted to the amount actually withdrawable but allowed to participate in future earnings and dividends then it would be inequitable as between them and non-withdrawing shareholders.

It is our opinion that withdrawing members are not entitled to dividends or earnings of a building and loan association even though the full withdrawal value of his shares is not paid and he receives only a pro-rated amount of same each month.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

BUILDING AND LOAN -- Home Owners' Loan Corporation bonds.

September 21, 1933.

9-25

FILED
59
45

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

On August 7th, 1933, we rendered an opinion which held:

> "If the building and loan companies substitute or exchange their first mortgages or deeds of trust for bonds of Home Owners' Loan Corporation, it would be an indirect method of investing its money in such bonds, which the statute does not permit. It is our opinion that legislation will be necessary before bonds of Home Owners' Loan Corporation may be accepted by building and loan companies in lieu of their first mortgages or deeds of trust and until such time the companies may not accept the bonds in exchange."

Since this ruling, based upon the existing law, considerable interest has been manifested; so much so that His Excellency, the Governor, has given the assurance that in the Special Session to be shortly called he will, to the extent of his power, to promote President Roosevelt's National Recovery Program, urge changes to conform present State laws to that program. To do this means helping distressed home owners.

Reasonably assured, therefore, that legislation will be enacted permitting the acceptance of Home Owners' Loan Corporation bonds by building and loan associations on distressed loans, we advise that as a matter of policy to be pursued in the individual case, such bonds may be accepted according to the plan hereinafter set forth. We are placing this suggestion of acceptance as a determination of policy and not as a question of law.

In our opinion of August 7th we show that building and loan associations may invest their funds in several particular ways. We restate: first; on shares of stock owned by shareholders; second; on prime unencumbered real estate, third; to other building and loan associations, fourth; in lawfully issued obligations of the Land Bank of the State of Missouri, fifth; on bonds of the United States, sixth; bonds of the State of Missouri. However, due to the depressed condition in all lines of business during the past few years and the lack of employment of a large percentage of home owners, many mortgage loans have fallen in arrears, valuation of real estate has decreased and unpaid taxes have absorbed, in some cases, entire equities. In other instances, building and loan associations have been compelled to foreclose their loans with the result that the up-keep, insurance and taxes on such real estate have far exceeded the rental value derived from such property, which has added a great burden to associations. These costs might continue for some time and, if, and when, the property is sold a loss would be incurred. Therefore, to protect the shareholders of building and loan associations in this emergency and to help distressed home owners, we suggest that in each particular case where the home owner is distressed and the only means and method available whereby building and loan associations may compromise an existing liability, then such mortgages may be exchanged for bonds of the Home Owners' Loan Corporation. Thus, when bonds are exchanged, it will be a method of repayment of a loan by borrowing shareholders (Section 5601 Laws of Mo.,1931). Second, when building and loan associations by foreclosure have title to property by virtue of such, then said bonds may be accepted in exchange for the real estate thus acquired. (See Section 5600, Laws of Mo., 1931, p. 153.)

In no event shall these bonds be considered or acquired as an investment and if acquired such should be listed as "collections" or "compromise of an indebtedness" or "securities acquired by virtue of selling a liability", respectively, as the case may be. It should be your further policy that these bonds be disposed of at an early practicable date to the best advantage of building and loan companies. It is our understanding that the value of these bonds have greatly increased and will remain constant; that there is a market for them; and further, that such will be accepted as collateral for loans by Federal Reserve Banks and by Federal Home Loan Banks. We again remind

you that the principal of these bonds are not guaranteed, but the interest of four per cent is guaranteed for a period of eighteen years.

Before such bonds may be accepted a resolution must be adopted or the by-laws of building and loan associations changed to permit them to do the things suggested in this opinion. It will be your duty before these bonds may be accepted, in any event, to approve such by-laws or resolutions.

We list some of the advantages derived by permitting building and loan associations to accept these bonds:

(1) By building and loan associations accepting these bonds, it will insure Missouri a greater, or at least its proportionate share of such allotted to it, as the associations own a majority of mortgages held in this State.

(2) It will be advantageous to home owners who are borrowing shareholders or who have lost their homes by foreclosure.

(3) Building and loan associations will be able to mitigate their losses on undersecured loans.

(4) Building and loan associations may pay withdrawing shareholders with these bonds if such members will accept them.

(5) The collateral feature for loans.

(6) By using the bonds as a means to liquidate unmarketable assets (real estate).

(7) It will take certain kind of real estate off the market, which at present has no sale value and thereby increase the value of remaining real estate.

It is our conclusion and opinion that you may promulgate a policy in accordance with the above and foregoing suggestions for such a period of time as required for the enactment of proper

legislation. We have in good faith relaxed our position on this matter, believing in the assurance given, the statutes will be changed in such manner as to conform with this opinion.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General

JLH:EG

)ING & LOAN: "Mutuality" necessary in all Building and Loan plan of stock.

11-17

November 15, 1933.

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

We are in receipt of the following communication from you:

> "The American Home Building and Loan Association of St. Louis is requesting formal approval of a new plan of stock which they propose to issue.
>
> In view of the fact that the plan is unique and differs somewhat from the ordinary plan of building and loan procedure, I hereby submit it to your Department for an opinion as to whether or not it conforms with the law and can be approved by this Department.
>
> I am inclosing a letter received from the American Home Savings and Loan Association setting forth the salient features of the proposed plan of stock that you may have their arguments and understand their viewpoint on same."

The American Home Building and Loan Association letter referred to by you reads:

> "Referring to conversation I had with you relative to the 15 year loan plan, the papers of which were sent to Jefferson City for your approval, I enumerate herewith a few of the salient points in favor of this plan as far as the borrower is concerned, likewise the Association.

From the borrowers point of view:

This plan we believe will fill a long felt want for a long time loan with small monthly installments.

It carries a rate of 6% interest, which rate seems to be the prevailing rate of interest in the minds of the average borrower.

It gives the borrower the benefit of a semi-annual reduction in the amount of the monthly payments.

It permits of monthly payments being credited semi-annually on the loan and for each $100.00 reduction of principal one share of stock is canceled, making the borrowing shareholder only liable for approximately one share of stock for each $100.00 unpaid on the loan.

From the Association's point of view:

This plan is an addition to and not a substitution for our present regular Building and Loan plan of loan.

It will, be believe, enable us to attract additional loans to the Association, thereby enabling us to keep our funds steadily employed.

It will fill what we believe a long felt want for a 6% interest loan.

It will attract, we believe, loans from borrowers who prefer to pay a specified rate of 6%, get a reduction semi-annually in interest rather than pay a higher rate of interest and receive as an offset semi-annual dividends.

It will enable us to regulate commission charges according to the money market conditions, whereas under present plan a stipulated rate is made, irrespective of money market conditions.

We believe that the future holds out the opportunity to attract money to us at lesser rates than we are now paying, which benefit we want to give to a certain extent to the borrowing shareholder and this plan will fill this need.

We are not doing away with our present plan and will continue it for those members who desire it. The new plan can be operated on the participating plan, that is, dividends not exceeding 3% will be allowed on monthly payments, providing the same are not withdrawn and applied to the loan but it is our wish that the borrower does apply it, even though by doing this he does not receive dividends on the small monthly payments, for in the long run he will be the gainor for it is our desire to give to the borrower the best possible plan which safety and fair dealing will permit.

We have gone over this plan of loan and we can see no objectionable features to it and we sincerely trust that your office as well as the Attorney General, to whom you submit the plan, will approve same immediately so that we can put the plan on the market by September 1st.

We are enclosing herewith schedule for this plan of loan showing how interest will be reduced as loan is being paid off."

The schedule appended to the American Home Building and Loan Association's letter, shows in part the following:

"Schedule for 15-year New Loan Plan at 6% interest and Monthly Payment on account of dues of $5.00 per month. Dues to be withdrawn semi-annually on the 15th day of February and August and applied direct to the loan, interest for succeeding months to be adjusted accordingly.

Dues	Interest	Withdrawn	Amount of Loan
5.00	5.00		1000.00
5.00	5.00		
5.00	5.00		
5.00	5.00		
5.00	5.00		
5.00	5.00		
		30.00	970.00
5.00	4.85		
5.00	4.85		
5.00	4.85		
5.00	4.85		
5.00	4.85		
5.00	4.85	30.00	940.00

	5.00	4.70		
	5.00	4.70		
	5.00	4.70		
	5.00	4.70		
	5.00	4.70		
	5.00	4.70	30.00	910.00
	Etc."			

And further,

	"5.00	.80		
	5.00	.80		
	5.00	.80		
	5.00	.80		
	5.00	.80		
	5.00	.80	30.00	130.00
	5.00	.65		
	5.00	.65		
	5.00	.65		
	5.00	.65		
	5.00	.65		
(15th year)	105.00	.65	130.00	0.00"

Other papers submitted include:

(1) Copy of the non-negotiable promissory note.

(2) Copy of "installment stock" to be used.

(3) Copy of by-laws.

1. The non-negotiable note contains among other things the following:

"The undersigned promises to pay to the * * * *, on or before 15 years after date, the principal sum of * * * * * * * Etc."

Also,

"The undersigned hereby requests that dues and dividends credited on the shares shall be applied on the 15th day of February and August to reduce the principal sum, which the Association hereby consents to do; interest for subsequent months to be adjusted."

Further,

> "Upon final payment of the entire indebtedness, the shares pledged shall be canceled and the value may be applied as a credit on this note."

Also,

> "For each $100.00 reduction of the loan one share of the stock pledged shall be canceled."

2. The "installment stock" contains, among other things, the following:

> "and agrees to pay _____ Dollars and _____ Cents as dues for one hundred seventy nine months and balance _____ Dollars and _____ Cents as dues in one hundred eighty months on the shares represented by this certificate, less deductions, if any, and dividends credited thereon, equal the par value of One Hundred Dollars ($100.00) per share, then the shares shall be deemed to have matured."

Also,

> "Dues paid on these shares and dividends credited may be withdrawn on the fifteenth days of February and August to be applied as a credit on the loan in connection with which these shares are assigned and pledged but if not withdrawn the same shall be entitled to participate in the dividends declared by the Board of Directors at a rate not exceeding 3% per annum."

Also,

> "For each $100.00 reduction of the loan one of the shares of stock pledged shall be canceled."

3. The by-laws provide in part (page 15):

> "The capital stock of the association may be issued in INSTALLMENT STOCK, PRE-PAID STOCK and FULL PAID STOCK, in such classes, in such amounts and at such times as the Board of Directors may deem advisable, but no monthly payment INSTALLMENT STOCK shall be issued, the estimated maturity of which shall be for a longer period than fifteen years, nor shall any withdrawal or membership fee be charged on any monthly payment INSTALLMENT STOCK greater in amount than two per cent of the par value thereof, exclusive of any reduction in dividend rate as may be provided in the certificate, if the stock represented by such certificate is withdrawn prior to maturity. The difference between the estimated rate of dividend, if carried to maturity, and the earnings allowed as provided in any certificate issued, shall in no way be considered a withdrawal fee. The par value of each share shall be One Hundred ($100.00) Dollars."

And further,

> "When payments, less deductions, if any, and dividends credited thereon equal the par value of any share, then such share will be deemed to have matured."

And further, page 19:

> "The dividends so declared shall be credited as of the last day of February, or August, as the case may be, provided, however, unless otherwise stipulated in the certificate of stock, the amount entitled to participate in dividends shall be the par value of Full Paid shares, and the book value of all Installment shares,"

Further, page 20:

> "All dividends credited on Installment stock and Prepaid stock unless withdrawn shall thereafter form a part of the capital invested on account of such shares for the purpose of division of future profits unless otherwise provided in the certificate of stock."

I.

Thus, from the above, it is readily ascertained that if one borrows (say one thousand dollars), such borrower repays said amount together with 6% interest on unpaid balances. The borrower never participates in the dividends; neither are such applied toward the reduction of the loan for the reason that semi-annually, to-wit, on the 15th day of February and August the amounts paid as dues are applied on the loan and when one hundred dollars is paid on the loan one ($100.00) share of stock is canceled. (Note By-laws, page 19: "The dividends so declared shall be credited as of the last day of February, or August, etc., * * *, the amount entitled to participate in dividends shall be the par value of Full Paid shares, and the book value of all Installment shares,") Thus the shares of stock would have no book value at any time. It is simply a straight loan plan; the borrower paying back dollar for dollar and the company receiving back dollar for dollar loaned together with 6% interest on amounts due on loan. The stock transaction is a fiction. It is just as stated in the association's letter, supra:

> "It will attract, we believe, loans from borrowers who prefer to pay a specified rate of 6%, get a reduction semi-annually in interest rather than pay a higher rate of interest and receive as an offset semi-annual dividends."

This plan is similar to what is described by Joseph H. Sundheim in his book, Sundheim Building and Loan Associations, Third Edition, page 18, as the "Reducing Payment Plan", in which he says:

> "Under this plan the stock payments of the borrower are applied at regular fixed periods on account of the principal of his loan. At

> the end of each fiscal period the borrower is charged with accrued interest and premium (if any) and given credit for all payments made, and the remainder is a new principal account for the next fiscal period."

We emphasize this,

> "It will be seen that under this plan the membership of the borrower is a mere fiction, and should losses occur, or the association become insolvent, the borrower, having no stock credits, all having been applied to reduce his debt, he escapes that liability, and the entire burden must be borne by the saving members."

And further,

> "This plan is legal under present legislation in nearly every jurisdiction in the United States as the technical requirements of membership are complied with."

We shall hereinafter determine whether or not this proposed plan is legal under the Missouri statutes.

II.

> "As stated in the cases before referred to, these building and loan associations are peculiar. They are conducted entirely on the mutual plan. The stockholders are members, not only in the usual sense of stockholders, but are partners with each other; the corporation is in the nature of a co-operative association."
>
> Layton v. Hough, 169 Mo. App. 213, l. c. 227.

> "As it is sometimes stated in the statutes relating to, and in the charters and constitutions of, building and loan associations, the principal object of a building and loan association is to create a loan fund for the benefit of its borrowing members, the underlying ideas being that, by means of the system

of small periodical payments provided, people of limited means will be enabled to become the owners of homes, and thrift, economy, and good citizenship will thereby be promoted. By reason of these favorable results attending the operation of these associations and their beneficent purposes, they have, especially before they attained their present tremendous growth, been favored and granted special privileges by the various legislatures, such as permission to charge high rates of interest and exemption from taxation. However, with the growth of these organizations, evils have crept in, the privileges granted have in many instances been abused by unscrupulous officer, and, in recent years, the courts have been compelled to subject their transactions to closer scrutiny.

"Building and loan associations are peculiar corporations in that, at the inception, a share therein has only a nominal value, and payment therefore is made at the end, rather than at the beginning, and in that the capital may be diminished at the will of the stockholder by his withdrawal. While it may be stated generally that their basic and essential principle is mutuality, and that they are neither corporations nor partnerships to the fullest extent, the courts have found it difficult and practically impossible to qualify them accurately with other bodies."

9 Corpus Juris, pp. 920, 921 and 922.

Observe part of Section 5593, Laws of Missouri, 1933, page 182:

"Any corporation heretofore organized or now existing under the laws of this state relating to 'mutual saving fund, building and loan associations,' and any corporation organized in pursuance of the provisions of this article shall have all the powers provided for in this article, and the object of such corporation

> shall be the accumulation of a capital in money, to be derived from payments by its members in periodical installments or otherwise, at such time and in such manner as shall be provided in the by-laws, and from the profits and accumulation arising from the investment of such payments."

In Kansas City v. Mercentile Mutual Building & Loan Association, 145 Mo. 50, l. c. 52, the court said:

> "The property of building and loan associations is excepted from assessment and taxation by state law; that law providing for the assessment and taxation of such corporations by assessing the shareholders on their shares, and from them collecting the tax."
>
> See Section 9768 R. S. Mo. 1929.

In Bertche v. Equitable Loan and Investment Association of Missouri, et al, 147 Mo. 343, l. c. 357 et seq., the Supreme Court, en Banc, said:

> "If the statute governing building and loan associations, and the by-laws passed in conformity therewith, fixed no definite or arbitrary period at which the shares shall reach their par or maturity value, for a greater reason the association, a mere creature of the statute, can not fix an arbitrary period of one hundred months or any other time within which the shares of its members shall reach maturity.
>
> "The law governing the formation of building and loan associations contemplates a scheme for paying the capital stock in instalments, so long as such periodical payments, taken in connection with its other income arising from fines, dues, interest and profits, are necessary in order to bring the stock up to par. This value represents the amount which the shares are expected to be worth, when, together with the profits upon investments, etc., it has accumulated to the amount contemplated at

> the outset. The actual value of the share may be very small indeed during the first years of the association's existence. But the par value is fixed from the beginning. The association may be said to have accomplished the purpose of its organization when by the periodical payments made by its members, and the gains therefrom, each member has paid up to the amount fixed by its charter. (Endlich on Bldg. Assn's (2 Ed.), sec. 12.)
>
> "It is a well settled proposition that the transaction between the association and its members is not a loan in a direct sense of the word, but only a prepayment or advancement to the shareholders of that to which he will ultimately be entitled."

And further,

> "Endlich on Building Associations (2 Ed.), section 331, in speaking of the advancements of the association to its borrowing members, thus states the rule: 'as to the repayment of the principal, the design is most simple. The member, bound by his original contract with the association to make stated periodical payments of fixed amounts, strengthens his undertaking, to the greater security of the association which has parted with its funds to him . . . . . by mortgaging his property as a pledge for such discharge to the end of the society's existence . . . . . The member, mindful of the impossibility of evasion, continues to pay his regular dues. These, together with all similar payments made by the other members, and together with all the revenues from whatever sources flowing into the society's coffers, are added to the common treasury and again made the means of securing new profits, until the period arrives when the association is ready to wind up. The shares, his own interest in the society's accumulations, have now reached their contemplated value. But the borrower has anticipated that result, and in so doing has given the association the right to make itself whole, to reimburse itself not only

for what it has given him, but also for what he has agreed to add to that amount by way of premium offered, out of the sum standing to his credit as a member of this society. That sum is necessarily the amount he has received, plus the premium he has bid. The society appropriates this and the principal is repaid.'

"Again at section 338, the same author says: 'Whatever is paid by the borrower by way of premium, interest, dues, fines, etc., becomes a portion of the common fund, and being reinvested adds its profits to the great bulk in which he has a proportionate interest; and these being again reinvested, and so on ad infinitum, continue to swell the assets of the association until in due course of time, distribution can be made, and advanced members may be relieved of their obligations. Thus the borrower himself profits by his own payments.'

"The question as to the rights and obligations of the stockholders and the association has received much consideration of late in several of our sister States, and the trend of the more recent decisions is that any contract made by such an association in contravention of the statute and its by-laws is ultra vires and void.

"All members must participate equally in the profits and bear the losses, if any, in the same proportion. (Note the paragraph in the Association's letter, to-wit: 'It permits of monthly payments being credited semi-annually on the loan and for each $100.00 reduction of principal one share of stock is canceled, making the borrowing shareholder only liable for approximately one share of stock for each $100.00 unpaid on the loan.') This is the fundamental law of building and loan associations organized under the different statutes throughout the Union. The provisions in the borrower's notes and deeds of trust sought to be released, to the effect that the shares of stock pledged to secure their payment shall reach their full par value at the end of one

> hundred months and the securities canceled and satisfied regardless of the earnings of the association, is clearly subversive of the legislative scheme governing building and loan associations and contrary to the clear letter and spirit of our statutes. The plan which seems to have been adopted by the association in respect to the loans in question is glaringly prejudicial to the non-borrowing members, and its enforcement will work a great injustice and hardship. Besides it would be inequitable and unfair. The rights of the borrowers must be determined from the standpoint of their relation to the non-borrowing stockholders."

And further,

> "The association being organized under a mutual plan must treat all of its members equally, and any contract whereby one stockholder obtains greater share of profits than another would be violative of the principle of mutuality between the stockholders. The plainest principles of justice and honesty clearly forbid that one class of stockholders equally meritorious should be compelled to suffer that others may profit thereby. In the last reported case to which we have been cited on the subject, King v. International Bldg. Loan & Inv. Union, 170 Ill. 135, the court there holds, that a building and loan association, organized and based on the mutual plan, requiring subscription to its capital stock to be made in periodical payments, which should continue until the payments, together with the earnings of the association should equal the full face value of the shares, has no authority to issue a certificate of stock wherein it agrees to pay the subscriber the full face value of each share at the end of six years, on payment of seventy-five per cent per month on each share during said period. In the case of Wierman v. International Bldg., Loan & Investment Union, 67 Ill. App. 550, the appellate court of Illinois held that a building and loan association is a mutual company and bound to treat its members equally, and any contract made by such association in contravention of such mutuality is ultra vires and void. The the same effect is Baltimore B. & L. Ass'n v. Powhatan Imp. Co., 39 Atl. Rep. 274."

In Williams v. Verity, 98 Mo. App. 654, l. c. 659, the court said:

> "It is contended by the assignee that a building and loan association can not arbitrarily fix any period when its shares shall mature, and that a borrowing stockholder is not entitled to have a deed of trust, given by him to secure the payment of his monthly dues, released until such dues are paid and the earnings thereon bring his stock to par; and that therefore the action of defendant in fixing the number and amount of the monthly dues to be paid on the Coulter stock by the plaintiff to bring such stock to par and to entitle her to a release of the deed of trust as to lot 2, as stated by its secretary in his letter to Rowley & Owen, was arbitrary and in excess of its authority. As was said by us in another case, there are only two ways by which a borrowing stockholder, under the statute of 1889, may be entitled to have released a deed of trust given to secure the payment of his monthly dues, one of which is when he repays the advance, as provided in section 2813, and the other, when the payment of monthly dues on his stock and the profits of the business of the association together become sufficient to mature such stock, or bring it to par. Caston v. Stafford, 92 Mo. App. 182. And when such an association fixes and declares that the payment of any given number and amount of monthly dues will bring the shares of its stockholder in the association to par, it acts in excess of its authority; for whether or not any specified number and amount of monthly payments would bring its stock to par must depend on the earnings thereon, which, of course, is an element of uncertainty in the business that renders it impossible for it, or any of its officers, to determine in advance when its stock, or any part of it, will mature, or, which is the same thing, reach par. It seems clear to us that the act of the building

> association in determining and representing that it required the payment of forty-six monthly payments of $9 each to bring the Coulter stock to par, and to thereby authorize a release of the deed of trust, was arbitrary and capricious--ultra vires."
>
> See also, Caston v. Stafford, 92 Mo. App. 182.

Section 5603, Laws of Missouri, 1931, page 154, provides in part:

> "Each shareholder shall pay to said corporation at or before each stated meeting of the directors or at such time as may be provided in the by-laws as a contribution to the capital thereof the sum fixed as dues for each and every share held by him, until each share shall, under the provisions of this article, reach the ultimate value thereof:"

Section 5601, Laws of Missouri, 1931, page 152, provides in part:

> "A shareholder may repay a loan at any time upon application to said corporation, upon such terms and conditions as may be prescribed in the by-laws of the association;"

Page 126, Sundheim on Building and Loan Associations, says:

> "The statutes, in most jurisdictions, provide that, 'a borrower may repay a loan at any time,' and while not expressly stated, no doubt the association would be compelled to accept part payment at any time, but this question has never been raised as it is the universal custom to do so, * * * * * the borrower is not compelled to cancel his stock; he may repay his loan in full and retain his stock."

Note this provision in the "Instalment Stock", supra:

> "For each one hundred dollar reduction of the loan one of the shares of stock shall be canceled."

III.

While the proposed plan apparently meets the technical requirments of membership so as to fall within the provisions of the statutes, yet, when analyzed, the "mutuality" feature is not present, hence ultra vires. We have hereinbefore set out what the object and duties of building and loan associations are and consist of, and quoted at length from various texts and cases to illustrate the fact that a contract that permits one class of stockholders to obtain an advantage over other stockholders would be ultra vires. We conclude that the plan proposed is ultra vires and assign some of the reasons therefor:

(1) It is simply a straight loan plan.

(2) The borrowing member does not participate in the dividends so that the dividends may be applied in reduction of the loan.

(3) Non-borrowing members obtain the benefit of interest (and earnings of such) paid by holders of proposed class of stock, which gives non-borrowing members an advantage over members of such stock.

(4) Insolvency:

(a) In event of insolvency uncanceled shares of stock owned by borrowers are subject to liability.

(b) Non-borrowing members must bear entire loss of canceled shares.

(c) Does it not attempt to create a debtor and creditor relationship?

(5) The certificate of stock fixes a definite maturity date, to-wit, fifteen years.

(6) The proposed plan is a substitution of present building and loan plan relative to loans to that of loan companies.

(7) Other reasons not specifically listed.

Therefore, in answer to your inquiry, "I hereby submit it to your Department for an opinion as to whether or not it conforms with the law and can be approved by this Department.", our answer is in the negative.

Very truly yours,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

JURORS: Jurors not on the regular panel but who are retained on the panel of qualified jurors from which the jury is selected, are entitled to their per diem and mileage.

11797 RS Mo 1929

11-23

November 16, 1933.

FILED 59

Hon. S.L. McClure,
Judge of the Probate Court,
Gallatin, Missouri.

Dear Judge:

This department is in receipt of your letter of November 6, 1933 in which you request an opinion as to the following state of facts:

> "The Probate Court of Daviess County would very much appreciate your opinion on the following:
>
> Some few weeks ago we had an insanity hearing, and a jury of 18 men were summoned and qualified to try the cause at issue. But of course 6 of these men had to be stricken, and were stricken off.
>
> The question which has arisen is would these six men be entitled to fees?"

I.

Jurors who are not on the regular panel but who are retained on the panel of qualified jurors from which the jury is selected, are entitled to their per diem and mileage.

Section 11797, R.S. Mo. 1929 provides as follows:

> "Jurors shall be allowed fees for their services as follows:
>
> For each juror attending a view, inquest or execution of a writ of ad quod damnum, per day....$1.00
>
> For each person who shall be summoned, attend and report for duty as a juror in any case

before a justice of the peace, per day .....$.75

For each mile traveled in going to and returning from the place of trial, in attending any trial before a justice of the peace, per mile.....05

For each person summoned, attending and reporting to any court of record, per day, except as otherwise provided by law.....1.00

For each mile traveled in going to and returning from the place of trial, in attending any trial before a court of record, per mile.....05

All fees allowed jurors as above shall be taxed as costs in the cases, respectively, in which they were summoned; but juries serving in more than one case on the same day, at the same place, shall only be allowed fees in one case; and any juror, who shall claim fees for attending in two or more cases, on the same day, at the same place, shall not be allowed fees for that day."

It will be noticed that Sec. 11797, supra, refers to courts of record. Article VI, Section 34, Constitution of the State of Missouri, provides in part as follows:

"The General Assembly shall establish in every county a probate court, which shall be a court of record. *****"

Section 1826, R.S. Mo. 1929 provides as follows:

"The Supreme Court of the State of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Section 2045, R.S. Mo. 1929 provides as follows:

"A probate court, which shall be a court of record, and consist of one judge, is hereby established in the City of St. Louis, and in every county in this state."

In the case of State ex rel. v. Wilder, 196 Mo. 418, the Court had before it the proposition of whether or not persons claiming fees for juror service are entitled to their fees as jurors notwithstanding they were not on the regular panel, nor were they on the panel of forty qualified jurors to try the case. In passing upon this question, the Court of necessity passed upon the question presented here in your letter. The Court held (l.c. 434):

> "'*****Section 3784, Revised Statutes, 1899, which provides: 'Each juror not on the regular panel and summoned to sit as a juror in any criminal cause wherein the offense charged is punishable with death, or by imprisonment in the penitentiary for life, or for not less than a specified number of years and no limit to the time, shall be allowed the sum of one dollar per day for each day that he may be in attendance on said court, and five cents per mile for each mile traveled in going to and returning from said court, whether he sits in the trial of the cause or is challenged off.'
>
> After a careful consideration of the provisions of that section we have reached the conclusion that it only embraces such jurors as were qualified upon the panel of forty from which the panel of twelve to try said cause were to be selected. It is apparent from the terms employed in the section above quoted that the term 'juror', as used in that section, means a qualified juror. This is made manifest by the closing terms of the section which says that the juror shall be entitled to his per diem and mileage 'whether he sits in the trial of the cause or is challenged off.' It is clear that this term would be absolutely meaningless if every person who was summoned in pursuance of the venire issued by the court to serve as jurors, were embraced in the provisions of that section and entitled to claim for jury service, notwithstanding they were not on the qualified panel of forty. That section simply means that the jurors who are not on the regular panel but are retained on the qualified panel of forty jurors from which the jury to try the cause must be selected, are entitled to their per diem and mileage, notwithstanding they may be challenged and not required to sit in the trial of the cause.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the six men qualified to try the cause at issue

but stricken off are entitled to their fees as set out in Section 11797, R.S. Mo. 1929.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

APPROPRIATIONS: Bureau of Building and Loan Supervision emergency fund construed.

December 6, 1933.

FILED
59
63

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge receipt of your letter which reads as follows:

> "This is to request your opinion as to whether or not the emergency fund provided for in House Bill 642, Section 48a, can be counted as a part of the general appropriation to the Bureau of Building and Loan Supervision as set forth on page 94 of House Bill 650, Section 10, which appropriation is $77,595 or is it to be construed that the $25,000 revolving fund is an additional sum over and above the general appropriation of $77,595.
>
> It was my understanding and the interpretation given me by legislators that our appropriation for the Bureau of Building and Loan Supervision was $77,595 and in addition to this sum, we had a revolving fund of $25,000 as a reserve in case it was needed. The auditor's office, however, are in some doubt as to this interpretation of the extra $25,000, therefore, this request for an opinion.
>
> Since it is imperative for this department to know as to whether or not appropriations are adequate to take care of us for this

> biennium, we would like to have your opinion at an early date so that we may take up with the Governor and the Legislature the correction of this matter in the event the $25,000 revolving fund can not be used in addition to the appropriation of $77,595, which is the general appropriation for this department."

The narrow question presented by your request is whether or not Section 48-a (Laws of Mo., 1933, page 18) is an appropriation over and above that appropriated for your Department by Section 10 (Laws of Mo., 1933, page 94).

I.

Laws of Missouri, 1931, pages 143-144, Section 5582, provides:

> "All fees for examinations or supervision now provided for and required of building and loan associations under the laws of Missouri governing building and loan associations shall be paid into the state treasury to the credit of a fund to be known as the building and loan supervision fund."

The Constitution of Missouri, Article IV, Section 43, provides in part:

> "All revenue collected and moneys received by the state from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriation made by law. * * * * * * * ."

Constitution of Missouri, Article X, Section 15, provides in part as follows:

> "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the

> State for the benefit of the funds to which they respectively belong, in such bank or banks * * * * * * * * * * * * *."

Laws of Missouri, 1933, page 415, Section 1, provides in part as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State) shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Etc."

Section 5583, Laws of Missouri, 1931, page 144, provides:

> "The supervisor of building and loan associations shall receive an annual salary of three thousand dollars ($3,000.00). The examiners shall each receive a salary to be fixed by the supervisor of building and loan associations, but in no case to exceed the annual sum of twenty-four hundred dollars ($2,400.00) for each of such other examiners. The stenographers shall each receive an annual salary of not to exceed one thousand five hundred dollars ($1,500.00). <u>All of said salaries shall be paid in equal monthly installments out of the state treasury by warrants drawn by the state auditor on the building and loan supervision fund.</u> In addition

> thereto the actual and necessary traveling and other departmental or office expenses of the supervisor of building and loan associations, the examiners, and other assistants herein provided for, shall be paid out of the state treasury upon vouchers approved and audited by the supervisor of building and loan associations, with warrants drawn on the treasurer by the state auditor on the building and loan supervision fund."

It is thus seen that the Bureau of Building and Loan Supervision collects fees which are "paid into the state treasury to the credit of a fund to be known as the building and loan supervision fund" and all expenses for operation and payment of salaries are paid "with warrants drawn on the treasurer by the state auditor on the building and loan supervision fund."

Thus, the Legislature for the biennium 1933-1934 appropriated (Section 10, Laws of Missour , 1933, page 94) the following:

> "There is hereby appropriated out of the state treasury, seventy-seven thousand five hundred ninety-five dollars ($77,595.00), chargeable to the state building and loan supervision fund, the following amounts for the purposes expressed:
>
> A. For Personal Service:
>
> The salary of the supervisor of building and loan associations $6,000
> And salaries for examiners, clerk, stenographers and janitor $40,770
>
> D. For Operation:
>
> General Expense: including communication, printing and binding, travel and other general expense and Material and Supplies: consisting of stationery and office supplies $30,825
>
> Total . . . . . $77,595 "

We direct your attention to the provision of the Constitution of Missouri, Article X, Section 19, in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law."

The Legislature made an appropriation to your Department as set out above, which was approved by the Governor May 19th, 1933. However, on page 18, Laws of Missouri, 1933, Section 48-a, the following was appropriated as an emergency fund which section reads as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the State Revenue Fund, the sum of Twenty-five Thousand Dollars ($25,000.00), or so much thereof as may be necessary, for the Bureau of Building and Loan Supervision, to be used as an emergency fund by said Bureau of Building and Loan Supervision, with the approval of the Governor; said sum to be repaid into the State Revenue Fund out of the earnings of said Bureau, as, if and when received, and the State Treasurer is hereby authorized and directed to transfer to said state revenue fund fees earned and received by said Bureau of Building and Loan Supervision up to the amount hereby appropriated, or such part thereof as may be released by the Governor for use of said Bureau."

It is to be noted that the $25,000.00 appropriated by above section is chargeable to the state revenue fund and is for the Bureau of Building and Loan Supervision to be used as an emergency fund by said Bureau of Building and Loan Supervision, with the approval of the Governor.

II.

Above we have shown that the Bureau of Building and Loan Supervision is on a fee basis and all fees are paid into the state treasury to the credit of the building and loan supervision fund,

and $77,595.00 (Laws of Mo., 1933, page 94, Section 10) was appropriated out of such fund "the following amounts for the purposes expressed" which then provides specific amounts to be paid for personal service and for operation.

Assume that the Bureau of Building and Loan Supervision did not collect fees sufficient to enable it to have in its fund enough to pay current expenses, then such would create a condition, namely, the Legislature appropriated money and no money in the fund in which to use, so in order to provide against such an emergency, in our opinion, Section 48-a, Laws of Missouri, 1933, page 18, approved May 23rd, 1933, was enacted. In other words, Section 48-a, supra, is an emergency fund which is drawn from the state revenue fund if and when the state building and loan supervision fund does not have in it money for the payment of the purposes expressed in Section 10, supra, and such is our opinion.

It will be noted that your Department may not expend any more than is appropriated by Section 10, Laws of Missouri, 1933, and if you do not have in your fund the amount appropriated, then with the approval of the Governor an amount not to exceed $25,000.00, as provided by Section 48-a, supra, may be drawn from the state revenue fund and deposited in the state building and loan supervision fund.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:RG

PROSECUTING ATTORNEY, CIRCUIT CLERK -- cannot apply money for collection of fees to payment of salary. -- must be paid into county treasury. Sec. 11315, 11314, 11317, 11813, 11814, 11816, 11817, 11830, R.S. Mo. 1929.

January 28, 1933

FILED
60

Hon. Howard R. Maness
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

Your recent letter to the Attorney General's office has been handed the undersigned for attention. You ask an opinion upon the following, to wit:

> "Where county officers, such as the Circuit Clerk and Prosecuting Attorney who receive a definite salary regardless of the fees that are collected, is it mandatory that they turn their fees into the county and take warrants for their entire salary, or may they apply these fees collected by them to their salary.
>
> "Due to the fact that Ripley County is very much in debt the officers are inclined to retain their fees and deduct this amount from their salaries."

Section 11315, R.S. Mo. 1929, among other things, provides:

> "It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues to his office, and to receive the same, and that at the end of the month to pay over to the county treasurer all moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the clerk of the county court."

Section 11314, R.S. Mo. 1929, provides:

> "The prosecuting attorney shall receive for his services per annum to be paid out of the county treasury, etc."

Section 11317, R.S. Mo. 1929, provides:

> "Penalty for failure of the prosecuting attorney to comply with any provision of the section just quoted."

Section 11813, R.S. Mo. 1929, provides that:

> "The salary of the clerk and that of his deputies and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month, and that the clerk and his deputies and assistants shall present their accounts to the county court, and said court shall draw its warrant therefor upon the county treasury."

Section 11814, R.S. Mo. 1929, provides that:

> "It shall be the duty of the clerk of the circuit court to charge and collect for the county in all cases, every fee accruing to his office and to which he may be entitled, under the provisions of sections 11785, 11787, and 11788 or any other statute, except, etc.: that he shall file with the county clerk a report of the fees accruing to his office, and that it shall be his duty upon the filing of said report to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in such monthly report."

Section 11816, R.S. Mo. 1929, provides:

> "It shall be the duty of such clerk within fifteen days (referring to the order provided in section 11810) has been made to pay over to the county treasury the amount of money so ordered paid, and to take duplicate receipts therefor, one to be by him filed in the office of the clerk of the county court, who shall thereupon charge the treasurer with the amount thereof, and if the clerk should fail to pay the money so ordered into the county treasury, the county court shall cause suit to be filed upon his official bond."

Section 11817, R.S. Mo. 1929, provides:

> "For a penalty upon the failure or neglect of the clerk to file his statement within the time required."

Section 11830, R.S. Mo. 1929, provides also for:

> "A penalty for every person violating the provisions of that article."

which is Article 2, Chapter 84, R.S. Mo. 1929.

It will be seen that the word " shall" is used in the above statutory provisions, and such word as used therein, is a word of command, imperative, and leaves no discretion in the matter. The word "shall" will be presumed to be used in the sense as indicated unless something in the character of the statutes or the subject to which it relates, or in the contents, show that such could not have been the intention of the legislature.

Black on Interpretation of Law, p. 531;
State ex rel Stephens v. Wurdeman, 295 Mo. l. c. 586;

Where a statute provides what results shall follow upon the failure to comply with its terms, such statute is mandatory and must be obeyed. The above quoted sections relating to the officers herein named employing the language as above designated with reference to their duties being considered, it is our opinion that they are required to pay over to the county treasury moneys and fees collected by them in their respective offices, and that they will not be permitted to apply the fees so earned to the payment of their respective salaries, but upon the contrary, shall receive their salaries from the county and be paid by county warrants as provided by law.

Very truly yours,

Carl C. Abington,
Assistant Attorney-General

CCA/N

Approved

Roy McKittrick,
Attorney-General

IN RE: Gasoline tax is legal enforceable on tractors and maintainers owned by townships, counties and contractors.

7805 RS Mo 1929

March 3, 1933

FILED
60.

Hon. J. B. McGuffin,
Prosecuting Attorney,
Lawrence County,
Mount Vernon, Missouri.

Dear Sir:-

Answering your letter of February 21st, relative to the State collecting 2¢ a gallon on gasoline tax on motor vehicles particularly on road "tractors" and "maintainers", will say that a statute should be construed so as to carry out the intention of the Legislature and I think especially so if adopted by a referendum vote of the people, and if not plainly unconstitutional.

Section 7795 says,

> "Every distributor shall * * * pay to the State treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into and distributed or sold by him within this state, during such year."

To the same effect is Section 7814.

Then comes the exceptions under Section 7805, which you will note includes gas for "stationary gas engines, FARM tractors, motor boats * * * fuels for cleaning, dyeing and other commercial use of same, or fuels * * * for any purpose whatever except in motor vehicles, etc." Then this section tells how these exceptional users may obtain a refund from the State by proper affidavit if attended to within ninety days.

You will note the strong exception of the word "farm tractors" which by inference would exclude other tractors.

In 1927 Attorney General Gentry wrote an opinion in which he said,

> "I am, therefore, of the opinion and have heretofore held that the State of Missouri, counties of Missouri, the cities and towns of Missouri, all the local subdivisions of Missouri and all the state institutions are subject indirectly to the gasoline tax where the gasoline is to be used to propel a motor vehicle over the public highways of this State."

And before and after that his, (Gentry) opinions were practically the same.

AA number of Attorney-General Shartel's opinions were to the same effect saying in one opinion (January 1931),

> "The department (this) has uniformly held that gasoline so used (road tractors while engaged in work on the county roads) is subject to the tax. It has also held that gasoline ues in tractors and other machinery of contractors doing work upon the highways is subject to the tax."

This being the ruling (of this department) on these statutes for so many years it would seem to be binding.

The Supreme Court has said,

> "* * *Where such a statute as this has been interpreted by those * * * whose duty it is to enforce it, and their construction has been acted upon for any considerable time due regard should be paid to such construction."
>
> Benanti vs. Security Ins. Co., 27 S.W. (2d) l.c. 71.

See also Ross vs. Railway Co. 111 Mo. 18.

> "The statutes of the state are presumably constitutional and their unconstitutionality must appear beyond reasonable doubt before they will be nullified as unconstitutional. State v. Scullin, etc., Co., 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Forgrave v. Buchanan County, 282 Mo. 599, 222 S. W. 755. The Courts will not make them unconstitutional by importing words into them by implication."
>
> Washington Tp. Road Dist.No.1 v. Robbins, 262 S.W. l.c. 47.

From the foregoing rulings and authorities we are convinced that it was not the intention of the Legislature to except road tractors and maintainers from the payment of this 2¢ g gallon tax and this opinion is strengthened from the further fact that in Section 7805 where a refund is permitted for certain exceptional users, the term FARM tractors is expressly mentioned whereas it could have been readily put in if desired by the Legislature, farm and road tractors and maintainers engaged in the uses you mentioned in your letter.

Furthermore, three Legislatures have been in Session since this construction was promulgated and none of them saw fit to make a change in the law as so construed.

Yours very truly

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney General

GBS/mh

APPROVED:

ROY McKITTRICK
Attorney General

RE: COMMISSIONERS - Right to accept contracts for work performed in their districts.

NEPOTISM - Right of Commissioner to employ relatives.

March 31, 1933.

FILED
60

Hon. J.B. McGuffin,
Prosecuting Attorney - Lawrence Co.,
Mt. Vernon, Missouri.

Dear Sir:

Your request for an opinion relative to (1) the power of Commissioners appointed for special road districts in your county to accept contracts for work or labor performed in their districts, and (2) their power to employ relations in these districts, has been referred to me for attention.

In an opinion from this office to the Hon. T.J. Harper, Prosecuting Attorney of Stone County dated February 11, 1933 with reference to the right of Commissioners to employ themselves, this conclusion was reached:

> " **** It is the opinion of this department that it would be unlawful as against public policy for the member of your Special Road District Board to be employed by the Board or engage themselves as the employee and draw compensation for working upon the highway of the road district in which he is serving as Commissioner."

The attendant evils to any other conclusion would be such, therefore, as to undermine the very principles of our government and would be in direct conflict with public policy.

In regard to your request anent the Nepotism Law, since you do not give any specific facts, I can only quote to you Section 13 of Article XIV of the Constitution of Missouri:

> "NEPOTISM, BY ANY OFFICER OR EMPLOYE, FORBIDDEN-FORFEITS OFFICE. Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

If your cases come within that section, they are of course forbidden. However, in connection therewith it might be well to note that relationship by affinity does not extend to the relatives of the other spouse by affinity only, the relationship by affinity being confined to the blood relatives of the other spouse.

State ex rel v. Hall and Ellis, 325 Mo. 154
28 S.W. (2d) 363.

Therefore, it is the opinion of this office that it would be unlawful for Commissioners appointed by special road districts in your county to accept contracts for work or labor performed in their districts.

Yours very truly,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

Attorney General

JWH:AH

INSANE PERSONS: Indigent persons, resident requirement and who respondible for upkeep in State Hospital.

June 3, 1933

FILED
60

Dr. E. T. McGaugh, M.D.
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We wish to acknowledge your letter of June 1, 1933, which is as follows.

> "Will you please note the attached letter with marked paragraph. I feel that this is a matter which should be brought to your attention, and will appreciate you writing to the Warden since the question is entirely a legal one."

The paragraph that you marked and upon which you desire information being as follows:

> "We are especially desirous of having answers to the following questions: (1) What constitutes legal residence in Missouri? (2) Does a former resident of Missouri retain this residence as long as he fails subsequently to establish it in another state? (3) What verifications would be necessary to satisfy the proper authorities of Missouri that a patient is a resident of that State? (4) How should such verifications be made? (5) If a patient's legal residence is found to be Missouri, to what State official should neuropsychiatric reports and supporting data be sent in our efforts to obtain authorization for delivering him to a hospital and to whom should we look for final authority?"

Before replying to the questions asked we wish to preface same with a brief history relative to State Hospitals and the caring of insane persons in Missouri.

Article 1 of Chapter 46, R. S. Mo. 1929, provides, among other things, that state hospitals are declared to be eleemosynary institutions of the State and such are under the management and control of a board of managers.

Article 2, Chapter 46, R. S. Mo. 1929, and amendments of 1931, thereto, provide, among other things, that persons afflicted with any form of insanity shall be admitted into the hospital for the care and treatment of the insane. Said article further provides for the admitting of pay patients and indigent patients. There is a prescribed procedure for pay patients and also a procedure for indigent patients. The pay patients are admitted upon the filing of a request in writing addressed to the superintendent of the hospital to which said patient wishes admittance. Also a certificate of two attending physicians describing his condition and a bond insuring payment of his upkeep while confined there, and the payment of his upkeep. The indigent patients are admitted by order of the several county courts and their upkeep is paid by the county from whence sent.

To gain admittance for an insane person to a state hospital, some citizen residing in the county in which the poor insane person resides makes the following affidavit addressed to the county court:

"State of Missouri)
(ss
County of _____)

The undersigned, a citizen residing in the county and state aforesaid, hereby states that _____is insane. That his insanity is less than_____ years duration: That he has not estate sufficient to support him at a state hospital, and is a resident of said county and state aforesaid. These facts can be proven by _____and _____(naming at least two persons, one a reputable physician) this _____ day of_____.

_____

_____

Subscribed and sworn to

_____

After the filing of such statement in writing, an inquiry is conducted by the county court and if such person is found to be insane and a poor person, the court makes its order committing such person to the hospital for the care and treatment of the insane. However, the counties are limited as to who and the number of insane persons may be sent to the hospitals. Section 8636 R. S. Mo. 1929 provides in part:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto." * * "

In reading the statutes you will note that the county courts of the 114 counties take care of their indigent insane people and such are committed to the State hospitals at the direction and expense of the county.

In the case of Thomas v. Macon County, 175 Mo. Sup. 68, l.c. 73, the court in writing his opinion held the following:

> "* * *Plaintiff next points to section 4867 (8636 R. S. Mo. 1929) which provides that: 'The several county courts shall have power to send to the asylum such of their insane poor as may be entitled to admission thereto.' And it specifies that the county shall pay for the support and maintenance of such insane poor persons as the county court may send to the asylum.
>
> Under that section, however, even the county court is not authorized by its arbitrary will or unlimited discretion to send any insane poor person it may select to the asylum at the expense of the county, but the court must hold due proceedings upon a petition filed showing that the insane poor person is 'a citizen residing in the county' and other essential facts as prescribed by the statute, and there must be a trial of the facts and a judgment of the court thereupon. (Statutes cited) The county court has no authority under those statutes

> to send a person to the asylum or maintain one there at the expense of the county who is not a resident thereof.* * **

Thus the responsibility for caring for indigent insane persons rests with the counties. Therefore, an insane indigent convict in custody in some place outside of the State of Missouri should be turned to the care and custody of the county in which he resides and not be taken to the boundary lines of the State of Missouri and there left. The counties must care for the indigent insane but only those residing within their boundaries. Thus it will be a question of fact in each instance as to where such insane person resides.

This brings us to the question of residence. The constitution or statutes do not define legal residence. Neither do they provide any length of time it takes a person to establish a legal residence, except in cases of voting, holding office, bringing suits in court, etc.

Section 8663 R. S. Mo. 1929, in the article and chapter relating to indigent insane persons as to who shall be entitled to the provisions of said article provides:

> "No person shall be entitled to the benefit of the provisions of this article as a county patient except persons whose insanity has occurred during the time such person may have resided in the state etc.* * **

Section 655 R. S. Mo. 1929, subdivision 17, defines residence as follows:

> "* * *seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively.* * **

Section 8663, supra, uses the words 'may have resided' in fixing the required residence of an indigent insane person before such county shall provide and care for such. We hold to the conclusion that these words should be construed to mean and are synonymous to the word 'domicile'.

In the case of In re Ozias' Estate, 29 S. W. (2d) 243, the court in discussing residence and domicile held the following:

> "Residence and domicile are used interchangeably, and, in so far as they apply to the situation here presented are synonymous.
>
> 'Domicile. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.'
>
> Bouv. Law Dict., Vol. 1. page 915, Proof of domicile, or legal residence, does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile there, though not conclusive. Hayes v. Hayes, 74 Ill. 312; Inhabitants of East Livermore v. Inhabitants of Farmington, 74 Me. 154. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile, and (3) an intention of acquiring a new one. Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706. It has been held a wife's removal into another state for the benefit of her husbands health and a residence there for twelve years will not change the original domicile. In re Reed's Will, 48 Or. 500, 87 P. 763; Ensor v. Graff, 43 Md. 291.
>
> A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact which is often difficult to determine. Words and Phrases, Second Series, Vol. 2, page 133; City of Lebanon v. Biggers, 117 Ky. 430, 78 S. W. 213, 214." * * **

The verifications necessary to satisfy the various county courts would be a matter to be taken up with them. We believe however, proper affidavits showing the history of the person confined in an institution outside of the State of Missouri for criminal insane, and the information or data that tended to establish the place or domicile or residence in such county together with a statement of his mental condition would meet their requirements. We again call your attention to the fact that some person, a resident of the county, must make the statement as hereinbefore set out.

In answer to your fifth inquiry; the officials to whom the reports and supporting date should be sent (in an effort to obtain authorization to deliver him to a hospital) is the county court of the county where such person resides, and that body is the proper authority to look to.

Very truly yours,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

JLH:MM

IN RE: COUNTY TREASURER TO EFFECT SETTLEMENT WITH COUNTY COURT FOR COUNTY FUNDS -- HOW?

12111-43-52 RSMo 1939

June 5, 1933. 6-5

FILED 60

Mr. J. B. McGuffin
Prosecuting Attorney
Lawrence County
Aurora, Missouri

Dear Sir:

Your letter of May 3 requesting an opinion of this office is in words and figures as follows:

"One Crawford, former Treasurer of this County, retired and made his final settlement with the County Court on December 31, 1932, and turned over to his successor - the newly elected Treasurer the amount balanced on his Books and Settlement - $36,462.42.

"Some weeks, (perhaps six or eight weeks) thereafter Crawford discovered that in the four County Depositories of this County that there remained a balance, in all totaling $233.80, to the credit of himself - Crawford - as County Treasurer. That is that he long that total amount in his settlement.

"Crawford went to the County Court and explained the matter saying that sometimes when the funds upon which County Warrants were drawn, was short that he advanced out of his own personal funds sufficient amounts to cover the shortage, and therefore asked that the above amounts in Depositories to credit of himself County Treasurer, be allowed to be transferred to his own personal account.

"My opinion was asked on the matter by the County Court and I gave it that the County Treasurer had no right to mingle his own funds with County funds, and that he had no

right to go behind the settlement already had unless he could clearly show mistake. I held that our County was entitled to the fund.

"I respectfully ask your opinion. Our County is not in position or able to have an audit made at the present time."

Section 12111, R. S. Mo. 1929, provides:

"In the settlements required by law to be made by the county court with treasurers and other officers holding county funds, whether quarterly, yearly or otherwise, it shall be the duty of the court, or some judge thereof, to ascertain by actual examination and count the amount of balances and funds in the hands of such officers, and to what particular fund it appertains, and such examination and count shall include all funds on hand up to the day on which such settlement is made."

Section 12143, R. S. Mo. 1929, provides:

"The county treasurer shall keep a just account of all moneys received and disbursed, and regular abstracts of all warrants and scrips drawn on the treasury, and paid or received by him, and shall cancel the same by writing in ink "paid" across the face thereof, when paid or received."

Section 12152, R. S. Mo. 1929, provides:

"He shall settle his accounts with the court semi-annually, at its first and third regular terms in each year; and at the end of his term, or if he resign or be removed from office, he, or if he die, his executor or administrator, shall immediately make such settlement, and deliver to his successor in office all things pertaining thereto, together with all money belonging to the county; and at each settlement the court shall immediately proceed to ascertain, by actual examination and count, the amount of bal ances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it

appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count."

In interpreting the above sections, in Cole County vs. Dallmeyer, 13 S. W. 687, 101 Mo. 57, the Supreme Court said:

"The evidence tends to show that Schmidt made a settlement with the county on May 6, 1884, ******. The amount paid by the executrix is evidenced by the receipt of Tanner, the succeeding treasurer, *****. Although this receipt professes to be a receipt for the balance due the interest fund, still it shows the exact amount paid on that fund; and, if there is in fact a balance still due, the receipt is no obstacle in the way of recovering that balance. The receipt is but prima facie evidence; ******. On the other hand it was competent for the defendant to show that the whole amount paid by the executrix was all that was due the county on the various funds."

Again, in interpreting the above sections, in Clark County vs. Hayman, 44 S. W. 237, 142 Mo. 430, the Supreme Court said:

"He was bound by his bond to faithfully perform the duties which his sureties undertook he should perform, among which was to keep a faithful and just account of all moneys payable into the county treasury which he received and keep an account of the receipts and expenditures. Having charged himself with the moneys thus received upon the books of his office, it is the clearest and most satisfactory evidence of his liability therefor and he and his sureties are only to be discharged from a liability therefor by showing disbursements on lawful warrants or such satisfactory evidence of mistake in so doing as would justify a court ofequity in correcting the account, and of this there is not the semblance of evidence in this record."

"*******settlement was shown by defendant's

> own witness, Mr. Ball, to be absolutely correct, and that it exhibited the exact amount due from Mr. Penn at the expiration of his office. *, independently of the settlement, the books of the treasurer showed these balances were due to the several funds.**** We see no hardship whatever in holding that, prima facie, the settlement made by the executors of Mr. Penn showed the State of his account with the county treasurer."

Again, in the case of The County of Marion vs. Phillips, 45 Mo. 75, the Supreme Court said:

> "We hold then, that the defendant in the case at bar, in making his settlement with the County Court of Marion County, settled and adjusted his claims and liabilities with the public agents of the county; that the entry upon the records of the court was not a judgment at law, but the record of the results of that settlement — a statement of his account, as adjusted between him and the county — and that any mistake in that settlement clearly proved is open to correction, and in the same manner as though it were made with an individual."

In the case of St. Louis Charcoal Co. vs. Moore, 163 S. W. 745; 178 Mo. App. 692, the Appellate Court said; while dealing with the doctrine of title by confusion of goods:

> "Also the contention that plaintiff acquired title to Smith's personal funds, under the doctrine of title by confusion, is without merit. To so deposit his personal moneys with those of the corporation was unwise, but it did not necessarily imply dishonesty in dealing with the funds of the latter. It appears that the company's books were correctly kept, so far as concerned its affairs, and later the accounts were separated and a settlement agreed upon which both parties admitted to be correct. There was therefore nothing in this theory to lend aid to plaintiff's case.
>
> "The judgment should be reversed. It is so ordered. Reynolds, P. J., and Nortoni, J. concur."

Also the two points involved in your inquiry are:

(1) Is the settlement of a retiring county treasurer's account final or may it be corrected?

(2) If said settlement is subject to correction and the correction reveals a balance in different county funds, is the retiring county treasurer personally entitled to said balances upon a showing that he confused his personal funds with county funds?

The statutory settlement of County Treasurer, retiring from office, is not in all events a final settlement simply because he charged himself with $26,452.42, as moneys received in the performance of his duties, and the court agreeing to settle at that figure. The books of his office evidencing that exact figure would be prima facie evidence that the settlement was final; but it is the retiring treasurer's equitable right to show that this total amount he charged himself with is not due the county in the various funds. Independently of the statutory settlement, the retiring treasurer has the right to show that his books, properly balanced, show a different amount credited to several funds. In other words, by proper proof, he has an equitable right to show that the charge of $26,452.42 against himself, upon retiring from office, is a mistake in fact. Your county court, in its settlement with the retiring county treasurer, in law, acted as the auditor of public accounts and the figure representing the legal statutory settlement is subject to review by said court and may be corrected by order of said court if any mistake in the original settlement is clearly proved to their satisfaction.

The fact that your retiring county treasurer checked out of office $233.80 long in his accounts, and that during his term of office he advanced money from his personal funds to pay county warrants when the county funds were not available to pay said warrants, would not justify handing over the $233.80 which was long in his account. Such practice in office may have been inspired by a noble motive; but to sanction it would encourage the mingling of personal funds with public funds. The law provides a method of protesting and paying warrants

with interest when county funds are not available to pay said warrants on demand. There was no statutory duty on the treasurer to make personal advances claimed by him. Although such advancements are not expressly prohibited, such a practice should be discouraged.

The county court has the statutory right to audit all claims against the county and to allow same if they find said claim is a valid legal obligation. They have the right to audit the claim of advancement in the instant case; after correcting any mistake of fact in the original settlement.

The retiring county treasurer should be held to strict proof of his several advancements on particular warrants and he would be entitled at best only to his bona fide advancements as such and not to balances.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOS/AJ

INFORMATION: Opinion on form of Information.

8-1

Paris, Missouri
July 29, 1933

FILED
60
36

Hon. J. B. McGuffin,
Prosecuting Attorney,
Mt. Vernon, Missouri

Dear Mr. McGuffin:

We acknowledge receipt of your request for an opinion on the information enclosed in your letter which request reads as follows:

> "I am submitting this draft, which I have written, to you before filing same so that you may make any alterations or make a new draft of information to be filed if you see proper."

Upon inspection of the copy of the information it appears that six separate and distinct charges of felony are united in one information. Are the six offenses charged, such as are permitted to be joined in the same information? We are of the opinion they are not and cite the following cases in support of that holding.

> State v. Carrigan, 210 Mo. 359-371
> State v. Christian, 253 Mo. 1. cl 391-4
> State v. Young, 266 Mo. 1. c. 731-2
> State v. Link, 315 Mo. 1. c. 193-9

Upon examination of Section 4090 R. S. 1929, we find that a commissioner of a Special Road District would not come in the class of offenders named in said section unless

it could be said such commissioner is a member of a board of trustees or a member of any Municipal Corporation and there is grave doubt that it could be said that a commissioner of a Special Road District is either, however a Special Road District under Section 8025 R. S. 1929 is a body corporate, but not municipal.

Passing to Section 4091 R. S. 1929, we find enumerated among a long list of those who may offend, this class "Any member of any commission." Therefore, having this in mind and referring to count one in the copy of your information, we have drawn an information in two counts, one under each division of said section 4091 R. S. 1929 which we think is permissible as it relates to the same transaction, and a conviction under either would work an acquittal of the other.

All of the counts appear to be of the same character. You therefore should file as many informations as the facts warrant and the circumstances justify. The copy of the information which we have drawn is herewith enclosed.

Yours very truly,

Approved

Assistant Attorney General.

Attorney General

IN RE: DOES PHARMACIST HAVE TO SECURE PERMIT FROM COUNTY COURT TO FILL PHYSICIAN'S PRESCRIPTION UNDER THE ACT OF 1933. (SESSION LAWS OF MO. 1933, p. 277) RELATING TO MEDICAL PRESCRIPTION FOR INTOXICATING LIQUORS.

4485-86 Laws 33

August 8, 1933.

FILED
60

Hon. J. B. McGuffin
Prosecuting Attorney
Lawrence County
Aurora, Missouri

Dear Sir:

Your letter of July 26 reads as follows:

"Kindly advise at once if enactment made by last Legislature, Acts 1933 at page 277 relating to Druggists selling liquors under Physicians prescriptions sufficiently repeals Sec. 4483 of R. S. 1929.

"Making my question plainer - can a registered Pharmacists in Missouri now handle and sell liquors under prescriptions issued by reputable physicians?"

The question presented is whether or not a registered pharmacist must secure a permit under Section 4483 R. S. Mo. 1929 to fill a prescription issued by a reputable practicing physician for intoxicating liquor?

Section 4483 R. S. Mo. 1929 provides that any person or corporation desiring to manufacture or sell ethyl alcohol or wine shall secure a permit from the clerk of the County Court of the county wherein such person resides and comply with certain conditions therein named and among which is that, after securing said permit, said holder thereof shall monthly file a statement under oath showing amount and kind of intoxicating liquor manufactured or received during preceding month with names and addresses of persons or corporations from whom received and disclosing amount and kind of intoxicating liquors sold or disposed of during said month with names and addresses of persons to whom sold or delivered, and amount and kind of intoxicating liquors on hand at end of month.

The last General Assembly of Missouri enacted and the Governor approved the following act relating to issuance of liquor prescriptions by physicians:

"Section 1. Repealing and reenacting certain sections. -- Sections 4485, 4486, 4504, 4505, 4509 and 4510 of Chapter 31 of the Revised Statutes of Missouri of 1929, are hereby repealed and two new sections to be numbered and known as Sections 4485 and 4486 enacted in lieu thereof to read as follows:

'Sec. 4485. Legalizing prescribing of liquor -- amount. -- frequency. -- It shall be lawful for any reputable physician licensed to practice medicine and surgery in this state to prescribe any distilled, spiritous, vinous, fermented or other alcoholic liquor in such quantities and with such frequency and dosage as in his judgment the needs of his patient may require.

'Sec. 4486. Legalizing filling prescription. -- It shall be lawful for any registered pharmacist engaged in the retail drug business or employed as a pharmacist in any retail drug store in this state to fill any prescription of any reputable physician licensed to practice medicine and surgery in this state, prescribing for the person named in such prescription any distilled, spiritous, vinous, fermented or other alcoholic liquor.'"

The first line of Section 4483 R. S. Mo. 1929 reads as follows:

"It shall be unlawful for any person, firm, association or corporation to manufacture or sell ethyl alcohol or wine within the State of Missouri for non-beverage purposes without a permit therefor as herein provided."

It will be observed this sentence applies distinctly to non-beverage uses and purposes of intoxicating liquor.

In construing the prohibition and druggists' law of Missouri, we must consider the past statutory legislation of both the State and the Federal government and the existing laws of both governments.

The statute law as to pharmacists in Missouri deals with intoxicating liquors only as a medicine.

The local option laws of Missouri and the state-wide Prohibition Laws deal with intoxicating liquors as a beverage.

This is an important fact to be borne clearly in mind in construing legislation affecting the sale of intoxicating liquors in Missouri.

In State v. Ryan, 217 M. A., l.c. 545, the Court said:

> "The prohibition statute is separate and distinct from the druggists' statute and does not repeal the provisions of the Druggists' Act unless it be so clearly in conflict therewith that both cannot stand. It is familiar law in this State that prior to the adoption of the Federal Prohibition Amendment and subsequent state legislation of a prohibitive character, the adoption of the local option law, which put prohibition in force in the territory adopting it, did not repeal or supersede the druggists' statute."

Prior to March 1933, Sections 7 and 8 of Title II of Federal Prohibition Statute required a physician prescribing intoxicating liquor to insert in the prescription the ailment for which it was to be used, and copies of said prescriptions were filed with federal officials. On March 3, 1933, this federal statute was amended by eliminating the provisions for filing copies of prescriptions with federal officials and setting forth in prescription the ailment for which same was given.

The Statutes of Missouri, Sections 4485 and 4505 R. S. Mo. 1929, respectively provide that physician's prescription must set forth the malady for which the intoxicating liquor is prescribed and that same is prescribed as a necessary remedy.

Sections 4485, 4486, 4504, 4505, 4509 and 4510 are all a part of the state-wide code of Prohibition Laws. Section 4483 is likewise the third section in the code of state-wide Prohibition Laws adopted May 27, 1919 and made effective January 16, 1920. Section 4483 appeared in the Session Acts of 1919 just as it appears to-day in the Statutes of 1929 (See Session Laws of Mo. 1919, p. 408.). Section 4483 does not mention druggists specifically and deals with the sale of intoxicants as a <u>beverage</u> and not as a <u>medicine</u>.

The Act of 1919 appears as Article 7 of Chapter 52 R. S. Mo. 1919, and is entitled "Prohibition". The same revision of 1919 which incorporated therein the above mentioned State-wide Prohibition Act of 1919, also carried forward from the Revision of 1909 the Druggists' and Pharmacists' Act intact as Chapter 39 containing Sections 4712 to 4735 inclusive, being a complete Druggists' Code authorizing physicians to write and druggists to fill prescriptions for medicinal use. If the said Act of 1919 had not therein any provision other than Section 4423 of R. S. Mo. 1929 relating to permits for sale of intoxicating liquor, there can be no doubt but what under the decisions of Missouri Courts concerning the local option laws, and in harmony with the general principles of statutory construction, the Missouri Courts would hold that the State-wide Prohibition Act and the Druggists' Act, being each a part of the code of statute laws relating to intoxicating liquor, the one dealing with said liquor as a medicine and the other dealing with intoxicating liquor as a beverage, that the two statutes - the druggists' and the prohibition statute, shall be so construed as to leave in force, where absolutely not contradictory with each other, the provisions of each.

It was held in Ex Parte Swann, 96 Mo. 44, and State v. Moore, 107 Mo., l.c. 82, that the local option law did not interfere in the least degree with the Druggists' and Pharmacists' Law; and, in State v. Ryan, 217 Mo. App., l.c. 545, the Court held that the State-wide Prohibition Statute does not repeal the provisions of the Druggists' Act unless it be so clearly in conflict therewith that both cannot stand. And in State v. Witty, 74 Mo. App. 550, and in State v. Alexander, 73 Mo. App. 605, and Knox City v. Whittaker, 87 Mo. App. 468, it was held that persons having druggists' licenses under pharmacists' law could not be indicted under the dramshop law.

Evidently, the Legislature of 1919 took cognizance of these decisions of the Supreme and Courts of Appeal holding that neither the local option law nor the dramshop law repealed the Druggists' Law and that all three should be so construed that the provisions of each should stand. That the Legislature of 1919 knew that it had to specifically provide the State-wide Prohibition Law should apply to druggists is evidenced by the fact that Section 4 of said Act (now appearing as Sec. 4805 R. S. Mo. 1929.) among other things provided,

> "That any druggist, pharmacist or proprietor of a drug store, holding a permit to sell ethyl alcohol or wine under this act may sell or give away ethyl alcohol or wine un[illegible] written

> prescription dated and signed, first having obtained from some regularly registered and practicing physician * * * * * * * * * provided further that each permit holder selling or giving away or otherwise disposing of ethyl alcohol or wine under this section shall attach a copy of each application and prescription received during each month to the monthly report required to be filed with the Clerk of the County Court under the provisions of Section 3 of this Act (Sec. 3 now appears as Sec. 4483 R. S. Mo. 1929.). Any permit holder who shall violate any of the provisions of this section or any person who shall make a false statement in an application for ethyl alcohol or wine shall be deemed guilty of a misdemeanor."

Evidently, however, the Legislature was not satisfied that the above quoted provisions of the Act of 1919 sufficiently tied the writing of prescriptions by physicians on to the provisions of what is now Section 4483 so as to over-ride the Druggists' Act as set forth in other parts of the Revised Statutes of Missouri of 1919; and so in 1921, Session Laws of 1921, page 471?, the Legislature more specifically undertook to make the provisions of what is now Section 4483 R. S. Mo. 1929, with reference to permits, apply to druggists. A close inspection of the above quoted provisions of the Act of 1919 relative to druggists will disclose that it does not specifically require a druggist to secure a permit in order to fill physician's prescriptions for intoxicating liquor under the Pharmacy Laws of the State. In 1921, the Legislature added the following to the State-wide Prohibition Law:

> "That nothing in this Act contained, shall so be construed as to prevent or prohibit any reputable licensed physician, having authority or permit, to prescribe ethyl alcohol or wine from prescribing in lieu thereof any intoxicating liquor susceptible of use as a beverage or to prevent or prohibit any druggist from possessing such intoxicating liquors; and in all such cases, the physician writing such prescription, the person for whom such prescription is written and the druggist filling the same shall be subject to same rules and regulations and with the same penalties and restrictions as provided

in this Act for the prescription and sale of ethyl alcohol or wine."

This section, it will be observed, makes the druggist subject to the same penalties and restrictions as provided in the State-wide Prohibition Law for the sale of ethyl alcohol or wine. The restrictions provided in said Prohibition Law with reference to permits were contained in Section 3 of said Act, which now appears in the same form as Section 4483 of 1929 Statute; and the specific direction in the amended statutes of 1931 that the druggists should be subjected, in filling the prescription, to the same restrictions and should be required to obtain a permit subject to conditions provided for in said state-wide act for the sale of intoxicating liquors, conclusively shows that the Legislature realized that Section 4483 R. S. Mo. 1929, even with the provisions of Section 4 of the Act of 1919 (now section 4506 of 1929) did not make the druggists subject to the state-wide Prohibition Law and that Section 3 of said original state-wide statute of 1919 (now section 4483, R. S. Mo. 1929) applied only to sales of intoxicating liquor as a beverage and not to sales thereof as medicine.

All of the above provisions specifically making druggists subject to the provisions, as to permit to sell on prescription intoxicating liquor, found in Section 3 of the original state-wide Act of Prohibition of 1919 (now appearing as Section 4483, R. S. Mo. 1929) were repealed by Section 1 of the Act of 1933 by expressly being designated as repealed sections of Revised Statutes of Missouri of 1929. This therefore leaves the state-wide Prohibition Law with Section 4483 R. S. Mo. 1929 as the only section that can be pointed to as requiring druggists to secure a permit under said section 4483 to enable them to fill a physician's prescription for intoxicating liquor;and this section nowhere mentions druggists nor pharmacists.

It is true, the opening sentence of Sec. 4483 R. S. Mo. 1929 makes it unlawful to manufacture or sell intoxicating liquor for non-beverage purposes in this State. But, intoxicating liquors are used for many purposes besides medicinal that are non-beverage uses, such as antiseptics, culinary, laboratory, industrial uses and for experimental purposes in educational institutions. This state-wide prohibition act and Section 4483 thereof constitute a code of Criminal Laws and will be strictly construed and no person, not clearly within the provisions thereof, will be subject to the penalties thereunder; and, as heretofore shown by the Missouri cases cited in criminal prosecutions, persons who are druggists will not be held subject either to the state-wide Prohibition Laws or to Local Option Laws or Dramshop Laws unless the provisions of said state-wide local option and dram-shop laws are so irreconcilably in conflict with the Druggists' Law of this State

that the two classes of statute cannot both stand.

Again, if with the provisions of the state-wide Prohibition Act providing specifically that druggists should be required to secure a permit under the provisions of Section 4483 eliminated from the Statutes of Missouri, druggists are still required to secure such a permit, then the Acts of the Missouri Legislature in enacting the repealed provisions of Sections 4485, 4486, 4504, 4505, 4509 and 4510 was a foolish and absurd thing, and left the law precisely as it was before said sections were enacted.

If it was unnecessary for the Legislature to enact the original section 4 (now section 4505 R. S. Mo. 1939) and Section 6593 (a) Session Laws of 1919, p. 417 (now Sec. 4485 R. S. Mo. 1939) specifically providing druggists should be required to secure a permit under Section 4483 in order to fill a prescription for intoxicating liquor, then in enacting said sections, the Legislature left the law precisely where it was before; but the rule of construction is, a Court will not impute to the Legislature the folly of enacting a statute without a purpose and which leaves the law practically as before. Sutherland on "Statutory Construction, Vol. I. (2d) pp. 476, 477, and 478. Curtis v. Gill, 34 Ct. 45.

There is no repugnancy between Section 4483 R. S. Mo. 1939, and the other provisions of the State-wide Prohibition Law, and the provisions of the Druggists' Act contained in Sections, 13157, 13158, 13160, requiring druggists to have written prescription from a registered and practicing physician before selling intoxicating liquor for medicinal purposes; and to file monthly with the County Clerk, a list of all prescriptions filled by him prescribing liquor during preceding month accompanying said list by an affidavit thereto; and requiring physicians not to issue prescriptions for intoxicating liquor in any quantity to be used other than for medical purposes, or to issue more than one intoxicating liquor prescription at one time or to issue any prescription contrary to any existing law. There is no conflict either between the Act of 1933 and the above herein referred to sections of the Druggists' Act, found in the Revised Statutes of Missouri of 1939.

In the case of State ex rel. Moseley v. Lee, 318 Mo. l.c. 989, the rule is laid down as follows:

> "If both acts can by any reasonable construction be construed together, both will be sustained. Two statutes are not repugnant to each other, unless they relate to the same subject."

Sedgwick on "Statutory Construction; (3d), p. 300 says:

> "It has been said that in construing any part of a law, the whole must be considered; the different parts reflect light on each other; and if possible such a construction is to be made as will avoid any contradiction or inconsistency. * * * * In putting a construction upon any statute, every part should be regarded; and it shall be so expounded if practicable as to give some effect to every part of it. * * * * In the construction of a statute, effect is to be given if possible to every clause and section of it; and it is the duty of the court as far as practicable so to reconcile the different provisions as to make the whole act consistent and harmonious. If this becomes impossible, then we are to give effect to what was manifestly the intention of the Legislature, though by so doing we may restrict the meaning or application of general words."

Turning now to the Act of 1933, we find that it first repeals all of the sections of the 1929 Statutes specifically requiring a druggist to secure a permit under section 4483 before he can fill a prescription for liquor. The first section provides that two new sections, to be numbered 4485 and 4486, shall be enacted in lieu of the same numbered sections in R. S. Mo. 1929. The second section thereof, numbered 4485, provides that it shall be lawful for any reputable physician to prescribe alcoholic liquor in such quantities and frequency and dosage as his judgment dictates his patient requires. Section 4485, R. S. Mo. 1929, required physician to secure a permit before he could write prescriptions for alcoholic liquor; but that section was expressly repealed by the Act of 1933; therefore, the professional judgment of the physician is the only controlling factor in the quantity, frequency and amount of alcoholic liquor a physician may prescribe.

The repealed section 4505 of R. S. Mo. 1929, prohibited pharmacists from filling physician's prescriptions except that it was stated therein the alcoholic liquor was prescribed as a necessary remedy. It is evident that the right affirmatively given to a physician by the Act of 1933 to prescribe intoxicating liquor solely according to his professional judgment, would be entirely worthless unless the prescription when written could be filled by a druggist. Therefore, after repealing the restrictive provisions as to druggists, contained in R. S. Mo. 1929, the third section of the Act of 1933 provides:

> "It shallbe lawful for any registered phar-

> macist * * * * to fill any prescription of any reputable physician * * * * prescribing for the person named * * * * alcoholic liquor."

The authority to issue the prescription and responsibility legally therefore is by 1933 Act vested in the physician. The Legislature intended to remove restrictions from the Druggist in filling the prescription so physician, unhampered, could exercise his professional judgment in prescribing alcoholic liquor.

The three sections of the new Act of 1933 relate entirely to the sale of alcoholic liquor as a medicine and not as a beverage. If it be true that despite the act of 1933, a registered pharmacist must still secure a permit under the provisions of Section 4483 R. S. Mo. 1929, to fill a physician's prescription for alcoholic liquor, for what purpose was the third section of the Act of 1933 enacted and what meaning, if any, shall be attached to the words "it shall be lawful for any registered pharmacist * * * * to fill any prescription of any reputable licensed physician * * * * for alcoholic liquor?" When the third section of the Act of 1933 says that it shall be lawful for the druggist to fill the physician's prescription, reference is made to the prescription authorized by the second section of said Act to be written by the physician. The third section of the Act was written to carry out the provisions of the second section. If this is not true, then the third section of the Act means nothing and was an idle gesture insofar as Legislature is concerned, because to hold that despite the third section of the new Act, the permit must still be secured under the provisions of Section 4483 R. S. Mo. 1929, is to say that the Legislature had no purpose in enacting said third section of the Act of 1933.

The law is that if it is necessary in order to give effect to a section of a statute, so as to not impute to a Legislature the folly of enacting a law that would leave the law precisely as it was, the Court will hold that a former statute is impliedly repealed although not mentioned in the new statute. This is the tule laid down by an eminent writer on "statutory construction". Sutherland on Statutory Construction, Vol. I, (2d) pp. 476, 477 and 478. And he cites the following instances of application of the rule:

> "While the statute existed, giving appeals to the county court from judgments of Justices of the Peace in all cases without regard to the amount other than upon the verdict of the Jury, a new statute was passed which allowed appeals from such judgments when they exceeded five dollars. It was held a repeal of the former statute; for otherwise there would be imputed

> to the Legislature the folly of enacting a statute without purpose and which leaves the law precisely as before."

Under the above rule of statutory construction, even if it should be held that after the repeal by the Act of 1933 of all the specific provisions requiring pharmacists to secure permits under Section 4483 R. S. Mo. 1929, still Section 4483 itself required druggists to secure permit thereunder to fill prescriptions for intoxicating liquor; yet under the above rule of statutory construction, the Act of 1933 being a later act, in order to give effect to all its provisions and to the third section thereof declaring it lawful for the pharmacist to fill the physician's prescription written without the restrictions therein provided for by the repealed sections, the Court should declare that insofar as Section 4483 R. S. Mo. of 1929 relating to permits to be secured by druggists, said provisions of Section 4483 were repealed by the third section of the Act of 1933, thereby relieving the Legislature of the imputation of enacting a statute without a purpose and leaving the law precisely as it was before. Both the physician and the pharmacist are given new affirmative rights by the Act of 1933. In 105 Mo. l.c. 272, the Supreme Court quoted from an eminent writer on "statutory construction" as follows:

> "It is a rule of great importance and frequently acted upon that where by a statute a new right is given and a specific remedy provided * * * * the right will be vindicated in no other way than that provided by the statute."

To the same effect is Ex Parte Joffee, 46 Mo. App. 365; Riddick v. Governor, 1. Mo. 147; State v. Haney, 168 Mo. l.c. 213; Sutherland on Statutory Construction (2d) Vol. I. p. 473. Here we find the new right given physician to issue the prescription and the pharmacist the right to fill it. Under the last statutory rule above quoted, the only method provided for filling the prescription issued under the Act of 1933, is the simple one provided by the third section of said Act of 1933, regardless of the provisions of other sections relating to druggists. If it be held Section 4483 required druggist to secure permit to fill physician's prescription for alcoholic liquor, then the act of 1933, not providing for a permit, conflicts with Section 4483, and the later Act of 1933 will be held to be an exception to the general provisions of Section 4483. State ex rel. County v. Fulks, 295 Mo. l.c. 625; McGrew v. Railway Co. 330 Mo. 961.

This opinion is written upon the assumption that it was the intention of the Legislature to harmonize the laws of Missouri with those of the Federal government as to the sale of intoxicating liquors, as medicine, under prescriptions of practicing registered physicians; and that it was the further intention of the Missouri Legislature to free the druggists of the State from any restrictions theretofore imposed upon them in filling physicians' prescriptions for intoxicating liquor to be used as medicine and that to accomplish this end, the Legislature expressly repealed the sections named in the said Act of 1933.

It is the opinion of this department that a duly registered pharmacist is not required under the law of Missouri to secure a permit under Section 4483 R. S. Mo. 1929 in order to be able to fill a prescription written by a reputable licensed and practicing physician for alcoholic liquor to be used as a medicine.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

ECC/AJ

BEER: Right of the Food & Drug Commissioner to revoke permits by a summary procedure.

13139+ laws 338-23

August 22nd,1933

FILED
60
40

Dr. E. T. McGaugh,
State Health Commissioner,
Jefferson City, Missouri.

Dear Sir:

We acknowledge your letter of August 21st, 1933 requesting an opinion from this Office. Your request was as follows:

> "There has been complaints from the breweries of the State that some breweries, or wholesalers, are, in and outside the State entering in to the retail business. It is claimed that the breweries or their agents are leasing buildings, furnishing the entire equipment for operating a bar for the sale of beer, the operator having no financial investment. If this is carried out, the saloon business will revert back to where it was before prohibition.
>
> I would like an opinion whether or not, under the law, we can take any action. Has the Health Department any police powers in such circumstances? Can we revoke the permit when we are convinced that the above conditions are true? "

On page 258, Laws of Missouri 1933, Section 13139c provides in part as follows:

> "It shall be unlawful for any person in this State to manufacture, or brew, or sell, any non-intoxicating beer without first having applied for, and secured, a permit from the Food and Drug Commissioner authorizing such brewing, manufacture and sale, thereof, * * *".

The legal description of the statutory prescribed permit holders is fourfold and set out in Section 13139e which provides as follows:

"Before any permit required by this article shall be issued, the annual fee required therefor shall be paid into the State Treasury, and the receipt for such payment filed in the office of the Food and Drug Commissioner. Annual fees required for permits authorized by this article shall be as follows:

"(a) For a permit authorizing the manufacture, and the sale by the manufacturer of non-intoxicating beer brewed or manufactured in this state, ($500.00) five hundred dollars.
(b) For a permit authorizing the sale in this state by any distributor, or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer, ($50.00) fifty dollars.
(c) For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, ($10.00) ten dollars.
(d) For a permit authorizing the sale of non-intoxicating beer by grocers and other merchants and dealers, for sale in the original package direct to consumers, but not for resale, ($5.00) five dollars. "

Section 13139ee further authorizes the manufacturer or distributor in possession of (a) and (b) permits respectively, to have certain specific statutory powers as follows:

"A permit to brew or manufacture and sell non-intoxicating beer in this state shall be construed to authorize the sale, by the holder of such permit, of non-intoxicating beer to distributors or wholesalers for resale to retailers only, and/or the sale of non-intoxicating beer by the holders of such permits, direct to retailers. A permit authorizing any distributor or wholesaler to sell non-intoxicating beer in this state shall be construed to authorize the sale thereof only to holders of permits authorizing the sale of non-intoxicating beer to consumers, not for resale, but shall not be construed to authorize the sale by any such distributor or wholesaler of non-intoxicating beer direct to consumers."

Section 13139h limits the powers of the holders of all permits issued under this Article by certain general provisions applicable to all permit holders and then by a special provision applicable only to manufacturers and distributors identified as (a) and (b) permit holders in the Act, which special limitation is as follows:

> "Provided no permit shall be issued under this act to any person other than a native born, or naturalized, citizen of the United States of America,' and provided further, no manufacturer or distributor, to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company, or corporation, applying for, securing, or holding, a permit under either sub-paragraph 'c' or sub-paragraph 'd' of Section 13139e of this Act."

The Supreme Court said in the case of State v. Bixman, 62 S. W. 828, l.c. 831:

> "Neither do we assent for a moment to the statement that 'the power of the state to prohibit the sale of beer is not an arbitrary one, but may be exercised only because of the conviction of the people that such sale is hurtful'. The limitation upon legislative power in our constitution does not depend upon the conviction of the people as to the propriety or impropriety of the exercise of that power, save as expressed in the constitution itself. The policy of the law is one thing; the constitutional power of the general assembly to enact it is an entirely different thing. Can it be that because the conviction of the people is that the sale of beer is not hurtful asconstitutional barrier has arisen to prevent the lawmaking branch of the government from imposing conditions and restrictions under which the business alone may be conducted? The legislature, in the act before us, has declared that beer can only be sold or manufactured in this state upon condition that it shall be made from certain cereals only, and shall be inspected, and the inspection fees paid to the state therefor. The defendant asserts that its action in so doing is unconstitutional. We answer that under the constitution of the state there is nothing to prohibit the legislature from suppressing the business absolutely. We stand upon firm ground in asserting this prerogative for the legislative department. To deny it is to depart from well-settled principles. Since the decision in Austin v. State,

> 10 Mo. 591, it has been the established law of this state that the right to sell spirituous or intoxicating liquors is not a natural right, but is a calling which no one has the right to pursue without having first received the privilege or a license so to do from the lawful authorities of the state.'

Our Supreme Court in State ex rel. McClung v. Beckef, 288 Mo. 607 l.c. 616 stated the law of Missouri relating to license matters thus:

> "In the absence of any inhibition, express or implied, in the State Constitution, the Legislature may, either in the exercise of the police power or for the purpose of revenue, levy license taxes on occupations or privileges within the limits of the state."

In the exercise of police power and for the purpose of revenue, the Legislature enacted the recent Beer Bill, which is now the law. By the express terms of the law, permits are granted, upon application to the Food and Drug Commissioner. Upon compliance with the law, permits are granted to manufacturers and distributors of non-intoxicating beer, and this permit allows the permitee to sell and distribute said beer within the limitations of the law providing for the same. A licensed privilege it is, and subject to such reasonable regulations and restrictions as the Legislature prescribed for the protection of the general public.

Our Supreme Court has said in Simmons v. State, 12 Mo. 268, l.c. 271, when speaking of the rights that one holding the privilege has in the exercise of that privilege:

> "None of the essential elements of a contract are to be found in the grant of license to practice law: there is no engagement between the State and the applicant for license that he will follow the practice of the law for livelihood; no legal consideration is paid the State for the license. The grant of the license is a mere naked grant of a privilege without consideration, and which the applicant may or may not, at his option avail himself.of. Therefore the State may revoke the privilege granted, or may impose such conditions upon its exercise as are deemed proper or demanded by the public interest."

We submit that a permit to do one thing within reasonable legal limitations is not a license to do that thing beyond the limitations. The

object of the Legislature was to take the manufacturers and distributors of non-intoxicating beer out of the retail business by limiting his privilege as it was limited. The limitation was intended to be a regulation upon the licensee's business. If the permitee did not intend to comply with the law he should never have paid for his permit.

There is no provision in the recent beer law for the revocation of the permit once it is granted, but it has been held in this State that absent a provision for revocation in the license act, an exact legal proceeding is not required in revoking a license.

In the case of State v. Ross, 177 Mo. App. 223; 162 S. W. 702, in an opinion by Judge Sturgis, then of the Springfield Court of Appeals, now a Commissioner in our Supreme Court, he said on page 228:

> "A license to sell liquor is neither a contract nor a right of property, within the legal and constitutional meaning of those terms. It is no more than a temporary permit to do that which would otherwise be unlawful, and forms a part of the internal police system of the State. Hence the authority which granted the license always retains the power to revoke it, either for cause of forfeiture, or upon a change of policy and legislation in regard to the liquor traffic. And such revocation cannot be pronounced unconstitutional, either as an impairment of contract obligation, or as unlawfully divesting persons of their property or rights."

Again at page 230, Judge Sturgis said:

> "The proceeding is an informal and summary investigation rather than a trial."

In the case of State v. Dykeman, 153 Mo. App. 416, 134 S. W. 120, Judge Cox said:

> "A license to sell liquor is in no sense a contract with the state, but a mere permit to do an act that would otherwise be unlawful and is subject at all times to the police power of the State Government. The party receiving such a license takes it subject to all the provisions of the law relating thereto, and knows when he secures the license that it may be revoked at any time for the cause mentioned in the statute.

> * * *The proceedings, therefore, are not required to be as formal and exact as would be the case in a judicial trial involving interference with life, liberty, or property."

It is the opinion of this Office that the Food & Drug Commissioner in Missouri is entirely within his statutory powers and duties when he revoked a permit of a manufacturer or distributor of non-intoxicating beer upon discovering that the permitee is not complying with the law, in that he is financially interested, directly or indirectly, in persons, firms or corporations selling non-intoxicating beer under retail permits, this being a direct violation of permits granted to wholesalers and distributors. As the statute does not provide a method of revocation, it is our opinion that it is within your power to revoke the same in a summary manner.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOS/mh

BOARD OF HEALTH: Qualifications of applicant for medical license.

9112 - 9120

September 1,1933 9/7

FILED
60
42

The State Board of Health,
Jefferson City, Missouri.

Attention: Dr. Herman S. Gove.

My Dear Dr. Gove:

I acknowledge receipt of your inquiry of recent date, requesting an opinion of this office. Your letter reads as follows:

> "Within the next year we are going to be confronted with candidates from foreign Medical Colleges. It is estimated that there are about five or six thousand Americans in European Medical Schools.
>
> New York has very rigid restrictions on allowing foreigners to appear before their board. Possibly it would require legislative action.
>
> I would like very much to have your opinion on this particular point."

The statutory requirements respecting the qualifications of an applicant for a medical license are found in the Medical Practice Act, found in Chapter 53 of the R. S. of Mo. 1929. Sections 9113 and 9120 provide in part as follows:

> "Sec. 9113. Examination--subjects to be passed--grade--recognition of certificates of other states.--* * * *All persons appearing for examination shall make application in writing to the secretary of the said board thirty days before the meeting. They shall furnish satisfactory evidence of their preliminary qualifications, to-wit, a certificate of graduation from an accredited high school, or its equivalent. They shall also furnish satisfactory evidence of having attended throughout at least four terms of thirty-two weeks of actual instruction in each term and of having received a diploma

> from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at time of graduation;* * * *The candidate shall be required to attain an average of seventy-five per centum of all subjects examined on, provided that he must not fall below fifty per centum on any one subject, before being granted a license;* * * *The board of health shall issue to such persons as they shall find upon examination to possess the requisite qualifications, a license to practice medicine and surgery in accordance with the provisions of this article* * **
>
> "Sec. 9120. Authority of state board of health to issue or revoke licenses to practice medicine.--The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes,* * * **

A candidate for a license to practice medicine and surgery in this State therefore must be graduated from an accredited high school or have equivalent educational qualifications; must be a graduate of a reputable medical college prescribing and enforcing the above requirements; must pass an examination as above prescribed with average grades as above set out; and must not be of bad moral character or guilty of unprofessional or dishonorable conduct.

The foregoing is the yard stick by which applicants are to be measured. No discrimination is made because of age, sex, race, color or citizenship. No discrimination is made between medical colleges, whether local, out of the state or foreign. In respect to the question of "reputable medical college", we refer to Section 9114 R. S. Mo. 1929, portions of which read:

> "The question as to whether any medical school is one entitled to recognition* * * as a medical school of good standing* * * * is hereby declared to be a question of fact and any person aggrieved by reason of the action of the board, shall have the right to have such question reviewed* * *in the circuit court.* * * **

Accordingly, each college is to be judged by the Board as the occasion arises, upon the particular facts of each case. No set rule is laid down, nor can one be applied.

We are unable to determine the nature of the legislation considered by the board, but the forgoing sets out the present requirements of the laws of this state. If you will submit to us the legislation considered with a memorandum as to the evils to be corrected or eliminated, we shall be glad to advise you further on the question.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

NEPOTISM:

Public officer receiving personal service from daughter does not violate Section 13, Article XIV, where daughter is not appointed to an official position.

October 4, 1933

FILED
60

Mr. Sam. M. McKay
Prosecuting Attorney
De Soto, Missouri

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Our Collector, W. C. Kerkhoff, has asked me for an opinion relative to the employment in the Collector's office of his daughters. In view of the recent decision of the Supreme Court, relative to the nepotism law, I would like to have an opinion from your office as to whether or not he is violating that law by permitting his daughters to work under the following conditions, to-wit:

His three daughters do all of the book and clerical work in the office. Two of them are single and live at home with him, and one was recently married and has a home of her own, although she continues to do some work in the office. None of the daughters are paid any salary nor do they sign the receipts, and Mr. Kerckhoff has no one who is a deputy, or authorized to give receipts as Deputy Collector. He, of course, supports the girls, buys all of their clothing, and furnishes them whatever spending money they require, but they are paid no fixed salary or wages.

I will appreciate an expression from your office in the form of an opinion, by which Mr. Kerckhoff can be governed, as he is law-abiding and does not want to violate the law, but, on the other hand, he feels that the nepotism law does not cover his case.

Of course, I take it that if the State would be liable for any salary or wages paid in the Collector's office, it might create a different situation, but since a Collector pays all salaries, if any are paid, out of his own commission, that seems to me to place a different construction on the law."

Section 13, Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above Section of the Constitution, any public officer who names or appoints any person related within the fourth degree to render service to the State, makes himself liable to forfeiture of office. We believe, however, that the proper construction to be placed upon the constitutional provision is that such person must be appointed to hold an official position or a public office existing under the laws of constitution of this State. The test is, as we understand it, whether or not the person is appointed to an official position and renders service to the State in such official capacity. We do not believe it was intended that a public officer might not avail himself of the personal service of the members of his family where they are not out of the public funds and where they are not rendering paid service to the State in an official capacity.

It is a familiar rule that the father as such is entitled to the services and earnings of his unemancipated children. That well-recognized rule is expressed in 29 Cyc. 1623, where it is said:

> "The father is the head of the family. He is entitled to the services and earnings of the children so long as the latter are legally under his custody or control and unemancipated."

We do not understand that this constitutional provision has changed that well-recognized rule. The father, whether a public officer or not, is still entitled to the services of his unemancipated children. Where such services are performed for him, such relative is not rendering service to the State in an official capacity, as contemplated by said constitutional provision. Where the relative, however, holds an official position and renders service to the State in that official capacity, the appointing officer has violated the constitution.

According to your inquiry the Collector's daughters do some work in their father's office; none of them are paid any salary and none of the daughters hold any official capacity in the office. The services they furnish are personal services to their father as such. They are not, in an official capacity, rendering service to the State of Missouri.

It is therefore the opinion of this Department that the Collector of your county is not guilty of violating Section 13 of Article XIV by permitting his daughters to render to him personal service where the daughters are not holding an official position and are not, as officials, rendering service to the State.

Very truly yours,

FRANK W. HAYES
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

FWH:S

STATE BOARD OF HEALTH: Without authority to issue temporary or conditional license to practice medicine.

9113 RS Mo 1929

October 7, 1933

10/7

FILED 60

McDaugh

The State Board of Health
Capitol Building
Jefferson City, Missouri

Attention: Dr. Herman S. Gove.

My Dear Dr. Gove:

I acknowledge receipt of your letter of October 2, 1933, requesting an opinion of this office which is as follows:

> "We have your letter of September 29 and in reply we wish to reduce our request in writing as to an opinion of your department as to the State Board of Health of Missouri issuing temporary or conditional licenses to practice medicine in the State of Missouri."

In Section 9113 of Article 5, Chapter 33 R. S. Mo. 1929, we find that all applicants for licenses are required to appear before the Board for an examination as to their qualifications to practice medicine in this state. This section, among other things provides as follows:

> "* * *All persons appearing for examination shall make application in writing to the secretary of the said board thirty days before the meeting. They shall furnish satisfactory evidence of their preliminary qualifications, to-wit, a certificate of graduation from an accredited high school, or its equivalent. They shall also furnish satisfactory evidence of having attended throughout at least four terms of thirty-two weeks of actual instruction in each term and of having received a diploma from some reputable medical college that enforces requirements of four terms of

> thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at time of graduation.* * *"

It is to be noted that the diploma referred to must be from a medical college requiring two years experience in operative and hospital work. The Board would therefore not be permitted or authorized by law to issue a license to any applicant who does not have this minimum requirement. In other words, the statute has set out the minimum requirements which must be met before the Board of Health is authorized to issue a license to the applicant. In the latter part of the section we find this:

> "* * *The board of health shall issue to such persons as they shall find upon examination to possess the requisite qualifications, a license to practice medicine and surgery in accordance with the provisions of this article,* * *"

By virtue of this clause the Board of Health is authorized to issue a license if the requirements of the section have been met. Of course, the applicant must be of the required moral character and must make the minimum grades required by the statute. After having met all of these tests he is entitled to receive a license to practice medicine and surgery in this State. This license is not a conditional license nor is it a temporary license, nor is any other license provided for in the chapter. The law authorizes but one license and that is a full and unconditional license to practice, evidencing the applicant's qualifications as a physician and surgeon.

In Section 9118 of the Medical Practice Act we find that the law prescribes a penalty for those who practice medicine or surgery or attempt to treat the sick without a license. In this section it is provided that all who do so

> "without a license from the State Board of Health as provided in this article"

shall be subject to prosecution. Accordingly, if the license issued by the Board of Health is not the license which is provided for in the Medical Practice Act, it would subject the applicant to prosecution for practicing medicine and surgery without a proper license.

It is therefore the opinion of this office that the State Board of Health is without statutory authority to issue any other than the license provided for in the statutes and there being no provision for a temporary or conditional license the Board is without authority to issue such.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

_____
Attorney General.

HGW:MM

OPINION RELATING TO THE LIABILITY OF COUNTIES FOR THE COST OF THE CRIMINAL INSANE TRANSFERRED FROM THE PENITENTIARY TO STATE HOSPITALS FOR THE INSANE UPON THE WARRANT OF THE GOVERNOR.

8636 RS Mo 1929

October 7, 1933

10-17

FILED
60
51

Mr. J. B. McGuffin,
Prosecuting Attorney Lawrence Co.,
Mt. Vernon, Missouri

Dear Sir:

This department acknowledges receipt of your letter under date of October 3, 1933, in which you state and inquire as follows:

> "About 1919 one Joe Schmidt, a transient or tramp, while passing through this county, was charged with some felony, arrested, convicted and sentenced to a term in the State Penitentiary. Shortly thereafter this defendant was adjudged insane and by order of the Governor was transferred to the asylum at Fulton, Missouri, and he is still there as a hopelessly insane inmate.
>
> Lawrence County has been charged by the Asylum monthly and yearly ever since his reception at said hospital, at about $18.00 or $20.00 per month, and the County Court here has been paying same.
>
> Our present County Court feels that this county is not chargeable for this prisoner, or inmate, because he is not now nor never has been a resident of this county and has no ties of any description in this county to make this county liable.
>
> I have tried to arrive at a definite opinion of the law but am not satisfied fully, and will ask for your opinion to help me in the matter."

Section 3801, R. S. 1929, reads as follows:

"If any person, after having been convicted of any crime or misdemeanor, become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to inquire into the facts, and he may pardon such lunatic, commute or suspend, for the time being, the execution of such sentence, and may, by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, it shall be executed upon him after such period of suspension has expired; and the expense of conveying such lunatic to the asylum shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the asylum for his board and clothing shall be paid as now provided by law in cases of the insane poor: Provided, if such person shall have property, the costs shall be paid out of his property, by his guardian."

Section 8636, R. S. 1929, provides that:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto."

Section 8636 specifies that the county shall pay for the support and maintenance of such insane poor persons as the court may send to a state hospital.

Under section 8636, however, even the County Court is not authorized by its arbitrary will or unlimited discretion, to send any poor person it may select to a state hospital at the expense of the county. The court must hold due proceedings upon a petition filed showing that the <u>insane poor person</u> is a <u>citizen residing in the county</u> and other essential facts as prescribed by the statute. There must be a trial of the facts and a judgment of the court thereupon.

The County Court has no authority, under this statute, to send a person to a state hospital or to maintain one there at the expense of the county if that person is not a resident thereof.

Section 8653, R. S. 1929, authorizes the County Court to certify to the Superintendent of the State Hospital that a pay patient, already in the institution, has not sufficient estate to support him there, and when that is done he becomes a patient on the county and the county is chargeable with the cost of his keep.

The sections above referred to, expressly authorizing the cost of keeping a patient in the State Hospital, contain the only provisions to be found in our statutes. In each case it requires that a person be a resident of the county and that the County Court shall take the prescribed action in the premises.

In Shields v. Johnson County, 144 Mo. 76, the court was dealing with the same statute under which the instant case has arisen. In that case the man had been convicted in Johnson County and during his imprisonment in the penitentiary had become insane and, by order of the Governor, had been taken to the asylum. The Supreme Court held that it was not essential, under those circumstances and under that section of the statute, that the County Court should first adjudge the man to be a resident of the county, but the court held that it was essential for the plaintiff to prove that fact in order to render the county liable.

In the same case, the court per Burgess, J. further said, "He was a citizen of the county at the time of his being sentenced to the pentitentiary, has since become insane, and is insolvent, are conditions precedent to the liability of the county for his board and

clothing at the asylum, may be conceded, and the burden would rest upon plaintiff of showing that Farland was a resident of Johnson County at the time of his conviction, and that he had no property."

In Thomas v. Macon County, 175 Mo. l. c. 72, the court, in part, said:

> "The plaintiff relies on that part of the clause just quoted which provides that the expense 'shall be paid as now provided by law in cases of the insane poor,' for his right to recover in this case. As we have seen, the only provision made by law for charging such expense to a county, is in case the insane person is a resident of the county. The residence of the insane person in Macon County, therefore, becomes an essential fact for the plaintiff in this case toprove before he can recover."

In Walton v. Christian County, 235 Mo. l. c. 309, the court said in part as follows:

> "The liability of the counties of the state for insane criminals living and residing in said counties who were insolvent when convicted and whose sentence has been suspended as in this case, by the warrant of the governor in order that they may be transferred to the state institution for the insane is well settled."

In view of the provisions of the law and the opinions of our Supreme Court relative to the construction of the statute in question, this department holds, that in order to make a county liable for the keep of an insane convict that by warrant of the Governor has been transferred to a state hospital for the insane, it must affirmatively appear,

First: That said person, at the time of his conviction was a resident citizen of said county.

Second: That he was insolvent when convicted.

Third: That the transfer was upon the warrant of the Governor.

We further hold that when the law requires residence of a person to be proven, proof of his actual presence at the place at one particular time does not satisfy the requirement and much less does the fact weigh when the person is there as a prisoner and against his will.

REspectfully submitted,

W. W. Barnes
Assistant Attorney General

APPROVED:

Attorney General.

WWB:SF

NEPOTISM--Section 13 of Article XIV of the Constitution of Missouri does not prohibit the appointing by a public officer of a second cousin. It prohibits the appointment of first cousin and those more closely related, and the civil rule is to be used in computing the relationship.

October 17, 1933

Filed: #60

Mr. J. B. McGuffin
Prosecuting Attorney
Mt. Vernon, Missouri

Dear Sir:

We are acknowledging receipt of your letter in which you enclose an inquiry from Mr. Harry Moore, Superintendent of Schools at Mt. Vernon, Missouri. His inquiry is as follows:

> "On the Mt. Vernon school board are two members who are in questionable relationship to one of the teachers. The teacher is a daughter of a first cousin of the two members of the board.
>
> It will soon be time to pay the teachers. The other members of the board fear they may be held liable for the salaries if the warrants are ordered drawn.
>
> I am asking that you get an opinion from the Attorney General of the state defining the relationships that fall within the fourth degree. An attorney General has stated in an opinion given on page 270 School Laws of Missouri, 1931, that the rule of the civil law should be used. While, as you know, Sec. 645, Revised Statutes of Missouri, commits Missouri to the use of the common law.
>
> If board members are to obey the law it is necessary they know who falls within the fourth degree. If this matter can be cleared, it will be appreciated by the school boards of the county, and, perhaps of the entire state."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision, the appointment by a public officer, of a relative related within the fourth degree, either by consanguinity or affinity, is prohibited. You inquire what relationship falls within the fourth degree and particularly whether or not the members can appoint a daughter of their first cousin, which is their second cousin. Affinity is defined in 2 C. J. 378, as follows:

> "The connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband."

Consanguinity is defined in 12 C. J. 510 as follows:

> "Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor."

Under the rule laid down in 12 C. J. 511, there are two methods in computing the degrees of consanguinity, as follows:

> "One by the canon law, which has been adopted into the common law of descents in England, and the other by the civil law, which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.' By the civil law the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

We do not find that the courts of this State have laid down any rule as to how the relationship under Section 13 of Article XIV is to be computed. In other states, where anti-nepotism provisions are in force, courts have generally followed the civil rule. The civil rule, as stated in the above quotation, is generally followed both here and in England in determining who is entitled to administer personalty of a decedent. We believe that the courts of this State, when the matter is presented for consideration, will adopt the civil rule in computing the degree of relationship under Section 13 of Article XIV. Under the civil rule, any relationship as close as first cousin or closer would be prohibited under the Constitution. A public officer may appoint a second cousin without violating the above provision of the Constitution. It is therefore the opinion of this Department that the two members of the board who voted to elect the daughter of their first cousin did not violate Section 13 of Article XIV. Since her

Mr. J. B. McGuffin

election was legal under the Constitution, she would be entitled to be paid for the services performed.

Very truly yours,

/s/ Frank W. Hayes
Assistant Attorney General.

APPROVED:

ATTORNEY GENERAL

PUBLIC HEALTH - Jurisdiction of Board of Health to protect city water supply from pollution by city sewer, Jefferson City.

November the Seventeenth

1933

FILED
60

Honorable E. T. McCaul,
State Health Commissioner,
The State Board of Health of Missouri,
Jefferson City, Missouri.

Dear Sir:

A request for an opinion under date of October 3, 1933 has been received from you, such request being in the following terms:

> "I wish to be advised concerning this department's power in a matter involving the purity of a city water supply.
>
> At the present time, Jefferson City is served by a water plant which is owned by the Capital City Water Company, a private corporation. This plant has as its source of supply the Missouri River. Water from this river is coagulated, filtered, chlorinated and subsequently delivered to the city distribution system. The intake is located upstream from the present sewer outlets of the city and has been at this location since 1888. The city now proposes to sewer a heretofore unsewered area and to discharge this sewage into the Missouri River at a point approximately 2000 feet above the water works intake. This department is of the opinion that the discharge of sewage into the river will constitute a potential menace to the sanitary quality of the water supply, if the water works intake is allowed to remain in its present location.
>
> The City of Jefferson City contends that, since this proposed outfall follows the normal drainage, it is the water company's duty to either move its intake or to pay the cost of piping the sewage to a point below the intake. The water company contends that, since its intake has been at its present location for 45 years and since it will be difficult to move, it is the city's duty to pipe the sewage below the intake.
>
> Will you please advise us specifically on the following questions:
>
> (1) What power does the State Board of Health have in preventing this hazard?
>
> (2) If the State Board of Health has legal power to prevent this hazard, would it be exercised in prohibiting the city from installing the sewer or would it be exercised in forcing the water company to move its intake or pipe the sewage below the intake?
>
> (3) If the State Board of Health has legal power to prevent the hazard, what procedure should be followed in exercising this power?

For your information, we are enclosing copies of this department's Regulations Governing the Installation, Extension, and Operation of Public Water Supplies and Regulations Governing the Installation, Extension and Operation of Public Sewerage Systems."

I.

JURISDICTION OF BOARD OF HEALTH

The State of Missouri has a right, under the police power, to protect its inhabitants by regulating the water supply of its navigable rivers. The Supreme Court of the United States in the case of Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828 (1908) enunciated its doctrine as follows:

> "* * *it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. Kansas v. Colorado, 185 U. S. 125, 141, 142, 46 L. ed. 838, 844, 845, 22 Sup. Ct. Rep. 552, s. c. 206 U. S. 46, 99, 51 L. ed. 956, 975, 27 Sup. Ct. Rep. 655; Georgia v. Tennessee Copper Co., 206 U. S. 230, 238, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618."

Revised Statutes of Missouri of 1929, Section 9015, provides in part as follows:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state."

Section 9028 provides in part as follows:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities."

Under the power given to the State Board of Health under the two statutes just cited the Board has adopted certain rules these being contained in Missouri Public Health Manual Book V - Sanitary Code - Part V of which is entitled "Regulations Governing the Installation, Extension, and Operation of Public Sewerage Systems" which provides in effect that no new sewer system shall be constructed or put in operation without the owner thereof first securing the approval of the Board of Public Health therefor, and Part VI of which is entitled "Regulations Governing the Installation, Extension and

Operation of Public Water Supplies which enact substantially the same regulations as to any waterworks supplying the public with water. Section 1 of both Part V and Part VI includes cities within the definition of owner. The Sanitary Code just referred to would prevent any change of the status quo with respect to the Jefferson City water supply and sewer system without the approval of the Board of Health, and would give the Board of Health jurisdiction to prevent any disturbance of the status quo which might be threatened, and such preventative action could be taken by an injunctive proceeding in the Circuit Court, provided the Board of Health under the statutes had jurisdiction and power to promulgate the regulations in the Sanitary Code above referred to.

The only obstacle in the way of such jurisdiction would be Section 9034 of the Revised Statutes of Missouri of 1929 which provides as follows:

> "Nothing in this article shall apply to the municipal water supply in cities in which a constant supervision of the said city water supply to insure a safe quality of water dispensed is conducted by or is acceptable to the city department of health of that city."

If Section 9034 removes from the jurisdiction of the Board of Health all municipal water supplies which are inspected to the satisfaction of city authorities, as in Section 9034 provided, then Section 9034 would prevent the Board of Health from interfering in any way or assuming any jurisdiction over the water supply of Jefferson City, because then nothing in Article I of Chapter 52 of the Revised Statutes of 1929, from which article alone the Board of Health derives its powers, would authorize any action by the Board of Health.

Section 9034 was enacted in 1919 as one of five sections constituting Laws of 1919, page 370, the whole of such enactment now being found as Revised Statutes of 1929, Sections 9031-9035, inclusive. These sections deal with a particular scheme for analyzing water supplies, and it might well be held by a court that Section 9034 in exempting certain municipal water supplies from the jurisdiction of the Board of Health was not intending to exempt them from the general jurisdiction of the Board of Health as defined in Section 9015 above quoted, which was enacted as Laws of 1919, page 372.

A further argument to the same effect is found in the fact that before 1919 two statutes prohibited the State Board of Health from interference with cities, such sections being Revised Statutes of 1909, Section 6662 and 6653, which provided as follows:

> "Sec. 6662. Rules of board not binding, when. - - No rule or regulation adopted by this board shall be legal or binding which shall conflict with any law of the state, or any ordinance of any municipality or town in the state."

> "Sec. 6653. Its powers and duties. - - The state board of health shall have general supervision over the health and sanitary interests of the citizens of the state. It shall be their duty to recommend to the general assembly of the state such laws as they

> may deem necessary to improve and advance the sanitary condition of the state; to recommend to the municipal authorities of any city, or to the county courts of any county, the adoption of any rules that they may deem wise or expedient for the protection and preservation of the health of the citizens thereof."

Said Section 6653 was repealed and superseded by Revised Statutes Missouri 1929, Section 9015, above quoted, and Section 6662 of the 1909 statutes was repealed at the same time, these changes having been made by Laws of 1919 page 372, so it seems to have been the intent of the 1919 General Assembly to extend the jurisdiction of the State Board of Health to cities. Aside from these technical considerations, it would be unthinkable that there should be no power to protect the inhabitants of a city from being exposed to the dangers of drinking polluted water, and the State Board of Health is the only state instrumentality created by statute which would have the power to prevent such an evil.

Another possible argument in favor of the power of the State Board of Health to prevent such evil might be in a construction of the phrase "municipal water supply" in Section 9034 as meaning water supply owned by a city which would not be an unreasonable construction, and since the Jefferson City waterworks is not publicly owned, it would not fall within Section 9034. Furthermore, the Supreme Court of this state has adopted an attitude of liberal construction toward the powers of the State Board of Health. Thus, in the case of State ex rel Horton v. Clark, 9 S. W. 2d, 635 (1928) the Court said:

> " * * *it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. 29 C. J. Sec. 30, p. 248, also section 6, p. 243. While boards of this character cannot act arbitrarily, or without substantial evidence (State ex rel. v. Adcock, 206 Mo. 550, loc. cit. 558, 105 S. W. 270, 121 Am. St. Rep. 681), yet, when any act, requiring the exercise of judgment and the employment of discretion, is within the scope of the exercise of a reasonable discretion, it will not be interfered with." (9 S. W. 2d, 638).

For the above reasons, it is our opinion that Section 9034 would not prevent the State Board of Health from taking jurisdiction to prevent the threatened danger, and that such Board of Health would have power and authority to prevent such threatened evil by either requiring the water company to move its intake before the new sewer system is put in operation, or by requiring the new sewer system to have its outlet at some place where it will not injuriously affect the water at the present intake of the water company.

II.

WHAT ORDER SHOULD BE MADE

As has been demonstrated above, the State Board of Health as a matter of power and jurisdiction could either under its regulations in the Sanitary

Code and under its general powers refuse to approve an outlet for the sewer system above the water intake, or could prohibit the water company from using its present intake if the proposed sewer outlet is approved. The remaining part of this opinion will deal with the rights of the parties apart from the jurisdiction of the State Board of Health. In the controlling statute it is provided that "public sewers shall be established along the principal courses of drainage" which provision, being a part of Revised Statutes of 1929, Section 6644, governs cities of the second class, and the same provision is found in Section 6822 dealing with cities of the third class, and since according to your request for an opinion the contemplated sewer follows the natural drainage course it would seem that Jefferson City would be directed by statute to place its outlet where it is now planning to place it.

However, even a city cannot discharge its sewage so as to damage the land of a lower riparian owner. The rule of the Supreme Court of Missouri is well stated in the case of Joplin Consolidated Mining Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406 (1894) where the court, at page 135, said:

> "The proprietor of land through which a stream flows can not insist that the water shall come to him in the natural pure state. He must submit, and that, too, without compensation, to the reasonable use of it by the upper proprietors; and he must submit to the natural wash and drainage coming from towns and cities. But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action, and in many instances injunctive relief. Proprietors of Locks, etc. v. Lowell, 7 Gray 223; Haskell v. New Bedford, 108 Mass. 208; Vale Mills v. Nashua, 63 N. H. 136; Chapman v. Rochester, 110 N. Y. 373; Lewis on Eminent Domain, section 65. The author just mentioned says: 'But we see no reason why this could not be done if authorized by law and compensation was made for taking the right to pure water.'
>
> Section 1541, Revised Statutes, 1879, provides:
>
> 'Public sewers shall be established along the principal courses of drainage, at such times, to such extent, of such dimensions and under such regulations as may be provided by ordinance.' And other sections give the city ample power to condemn private property for sewer purposes, the compensation to be ascertained by five freeholders to be appointed by the mayor. Secs. 1524 and 1544. The fair, and, we think, clear, implication of the language used in section 1541 is that the principal courses of drainage may be used for sewer purposes, until sewers are constructed along the same. Indeed, these courses of drainage constitute the only receptacles for such matter. We, therefore, hold that the city of Joplin has the right and power to construct the public sewer in question so that it will discharge its contents into Joplin creek. Whether the city can do this so as to create a public nuisance we need not inquire, for in our opinion the evidence makes out no such

> a case. It does, however, tend to show that the plaintiff's lands will be damaged by the discharge of the sewer matter into the creek. Whether this damage would amount to the taking of private property for public use is not important to inquire; for our constitution declares that private property shall not be taken or damaged without just compensation. If the discharge of the sewer matter into the creek will decrease the value of the plaintiff's land through which the creek runs, then the damage thus done is clearly within the constitutional provision, and the plaintiff must have compensation therefor. Van De Vere v. Kansas City, 107 Mo. 84." (124 Mo. 135)

To the same effect see Smith v. City of Sedalia, 152 Mo. 283, 53 S. W. 907 (1899) wherein the court at page 302 said:

> "The fact that sewers are necessary to a city and that the statute directs that they shall follow as nearly as practicable the natural drainage of the country, afford no justification to the action of a city in emptying its sewers on the land of an individual to his damage. Our Constitution declares that private property shall not be taken or damaged without payment of just compensation. The Legislature therefore could not, if it so intended, confer authority on a city to injure private property for the public good without first paying the damage. But subject to this qualification, private interest mutt yield to the public good. If it is a public necessity that the plaintiff's land be taken or damaged in order to dispose of the sewage of the defendant city, it may be so condemned according to law, but the city must first pay him the just compensation."

Likewise, in City of Cape Girardeau v. Munze, 314 Mo. 438, 284 S. W. 471 (1926) the Court at page 471 said:

> "In other words, if the city does not cause the waters of Cape La Croix Creek to be polluted beyond the extent of their pollution from the natural wash and drainage coming from the city and upper proprietors before the opening of the sewer system, or to be rendered more unfit for use than such waters were prior to the construction of the sewer, appellants have no lawful claim for compensation or damages. Ample evidence was offered at the trial tending to show that the waters of the creek were polluted and contaminated by reason of the natural wash and drainage from its watershed from slaughter houses, open cesspools and street or gutter drainage, before the construction and operation of the proposed sewer system. On the other hand, however, the city must respond in damages in the event that its use of the creek so pollutes the waters thereof as to render the same more unfit for use than they were prior to the construction and operation of the sewer system, or so pollutes the stream as to deprive the appellants of the uses of the water they would otherwise reasonably enjoy. This principle is recognized

in Joplin Consolidated Mining Co. v. City of Joplin, supra, wherein we said: 'But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action."

From the above cases it is apparent that the city cannot claim the protection of the statute directing it to have its sewers follow the natural courses of drainage so as to relieve itself from paying lower riparian landholders who have been damaged, so that probably the water company would have a remedy at law against the city for the expense involved in moving its intake if the Board of Health approves the proposed sewer construction, and because such remedy exists and because the Board of Health would have power to make whatever kind of order would seem to it most proper, and especially since the Board of Health could withhold approval of the proposed new sewer system, then it might be entirely proper for the State Board of Health either to withhold approval of the proposed sewer system, and only to approve a sewer system which did not prejudice the present water company's intake, or to approve the present sewer system on the condition that the city pay damages to the water company, i. e. the amount necessary for the establishment of a new intake above the proposed sewer outlet. For an admirable collection of authorities dealing with the rights of lower riparian owners against pollution see the brief for the State of Missouri in the case of Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572 (1906). The Supreme Court of the United States in the case of Darling v. Newport News, 249 U. S. 540, 63 L. ed. 759 (1919) seems in conflict with the Supreme Court of Missouri but, of course, the Missouri rule would govern the present situation, and in any event Darling v. Newport News might be distinguished on the ground that the polluted area was a part of the ocean and not a fresh water stream.

For the reasons above stated it is our conclusion (1) that the State Board of Health has jurisdiction to prevent the threatened hazard, (2) that this power could be exercised by withholding approval of the proposed sewer system or by ordering the water company to move its intake in the event the proposed sewer system is approved, or in making approval of the proposed sewer system conditional upon the city paying the cost to the water company of moving the intake, the latter alternative seeming most in accordance with the law of this state, and (3) that the proper method of exercising its power would be for the State Board of Health to make appropriate orders in conformity with its decision, and if such orders are not obeyed by instituting proceedings in equity in the Circuit Court to prevent such non-compliance with its orders.

Yours very truly,
EDWARD R. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL

TAXATION: Construction of the word "destruction" as used in Section 9963b, p. 448, Laws of Missouri 1933.

11-23

November 22, 1933

FILED
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Hon. P. B. McHaney
Counsel Insurance Department
Jefferson City, Missouri

My Dear Mr. McHaney:

We acknowledge receipt of your recent request for an opinion of this office upon the following matter:

> "In the course of our duties we have been requested to rule on the construction of Section 9963b Revised Statutes of 1929, as amended in 1933 (see laws of Missouri, 1933, page 448) with reference to the meaning of the word 'destruction' as used in said Section.
>
> It appears to be the opinion of some legal experts that said Section applies only when there has been a total destruction of the premises referred to in said Section by fire, windstorm or tornado. Other legal experts contend that said Section applies to small claims for loss or damage to buildings, regardless as to whether the building was totally destroyed or not.
>
> We therefore, would like your opinion as to the meaning of the word 'destruction' with reference as to whether it means a partial or total destruction, or any other meaning which you care to attribute to the word as it is used in said Section of the statutes."

We shall first refer to the pertinent parts of Section 9963b as found on page 448, Laws of Missouri 1933, which reads as follows:

"In the event of the destruction by fire, windstorm or tornado of any permanent buildings* * * situate upon any land * * *which * * *at the time of destruction were situate upon any land * * *against which taxes were then levied and assessed and was so situate at the time of such levy and assessment, the lien of such taxes shall attach to and follow any insurance that may be upon said property at the time of its destruction, * * *Provided however, if in the opinion of the county collector the destruction of such building * * *will not prejudice the collection of such taxes,* * *the county collector shall be authorized in writing* * *to waive and release the lien by this section given.* * *the assured* * *making claim for loss* * *shall file with such company a statement from the collector* * *in writing, * * *that there are no taxes against said buildings* * *or that taxes exist against the same and the amount and description thereof, and whether or not such lien is waived* * *"

I.

DEFINITIONS OF " DESTRUCTION."

In turning to Corpus Juris we find this definition of the word "destruction":

"Destruction. While the term ordinarily means breaking up in parts, demolition, pulling down, it need not necessarily be so construed."

In Ballentine's Law Dictionary we find the following:

"Destruction. The word is sometimes synonymous with the word loss."

While Ballentine does not contain any interpretation of the phrase "partial destruction," it does recognize the term "total destruction".

II.

RULES OF CONSTRUCTION REQUIRE CONSIDERATION OF PURPOSE OF ACT.

Now it is a familiar rule that in construing any statute

the terms thereof shall be applied in their usual and ordinary sense and that the entire statute should be considered in giving effect to any part or portion thereof. It is likewise true that the conditions under which the act was passed and the purpose for which it was passed are to be considered in giving effect to the statute, as stated in the case of Louisiana Purchase Company vs. Schnurmacher, 155 Mo. App. 601, l.c. 605:

> "It is a familiar canon of construction of statutes that the conditions under which the statute was enacted, and the purpose to be secured by it, should always be kept in view in determining what the legislature meant by the language used in the statute." * * *"

Keeping these rules in mind and looking to the history of the statutes, we find it was passed during a period of severe financial stress, at a time when the collection of state, county and municipal taxes was at a very low ebb, resulting in these governmental agencies being without sufficient funds to meet the necessary expenses of government. It would seem that the purpose with which the law was enacted was to insure a prompt payment of taxes as well as to insure their ultimate payment.

In this statute, it is apparent that the interpretation which is to be given the word "destruction" will determine whether or not the statute promotes and fulfills the purpose for which it was enacted. As it appears that no lien exists except in the case of a "destruction" of the improvements, if the loss did not constitute a "destruction", no lien would exist. Accordingly, if a strict and narrow definition is given to the word "destruction" the collection of taxes may be seriously retarded. We find in the case of Rogers vs. National Council, 172 Mo. App. 719, l.c. 725, the following statement:

> "* * *In declaring the sense of a statute, the court should effectuate its obvious intent in favor of remedial justice rather than infringe its spirit by a narrow and technical construction. * * *"

Accordingly, in order to effectuate the purpose for which the statute was enacted, it is our opinion that the word "destruction" in the subject statute is used in the sense referred to in Ballentine's Law Dictionary herein referred to as being a "loss," and that the lien exists for a loss whether total or partial.

III.

LIBERAL CONSTRUCTION CONSISTENT WITH MOREY vs. FELTZ.

This construction is in accord with the decision of the St. Louis Court of Appeals in the case of Morey vs. Feltz, 187 Mo. App. 650. In this case the court was called upon to interpret a clause in a lease exempting defendant from the payment of money rent "in case of overflow or destruction by water". After considering the phrase "overflow" the court takes up for discussion the clause "destruction by water," l. c. 662:

> "* * *And we think that the expression, "destruction by water," should be held to cover an actual destruction of crops upon the premises by water, though it be by water accumulating from excessive rainfall; and that therefore the jury should be instructed that plaintiff cannot recover cash rent for land, if any, upon which defendant's crop of oats was wholly or partially destroyed by water accumulating and standing upon such land." * * *"

IV.

LIBERAL CONSTRUCTION MAKES STATUTE WORKABLE.

In order to clarify our position in reference to this law, we wish to make one further observation. As heretofore stated, it is a familiar rule that in construing any statute the four corners of the law should be considered and the same construed together. If a strict or technical definition or construction is to be given to the word "destruction" as used in this law, every county collector will be required to first, judicially determine whether or not the loss is of such a nature as will give rise to a lien on behalf of the state and second, if a lien exists form an opinion as to whether or not such loss will jeopardize the collection of taxes levied and assessed. In making the first determination, we suggest that if the collector erroneously decides that there is no lien for the loss he would be responsible on his bond for the collection of the taxes in the event they were not recovered. While if he erroneously determines a lien to exist on the insurance money when in fact the loss did not amount to a "destruction" within its technical definition, he might subject himself to a law suit to sustain his judgment. However, in respect to the second determination which he is to make as above stated, we direct your attention to this proviso in Section 9963b:

"Provided however, that if in the opinion of the county collector, the destruction of such building* * *will not prejudice the collection of such taxes* * *the county collector shall be authorized * * *to waive and release the lien by this section given."

By reason of this clause the county collector may waive the tax if he feels that the collection of the tax has not been jeopardized by the "destruction." We cannot believe that the legislature intended to place upon the collector this double responsibility, or the duty of judicially determining in each case whether or not any lien existed on the insurance money. It is much more logical to give full effect to the above quoted proviso. This can only be given by considering any loss in "destruction" within this section.

This is an elastic provision, meant to protect the collector and to permit a practical application of this law. If the loss is negligible the collection of the taxes could not be jeopardized. It was intended that the collector should waive the lien given in such case. The only sensible application that can be made of this law is for the collector to waive the lien for the taxes when the amount of the loss is small or inconsequential. It is difficult to conceive that a five, ten or twenty-five dollar loss would jeopardize the payment of taxes under any circumstances. Of course, this is a matter for each collector to determine and upon which he should exercise his best judgment.

V.

CONCLUSION.

In view of the foregoing it is the opinion of this office that "destruction" as used in Section 9863b, page 448, Laws of Mo. 1933, is synonymous with the word "loss" and that the lien for taxes exist for any loss whether partial or total.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

SCHOOLS : Interest compounded on county school mortgages not to be cancelled by county court.

9-51 R.S.Mo. 1929

12-11

December 8, 1933.

FILED 60 63

Hon. J. B. McGuffin
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Mr. McGuffin:

This is to acknowledge your letter wherein you request an opinion relative to the following facts:

> "A number of our citizens here indebted to the County on School loans, and wholly unable to pay compound interest upon their loans, are seeking to have the compound interest feature cancelled.
>
> Our County Court feels liberally inclined in the matter but asks an opinion from your Office."

I.

Section 9243, R. S. Mo. 1929, provides in part as follows:

> "It is hereby made the duty of the several county courts of this State to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, "

And further,

> "shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, * * * * * ."

Section 9244 R. S. Mo. 1929, provides in part:

> "The county court shall not loan any money belonging to the school fund to etc.,* * * any officer of the county who shall violate the provisions of this section by authorizing any such loan or drawing any warrant for moneys loaned in violation of this section shall be held responsible for the sum so loaned, with interest thereon to be recovered in the name of the county to the use of the district whose fund has been so used."

Section 9251 R. S. Mo. 1929, in part provides:

> "When any moneys belonging t said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances etc. "

And further,

> "; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. * * * * * * * ."

In Neal v. Chariton County, 15 Mo. 412, l. c. 414, the court said:

> "In relation to these funds, the county courts are trustees. They have no authority to dispose of the principal entrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and the interest of these funds. If they can give away the one,

> they can give away the other. If a neighbor should put money in their hands to loan out for him at interest, and they should give it away or release the interest, would they not expect to make it good out of their own purses? What is the difference between that case and this? Would they not be ashamed, when asked for the money with which they were trusted, to offer an excuse for not paying it, that all the people of the county in which they lived had petitioned them to give it away and they had done so?"

And further,

> "The fund, as has been said, is a permanent one, and if every man, woman and child in a township should petition the county court to give it away, that which is by law entrusted to it, for the education of its children, it should without hesitation, reject their prayer. The will of the people, when expressed in relation to matters in which they have a right to interfere, should be respected by their agents, but when they call upon those to whom is confided the administration of the laws, to sacrifice their trusts and to violate their oath, their will should be disregarded."

See also, Montgomery County v. Auchley, 103 Mo. 492;
Lafayette County v. Hixon, 69 Mo. 581.

II.

It is our opinion that the County Court shall not cancel the <u>compound interest</u> feature.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

SCHOOLS: Special State aid under Sections 9220, 9223 and 9431 R. S. Mo., 1929, not to be pro-rated or affected by laws of 1931, page 334.

July 22, 1933

FILED
61

Hon. George Melcher, Superintendent
Public Schools
Library Building
Ninth and Locust Streets
Kansas City, Missouri

Dear Mr. Melcher:

We acknowledge receipt of your request for an opinion of this office on the following question:

> "Are the special grants established by Sections 9220, 9223, and 9431, R. S. Mo., 1929, long prior to the passage of the school law of 1931 affected by that school law?"

Briefly Section 9220, referring to classes for blind, deaf, crippled and feebled minded children, provides as follows:

> "* * * * Each school district maintaining special classes * * * * shall, * * * * receive state aid to the amount of seven hundred fifty dollars ($750) per annum for each teacher employed * * * * In August of each year, before apportioning the state school funds in accordance with section 9257, the state superintendent of public schools shall set aside a sum equal to the total of all the state aid to which the various school districts of the state are entitled under the provision of this section for the preceding fiscal year. * * *"

Appropriate parts of sections 9223 and 9431 are as follows:

> "Sec. 9223. School districts may establish special classes for twenty or more children, who, while not feeble-minded, are on the borderline of mental deficiency, * * * * and shall receive state aid to the amount of three hundred dollars ($300) per annum for each teacher wholly employed * * * *"

> "Sec. 9631. Whenever a town or rural district * * * * shall contain fifteen or more children who are orphans and who are of school age and are supported in whole or in part by any philanthropic organization, the state shall grant such district a special aid not to exceed two dollars and seventy-five cents per month for each such orphan child in regular attendance."

Section 9257 provides for the apportionment of State school funds to the public schools of the counties, based upon teachers employed and daily attendance of pupils.

The General Assembly in the 1931 session passed an Act providing for Enlarged School Districts, at the option of the inhabitants of the counties. This Act is to be found at page 334, laws of 1931.

Section 13 of said Act provides for the apportionment of state money to the various districts organized under the Act. No provision is made in the Act for special state aid in the instances covered by sections 9220, 9223 and 9431, although need for this special aid might arise in such district, except by the following clause (p. 341):

> "Provided, that special state aid shall continue to be apportioned as now or hereafter provided by sections 9220, 9223 and/or 9431 Revised Statutes 1929:"

Accordingly, it is the opinion of this office that the law of 1931 specifically recognizes the payments to be made as special state aid under sections 9220, 9223 and 9431, and that such payments are to be made or apportioned prior to the apportionment of funds to the districts for regular or normal instruction.

We are not unmindful of the following provision of section 13 of the law of 1931 (p. 341) which reads as follows:

> "Provided, however, in the event there should be insufficient funds to carry out the minimum guarantee of seven hundred fifty dollars ($750) for each elementary teaching unit and one thousand dollars ($1,000) for each high school teaching unit, and the teacher quota and the attendance quota of one and three-thenths cents (1.3) for such districts as do not participate in the minimum guarantee, all school funds to be apportioned by virtue of the provisions of this act shall be apportioned to all districts in pro rata proportion, paying such percentage

of each and every one of these apportionments as the money available in the public school fund will permit:"

However, it is apparent that this proviso applies only to "each and every one of these apportionments", to-wit: the elementary teaching unit, the high school teaching unit, the teacher quota and the attendance quota, and does not affect or control the payments to be made as special state aid.

Respectfully submitted

HARRY C. WALTHER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

Counties: Refunds from State, taking over bridge to which county contributed, may be put in general revenue fund of county by county court. On transfer or paying back to other counties their contribution no commission allowable under 12316, R.S. 1929.

January 16, 1933

FILED
62.

Hon. Joe H. Miller,
Prosecuting Attorney
Carroll County,
Carrollton, Missouri.

Dear Sir:-

Your inquiry of December 22, 1932 of this Department reads as follows:

"The County Court has requested me as Prosecuting Attorney to write your office for an opinion regarding a recent refund payment to Carroll County by the State Highway Commission of Missouri.

"In July 1922 a special election in this county voted $125,000.00 bond issue for the following purpose: "grading, construction, paving or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts in said county". This amount was used in helping construct a bridge across the Missouri river at Waverly, Missouri. These bonds have been retired. Carroll county also advanced a considerable sum of money toward the construction of said bridge.

"The refund to Carroll county from the State Highway Commission was paid to Carroll county in full on the basis of ninety per cent on the dollar in order that this county might obtain the money this year. The money was paid to the county Treasurer and ex officio collector.

"Is it possible under the law as stated in Revised Statutes of Missouri for 1929 at Section 12167 and 12174 or any other law to use any of the refund from the bond issue for any other purpose than that for which it was voted, that is, can the County Court order the Treasurer to place so much of this money into the general revenue for general use?

"The total amount received by the County included some money due other counties that advanced money through this county toward said bridge. The question has arisen whether or not the county Treasurer and ex officio collector would be entitled to any compensation, above that which he regularly receives,

for disbursing or transfering any of this refund money under R. S. Mo. 1929, section 12316 or any other law? It is my opinion that such payments or transfers do not amount to a disbursement."

Section 12167, R. S. 1929, provides:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the general revenue fund of the county, or to such other fund as may in their judgment be in need of such balance."

Section 12168, R. S. 1929 also provides:

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds, not otherwise provided for by law, excepting balances of funds of which the objects of their creation have been fully satisfied."

In State ex rel. vs Appleby, 136 Mo. 408, 413, these sections were cited as express, authority to the court to transfer a surplus from one fund to another to make up a deficiency therein and the court upheld a mandamus to issue warrants to pay certain criminal costs that had been duly certified to the county court for payment, which could be made by such transfer so authorized. The powers and duties of county courts so to adjust the county's finances are discussed in this case.

It is true that in Carthage Special Road District vs Ross, 270 Mo. 76, the court held that a road fund collected by tax levied therefor could not be transferred under these sections, and that the latter were modified by the later road laws. However, aside from the last suggestion, it appears in that case that there was no surplus in the road fund, even though a deficit existed in others, and that this road fund was needed for the purpose for which the taxes were levied and collected.

We do not find that Section 12174, R. S. 1929 has any application as it refers to township bonds only. In our opinion this refund may be transferred by the county court to the general revenue, if it so desires. The purpose of the bonds voted was accomplished and the money spent as voted. The object of the creation of the original bond fund having been fully satisfied, the refund from the State, after the bonds have been retired from the proceeds

of county taxation, is like a gift to the county of a general nature, so that putting it into the general revenue of the county seems to us the most equitable disposition of it, this giving the benefit to the taxpayers in general who paid the bonds.

It seems to us to be a surplus quite analagous to one left over after the extinction of county refunding bonds, which surplus Section 2903, R.S. 1929 says shall be paid into the general revenue fund of the county. In fact, a surplus in a fund after satisfaction of its objects has been held to be part of the general revenue fund of the county. 15 C.J. 584, note 67, (a). citing cases.

On your second question we agree with you that your county treasurer and ex officio collector is not entitled to any commission under Sec. 12, 316, R. S. 1929 or otherwise for receiving or transferring this refund money or paying over that portion to other counties which they had advanced, as such transfers or payments are not a disbursement, nor the receipt of the refund a collection of taxes within the law.

Respectfully yours,

DENTON DUNN
Assistant Attorney General

APPROVED;

ROY McKITTRICK
Attorney General

DD/mh

CITIES OF THE THIRD CLASS: Must issue Sewage Disposal Bonds under Section 7276

September 14, 1933 9/15

FILED
62
44

Hon. Hugh Miller,
State Engineer
705 Market Street
St.Louis, Missouri

Dear Mr. Miller:

Your request for an opinion of this office respecting the power of a city of the third class to-wit, the City of Aurora, Missouri, to issue bonds for the construction of a Disposal Plant has been received. Your request reading as follows:

> "The City of Aurora has made application for a loan of $25,000, including a grant of $8,800, for the construction of a Sewage Disposal Plant.
>
> The Advisory Board, upon considering this application, has suggested that the matter of bond security be placed before you for your opinion. The City cites Section 7276 Revised Statutes of Missouri, 1929, as its authority to construct a disposal plant and its obligation to pay for it. It then cites Section 6788 Revised Statutes of Missouri, 1929, as its authority for incurring a debt of 50% of its fiscal yearly revenue, offering a general obligation bond therefor for a one-year period, and at the expiration of that year propose to issue obligation bonds over a period of ten years.
>
> In this particular case, Section 7276 apparently gives the authority and empowers the Council to construct the disposal plant. This may or may not be interpreted to imply the incurring of a debt therefor. This being a public health measure, may be sufficient legal grounds for the City to incur the debt and pay for it under the above mentioned Section 6788. The purpose

> of the City of Aurora following this procedure, is to save any additional taxation on the citizens.
>
> The financial structure of the City is sufficient to borrow money under this procedure, but an opinion from you is desired as to whether the first year bond and the funding bonds are legally safe as security."

We shall not directly deal with your inquiry as made for the reason that it is the opinion of this office that there is no authority in the City of Aurora to issue its general obligation bond for one year period under Section 6788 for the loan referred to in your inquiry.

Section 12 of Article 10 of the Constitution of Missouri limits the power of any city to incur indebtedness. Portions of said section reading as follows:

> "SEC. 12. MUNICIPAL INDEBTEDNESS, LIMIT OF--HOW INCREASED--EXCEPTIONS AS TO CERTAIN CITIES.--No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose;" * * * *

By reason of the foregoing prohibition, the City of Aurora is prohibited from incurring any indebtedness in excess of one years revenue without an affirmative vote of two-thirds of the voters.

Section 6788 R. S. Mo. 1929, provides for the issuance of bonds by the Mayor and Council up to 50% of the current revenue. This section reads as follows:

> "The council shall have the power to levy, annually, taxes upon all taxable property within the city, in addition

> to other taxes, and in sufficient amount for the purpose of paying the interest and coupons as they become due on all bonds now issued and outstanding, and such taxes shall be collected in the same manner and time as other taxes. The mayor and council shall also have the power, by ordinance, to issue bonds, payable in one year, to an amount not exceeding half the current revenue for the fiscal year, and also to issue bonds in renewal of other bonds of the city maturing for the requisite amount, and which the city has no fund to pay: Provided, however, that such renewal bonds shall not bear any greater rate of interest than did the original bonds, and shall not run for a longer time than ten years. The mayor and council shall also have power by ordinance to issue bonds for the purpose of funding the floating indebtedness of the city existing at the time of its incorporation as a city of the third class: Provided, however, that such bonds shall not draw any greater rate of interest than six per cent per annum, payable semi-annually, and shall not run for a longer time than ten years."

In view of the constitutional provision hereinbefore referred to, this statute could not possibly be construed to authorize the City of Aurora to incur an indebtedness of 150% of its current revenue. It is our opinion that this section simply permits the city to anticipate up to 50% of its current revenue and does not attempt to authorize the incurring of a bonded intebtedness by the Mayor and Council without a vote of two-thirds of the voters of the city. Our position is confirmed by the remarks of Judge Graves in the case of Union Trust and Savings Bank vs. City of Sedalia, a decision of the Supreme Court reported at 254 S. W. 28. In this case some $15,000.00 in bonds was issued under the authority of an ordinance passed, representing said bonds to be less than 50% of the current revenue. The Court on page 31 made this statement:

> "This is the original law by which cities of the third class were authorized to anticipate and use their annual revenue in advance of its actual collection, by the issuance of current revenue bonds. They were referring to Section 70 of the Act

of the 37th General Assembly now Section 6788 R. S. Mo. 1939."

It would seem that the instant case is similar to that of Book vs. Earl, 87 Mo. 246. In this case Holt County contracted for the repair and remodeling of their court house at an expense of $9600.00. There annual revenue is $28,000. However, all of said $28,000 was appropriated to the pauper, road and bridge, county officer, jury and contingent fund, and while the $9600, in itself was not in excess of the current revenue, the total indebtedness incurred was $9600 over the current revenue. The Court enjoined the payment of the warrants to the contractor for the building of the court house and stated at page 252:

> "If building three new additions to the court house and remodeling the same were, in their opinion, needful and expedient, the question as to whether or not a debt amounting to nearly ten thousand dollars in excess of all the revenue it was possible to raise to meet the ordinary and current expenses of the county should have been submitted to the qualified voters of the county, as required by sections 11 and 12 (Article 10) of the Constitution."

Now in considering Section 7278 R. S. Mo. 1929, it is our opinion that it is under this section that the legislature intended the improvements contemplated in your inquiry should be contracted for and paid for. Portions of this section reads as follows:

> "SEC.7276. AUTHORIZED AND EMPOWERED TO PROVIDE MEANS TO PROTECT PUBLIC HEALTH.-- In addition to all powers now possessed by cities of the second, third and fourth classes in this state for the protection of the public health, each city of the*** third, or fourth class of this state is hereby authorized and empowered ***** to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities. Such ****sewage disposal plant, may be acquired by such cities with funds derived from the issue and sale of bonds in the manner provided by law for the issue and sale

> of bonds for other public purposes; or such may enter into contract for the construction or purchase of such ****disposal plant to be paid for out of the general revenues of such cities in annual installments:******"

In this section the Legislature has specifically provided for the issuance of bonds for the purchase or construction of sewage disposal plants, and having directly and specifically legislated on the subject we feel that that in itself should be sufficient to bar the use of such a general section as Section 6788. We note the contention that the disposal plant may be considered as a public health measure and of such a nature as to constitute a demand upon the current revenues of the city for payment. However, we feel that the Legislature has specifically indicated the manner in which this improvement is to be made and having done so the law should be followed. The Legislature of course is clearly within its power to distinguish between these expenditures as stated in the case of Water Works Company vs. Carterville, 153 Mo. 128:

> "****It has been held in some courts of great ability that the supply of water is itself an item of current expenditure essential to the welfare of the municipality, but it was clearly within the province of the Legislature to distinguish also between these ordinary expenses, and prefer those for the support of the police and salaries of the necessary officers to enforce the powers conferred for the benefit of the State.*****"

We therefore are of the opinion that the Federal Government to be secure should require that this Disposal Plant be contracted for under the provisions of Section 7276 R. S. Mo. 1929.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

HGW:MM

ASSESSORS:)
(Sections 10025 and 9760 discussed. Assessment of local
TAXATION:)property other than distributable. Time of assessor.

May 23, 1933

FILED
63

Mr. Jesse A. Mitchell, Commissioner
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of May 23rd, which is as follows:

"At our Assessors meeting yesterday a controversy arose as to the assessment of local assessed property of Public Utilities. Section 10025 sets forth how such property shall be assessed. Section 9760 of the General Revenue ~~has~~ gives the Assessor authority to make list where none is given. The question at issue is whether or not Section 9760 is operative as to assessment of property owned by Public Utilities and is the Assessor clothed with that authority relative to local assessed property of Public Utilities the same as other property?

Public Utilities make return out of distributable property to the State Tax Commission on the reverse side of which they show the amount of property they have returned to each County for local assessment. We desire to know if the local taxing authorities must rely upon the statement so made by the Company or should the Assessor assess the same as in cases of private property? The law provides that the local assessed property of Public Utilities shall be entered on the Railroadbbook, which is a prequisite to the collection of the tax. Is it the duty of the County Clerk or the Assessor to make the entry on the railroad tax book?

Thanking you for the courtesy of an early reply."

Section 10066 R. S. Mo. 1929, provides in part the following:

> "* * *and all property,real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, and express companies, shall be subject to taxation for state, county, municipal and otherlocal purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property;* * *"

Section 10012 R. S. Mo. 1929, provides that a statement of the distributable property of railroads shall be furnished to the State Auditor on or before the first day of January of each year.

Section 10025 R. S. Mo. 1929, reads as follows:

> "All property, real, personal or mixed, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

Section 9760 R. S. Mo. 1929, reads as follows:

> "Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

You desire to know if Section 9760 contemplates the local assessor to assess property mentioned in Section 10025.

It will be seen that Section 10012 pertains to the filing of a statement by the railroad companies to the State Auditor regarding their distributable property, and Section 10066 provides that public utilities (so termed by you for brevity sake) shall also comply with the provisions relative to distributable property the same as railroads. Section 10025 provides that other property (not distributable) of these public utilities should be assessed by local assessors, and Section 9760 provides the manner in which the assessors may obtain information for the assessment of such property.

It is our opinion that Section 9760 is operative as to the assessment of property (other than distributable) owned by public utilities, and the assessor is clothed with authority to so assess property mentioned in Section 10025 the same as he assesses other local property.

It must follow then that the local taxing authorities do not have to rely upon the statement made by the company on the reverse side of the statement which is submitted to the State Tax Commission, provided for by Section 10012, and that the

assessor may assess property mentioned in Section 10025 as he does in cases of private property.

It is our further opinion that it is the duty of the county clerk to make the entry of assessed property on the railroad tax book. Sections 10030 and 10031 R. S. Mo. 1929; State ex rel. Kersey, v. Western Union Tel. Co. 263 S. W. 419.

You were in great haste for this opinion and hardly gave us time enough on same, so if we have not made our position clear or covered any part as fully as you wished, please let us know and we shall render a more comprehensive opinion.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

PROPERTY: ✓
TAXATION: ✓ Tax commission has no jurisdiction to reassess property if resort to county board of equalization is not made before applying to tax commission.

6-20

June 14, 1933.

FILED
63
28

Hon. Jesse A. Mitchell
Commissioner
State Tax Commission
Jefferson City, Missouri

Dear Mr. Mitchell:

This is to acknowledge your letter of June 8th, 1933, which letter is as follows:

> "This Commission was asked to reassess certain property in St. Louis City. A hearing was set for June 5, at which time the writer appeared to take evidence. The City Counselor of St. Louis City questioned the authority of the Commission in the matter involved. The attorneys for both sides consented to waive a decision on the part of the Commission as to their jurisdiction to decide and the hearing proceeded with the understanding a decision would be withheld until the matter of jurisdiction was determined. The accompanying brief sets forth the matter very fully. Will you kindly favor us with your opinion as to our jurisdiction? "

The Laclede Trust Company of St. Louis filed its personal return for taxes, by its officers, for the year 1932. Subsequently said bank was placed in liquidation. After it was in liquidation, an attempt was made to appear before the board of equalization of the City of St. Louis to have a reassessment of its property. However, no appeal in writing was filed before the local board by claimant. A petition for reassessment was filed with the tax commission and before testimony was taken an objection was made questioning the authority or jurisdiction

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of the commission to entertain such proceedings for the reason that claimant did not file an appeal in writing to the board of equalization from the assessment of its property specifying the matter for which it complained. Other objections were assigned but need not be here set out. The commission took testimony, reserving its ruling on the question of jurisdiction (which was not waived by hearing of the evidence but fully and truly agreed and understood that if the commission did not have jurisdiction a decision would be rendered by it to that effect).

St. Louis is a city having a population of over five hundred thousand inhabitants, and it has a charter. The provisions of same may not violate either the Constitution of the State or any general law of the State. It is further made a city without a county perforce of constitutional provisions.

State ex inf. Gentry, Attorney-General v. Armstrong et al, 286 S. W. 705.

The sole question presented by your inquiry being: May the tax commission hear and determine a matter of over-assessment presented by a claimant if such claimant did not appeal to the board of equalization in the first instance?

Article XV, Assessment Division, Section 14 of the Revised Code of St. Louis, 1926, reads as follows:

> "Any person may appeal in writing to the board of equalization from the assessment of his property specifying the matter of which he complains."

This section is similar to Section 9802 R. S. 1929, which is as follows:

> "Every person who thinks himself aggrieved by the assessment of his property may appeal, and every appeal shall be in writing, and verified by affidavit, and shall state specially the grounds of the appeal and the matter or thing complained of, and no other matter shall be considered by the board."

You will therefore note that the matter of adjust valuations placed on property assessed by the assessor was contemplated to be brought before the local authorities in the first instance so that they might determine the matter and after the local board heard and determined same and the claimant be still aggrieved, he could then petition the State Tax Commission for a hearing, and so on follow the procedure prescribed in the statutes.

In the instant case the claimant has not availed itself of the procedure outlined in the statutes and we are of the opinion that it is barred from appealing to the Tax Commission for relief because of its failure to first apply to the Board of Equalization.

In the case of State ex rel. Wyatt, Collector, v. Hoyt, Appellant, 123 Mo. 348 l. c. 356, the court in its opinion held,

> "If the owner thinks injustice has been done by the assessor, he has the right to appeal to the board of equalization and have his wrongs remedied. It has been held that the action of the assessor under the revenue law is judicial, and when the jurisdiction to assess the property exists, his valuation, unless appealed from, is conclusive upon the one liable for the taxes."

Also, in the case of Brinkerhoff-Paris Trust & Sav. Co. v. Hill, 19 S. W. (2d) 746 l. c. 751, the court in its opinion made this observation,

> "It is no doubt true that the state tax commission was not intended to supplant local assessing officers and boards, etc., * * * * * *."

Also, in the case of State ex rel. Hawkin v. Edwards, 286 S. W. l. c. 26, the court held,

> "The defendant, therefore, having notice that his property was overvalued in the assessment, had his remedy plainly pointed out by the statute. The courts cannot take up the burden which the statute places upon assessors and boards of equalization. He failed

to follow the method pointed out by the statute which is the one available to the taxpayer whose property is excessively valued."

We have not set out the powers and the duties of the State Tax Commission which are full and adequate not only to supervise but to review assessments not made conformably to law, and to revise them if such be the fact.

In the language used by the court in the Brinkerhoff-Faris Trust & Sav. Co., v. Hill, supra, we are strengthened in our conclusion that the Tax Commission does not have jurisdiction to hear the matter herein considered, namely, that to permit taxpayers throughout the state who feel aggrieved through alleged discriminatory assessments of their property, to stand silently by till after the boards of equalization have completed their work and then make the protest that their assessments are discriminatory for the first time to the State Tax Commission.

We are returning herewith the brief appended to your letter.

Yours very truly,

James L. Hornbostel,
Assistant Attorney-General.

APPROVED
ROY McKITTRICK
Attorney-General.

JLH:EG
Enc.

TAXATION---Various problems concering the application of Senate Bill 94 to the collection of delinquent State and County taxes. Should be cross indexed under Delinquent Taxes.

August 8, 1933

FILED
63

State Tax Commissioner
Jefferson City, Missouri

Gentlemen: Attention Honorable Andrew J. Murphy.

Acknowledgment is herewith made of your request for an opinion of this office respecting Senate Bill 94 respecting the following questions:

"1. Are both new Sections 9952, as enacted by Senate Bill 94 and House Bill 44, effective? If not, which one is effective?

2. What is the effective date S. B. 94.
Section 8845 - 1-2-3-4
Section 9952 - 1-2-2a

3. Does first Tax Sale occur November 1933 or 1934?

4. If first sale is November 1934, what about taxes five years delinquent January 1934.

5. If suits for 1928 taxes were filed before July 24, 1933, could collector dismiss same in 1934 and proceed under new law without these taxes becoming outlawed. 9962 B.

6. If S. B. 94 is effective on July 24, will the collectors have to make new delinquent land books. Sec. 9952.

7. What fees allowed collectors and county clerks for making and recording delinquent land list. Sec. 9945 - 23 to 45. Sec. 9969 - 6 to 9.

8. At what exact date or time do taxes become levied and assessed, as to collectors duty to certify. Sec. 9963 B. 6-7.

9. Can City Collectors sell lands for delinquent taxes or do they have to certify delinquent lands up to county collector for sale. Sec. 9963 C.

10. Is it mandatory that the collector sell all real estate delinquent every year, or could he allow several year's taxes and penalties to accumulate before advertising the real estate for sale.

11. Would the enactment S. B. 94 and H. B. 44 give the collectors the option of proceeding to the collection of taxes under either bill?

12. Would Section 9961 which has not been repealed give collectors authority to enter suit for back taxes?

13. Are Senate Bills 110-115 changed or amended by subsequent passage and approval of Senate Bill 94?

14. What effect does subsequent approval of Senate Bill 80 have on interest and penalties provided for in Senat Bill 94?"

We shall take your inquiries in the order in which they appear above.

Senate Bill 94 repealed Section 9952 as appearing in the Revised Statutes of Missouri, 1929, and enacted a new Section 9952, differing in its entirety from the old section. This new section provides for an important part of the machinery for the enforcement of the payment of delinquent taxes by a sale of the property taxed. Senate Bill 94 contains no emergency clause.

House Bill 44 purported to repeal Section 9952 of the 1929 Revision and enacted a new Section 9952, which reads as follows:

> "COLLECTOR TO SUE FOR BACK TAXES---WHEN---ATTORNEY'S FEES---PUBLICATION---PROSECUTING ATTORNEYS TO ACT IN CERTAIN COUNTIES.--- If, on the first day of January of any year any of said lands or town lots contained in said 'back tax book' remain unredeemed, it shall be the duty of the collector to proceed to enforce the pay-

of the taxes charged against such tract or lot, by suit in a court of competent jurisdiction of the county where the real estate is situated, which said court shall have jurisdiction without regard to the amount sued on, to enforce the lien of the state of such cities; and for the purpose of collecting such tax and prosecuting suits for taxes under this article the collector shall have power, with the approval of the county court, or in such cities, the mayor thereof, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury, and an additional sum not to exceed $3.00 for each suit instituted for the collection of such taxes, where publication is not necessary, and not to exceed $5.00 for each suit where publication is necessary, as may be agreed upon in writing, and approved by the county court, or in such cities, the mayor thereof, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided; and it shall be the duty of the collector, when suit shall have been commenced against any tract of land or town lot on said 'back tax book,' to note opposite said tract or lot such fact, also against whom suit has been commenced; and in cases where suit is brought for the enforcement of liens as above, where summons shall have been issued against any defendant, and the officer to whom it is directed shall make his return that the defendant cannot be found, the court before whom the suit is pending being first satisfied that the summons cannot be served, shall make an order directing that notice of such action be given to such defendant by publication; and in all cases where it shall be alleged in the petition, or in an affidavit subsequently

filed with the clerk, that the defendants, or any one of them, is a non resident of the state of Missouri, so that the ordinary process of law cannot be served upon them, then such order may be made, and such notice by publication given by the clerk of the court in vacation, and which notice shall be published in like manner and with the same effect as when ordered by the court; the proof of publication of the order required by this section may be made by the affidavit of the publisher of the newspaper in which the order was published, or by the affidavit of any person who would be a competent witness in said cause, filed with the court; and if the defendant or defendants fail to appear at the time and place required by said order and defend said cause of action, judgment by default shall be rendered as prayed, which judgment shall be as binding and effectual against the property on which the lien is sought to be enforced as if there had been personal service on the defendant; AND PROVIDED FURTHER, that in cities of thirty thousand or more inhabitants, the attorney or attorneys appointed by the collector, with the approval of the mayor of such cities, for the purpose of prosecuting suits for taxes under this article, shall be entitled to a fee in any suit, such fee not exceeding five per cent, after judgment is obtained, collected and paid into the treasury, as may be agreed upon; and if such taxes are paid before judgment is obtained, the attorney collecting the same shall be entitled to a fee not exceeding two per cent on all sums collected and paid into the treasury. PROVIDED, HOWEVER, that in all counties of this State that now have or may hereafter have a population of not less than 80,000 nor more than 95,000 according to the last decennial census of the United States, the Collector shall have no power or authority to employ such attorneys, that the Prosecuting Attorney of such counties shall be the back tax attorney, and that all fees collected as

> such by the Collector shall be paid into the County Treasury; and each of the Prosecuting Attorneys in such counties shall be entitled to such additional temporary clerk and deputy hire as in the judgment of the Prosecuting Attorney and the County Court may be deemed necessary, for such time and at such salary as may be fixed by the Prosecuting Attorney and the County Court."

House Bill 44 was both passed by the General Assembly and approved by the Governor subsequent to Senate Bill 94. We, find these two Sections 9952 as apparently valid and effective laws, the section in House Bill apparently authorizing a procedure that was repealed by and is entirely requgnant and contrary to the entire intent and purpose of Senate Bill 94. There can, of course, be no question as to the intention of the Legislature in enacting Senate Bill 94. If we can determine the legislative object of House Bill 44, we may be able to construe these acts so as to give full effect to both. The only change in Section 9952 as contained in House Bill 44 and as contained in the 1929 Revision is the addition of the proviso above underlined. This change only affected Greene County, and authorizes and requires the Prosecuting Attorney of said County to act as delinquent tax attorney. No change of any kind was made as to any other provision of said Section. Accordingly, it is a reasonable conclusion that as Senate Bill 94 repealing 9952 was not effective till ninety days after adjournment, and as said original Section 9952 was a valid and subsisting law until that time, and as House Bill 44 made no change in that section except as above pointed out, the whole intent and purpose of House Bill 44 was to effect this change in the selection of the delinquent tax attorney during the emergency clause period. An examination of the emergency clause supports this conclusion. This clause is found on page 467, Laws of 1933 and reads as follows:

> "Section 2. EMERGENCY.---The financial condition of the counties and of the people therein, to which this act applies, and relief of the same being imperative without delay, creates an emergency in the meaning of the Constitution and this act shall be in force and effect upon its passage and approval."

As the only part of said act which was not already operative was the added proviso, the "relief" creating the "emergency" referred to must have been the added proviso. That the emergency clause may be considered in determing legislative intent is well settled. The

Supreme Court in this matter stated as follows in the case of State vs. Bengsch, 170 Mo. 81, l. c. 109:

> "Now, if laws passed at remote periods, laws in pari materia, or cognate-subject laws, laws that have expired or been repealed, unconstitutional laws, may have the shell of their legislative nuts cracked by the hammer of judicial investigation, in order to extract the kernel of their intention, then a fortiori, may a similar result be reached where the shell of the legislative nut has been cracked by the legislators themselves, and the kernel of their intention extfacted and spread on the platter of an emergency clause ready for immediate use. We hold the emergency clause in this instance as conclusive evidence of the legislative purpose,* * * *."

Having concluded that the sole intent of House Bill 44 was to provide that the Prosecuting Attorney of Greene County also act as Delinquent Tax Attorney, we are of the opinion that House Bill 44 is only operative as enacted (subject to Senate Bill 80) up to July 24, 1933.

The foregoing construction is further supported by the rule that acts relating to the same jubject, passed at the same session must be treated as part of the same act and construed together. The Supreme Court en banc stated in Gasconade County vs. Garden 441 Mo. 569 as follows:

> "Especially is it true that legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as part of the same act.

We have not overlooked the fact that House Bill 44 was enacted subsequent to Senate Bill 94, or that it is in fact a special law, but are of the opinion that any other construction would render said House Bill 44 repugnant to the intent and purpose of Senate Bill 94.

In reply to the second interrogatory, which reads as follows:

> "2. What is the effective date S. B. 94.
> Section 9945 - 1-2-3-4
> Section 9952 - 1-2-2a"

it is evident that, as there is no emergency clause on Senate Bill 94, it is to become effective ninety days after the adjournment of the General Assembly, to-wit, July 24, 1933.

As to its effective date so far as particularly applies to Section 9945, it is our opinion that this act requires nothing to done which in the ordinary course of events would have been done by July 24, under the laws as existed prior to the passage of Senate Bill 94. It should be noted that the only changes made in Section 9945 require the Collector to perform the acts which under the section as contained in the 1929 Revision were required of the County Clerk.

As to the effective date of the Act so far as it particularly applies to Section 9952, we find it necessary to consider additional factors. The first few lines of said Section read as follows:

> "Section 9952. Shall record delinquent tax property,--Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record * * * *, a list of land and lots, * * * * returned and remaining delinqent for taxes * * * *."

The statute is unambiguous in its statement that this list be made by the collector upon the effective date of the Act. However, it is our opinion that the failure of the passage of the emergency clause of said bill renders such action by the collector useless, unnecessary, and an unwarranted expense to the county and the tax payer, and inconsistent with the policy of the Fifty Seventh General Assembly.

Section 9952 as contained in this Act was not effective until July 24, 1933. By that date, every county clerk had completed the making of the "back tax book" under the law as existed prior to the passage of the Act. This "back tax book" contains the identical information, including taxes and penalties required by Senate Bill 94 to be noted in the "list of lands and lots returned and remaining delinquent". A charge has been assessed against each parcel of land as "costs" for the making of this book, which charge must be paid by the tax payer (subject to the terms of Senate Bill 80). The delinquent taxes can be collected as efficiently under Senate Bill 94 through the use of the "back tax book" as prepared by the clerk, as through the use of the "list of lands and lots returned and remaining delinquent" as is contemplated as being prepared by the collector. As the "book" as prepared by the clerk was prepared during the existence of a valid law, making such "book" the official record of all matters re-

quired to be kept therein, there would be no object, necessity or advantage in the compiling, at this time, of the book or list provided for in Senate Bill 94. Had the emergency clause on this Bill carried, the situation might have been different, as the collector could have then compiled the book without duplicating the work of the clerk.

As it is apparent that the interest of all parties concerned will not be served best by the collector, at this time, compiling the list of delinquent taxes provided for in Senate Bill 94, it would appear that the clause "and immediately upon the effective date of this act" is to be construed to be directory and not mandatory. The remarks of the Springfield Court of Appeals in 144 Mo. Appeal 593, Paving Co. vs. McManus, l. c. 607 are particularly appropriate.

> "The distinction between mandatory and directory enactments has often been under consideration by the courts. Into which of these classes any given statute falls is to be determined by its character and purpose. If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory."

The foregoing was based upon the decision of the Supreme Court in the case of State ex rel Hamilton vs. Railway Co. reported at 113 Mo. 297. Judge MacFarlane at page 308 stated as follows:

> "'When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed.' In such case the statute is said to be directory. Sedgwick on Construction of Statutory and Constitutional Law, pp. 316, 317, 318; Dwarris on Statutes, 608-611; Beck v. Allen, 58 Miss. 156; Counties v. Railroad, 65 Ala. 394; Pond v. Negus, 3 Mass. 230; Williams vs. School District, 21 Pick. 75. The legislative power expressly existing, and the manifest purpose being merely to cor-

> rect an error, or supply an omission of the county court, we must hold that the date, or occasion named by the statute for exercising the power, was directory only and the levy, made November 5, 1887, was a valid exercise of the power."

It is, therefore, the opinion of this office that the collector is not required at this time, to prepare the list of delinquent taxes contemplated by Section 9952 as contained in Senate Bill 94, but may proceed with the collection of taxes from the back tax book prepared by the County Clerk. It is our further opinion that the list of delinquent taxes should be compiled by the collector in accordance with this section between January 1 and July 1 of 1934 and each subsequent year as required by Senate Bill 94.

In reply to your third inquiry we refer to Section 9953a as set out on page 430 of the Session Acts of 1933.

> "LANDS AND LOTS SUBJECT TO SALE--WHEN.--All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year," * * * *

The section does not require in absolute terms a sale in November 1933, but provides for a sale each November from which it would logically follow that such sale might be held in November of 1933.

It should be remembered, however, that subsequent to the passage of this Act, Senate Bill 80 was passed and approved. Portions of this Act as found on page 423 of the Laws of 1933, are as follows:

> "Section 1. REMISSION OF PENALTIES, INTEREST AND COSTS.--In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for the year 1932, the collectors of revenue of the counties and cities of this state are

> hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; Provided, however,* * * * if paid after Oct. 31, 1933, and not later than Dec. 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs: * * * *."

on the first Monday of November, the date upon which the sale would be required to be held, every delinquent taxpayer would be entitled to pay the tax plus but 75% of the penalties, interest and costs, whether the same accrued by virtue of Senate Bill 94 or by other statutory authority. This right is fixed, and one of which the taxpayer may not be deprived.

In the case of State, ex rel McKittrick vs. Bair, not yet reported, Honorable Judge Charles T. Hays in construing Senate Bill 80, stated as follows:

> "So we think that under a proper construction of the statute assailed in the instant case the filing of suits for delinquent taxes and penalties is not prevented, but that penalties are remitted in the manner provided in No. 80, upon proper tender of payment of the original taxes, without penalties, fees or costs, upon judgment rendered, (except as noted later)."

Without question, Senate Bill 94 is subject to Senate Bill 80, so long as the later is effective. Quoting Judge Hays, supra;-

> "With respect to the Act here assailed, * * * * (it) declares the existence of a situation arising from lack of public funds, so grave and exigent as to imperil the functioning of the State government itself in its essential branches, and implies that the remedy lies in changing the mode of collection, and thereby accelerating the collection of delinquent taxes through the remission of the retarding penalties. This consideration impels the conclusion that in its fostering care for the transcendent public interest the Legislature intended that the Act should suspend all provisions

> of law repugnant to the same or out of harmony therewith."

It is apparent that a sale of property for the satisfaction of taxes prior to the expiration of Senate Bill 80 (January 1, 1934) would be repugnant to and out of harmony with the provisions and the intent and purpose of Senate Bill 80, under which circumstances, Senate Bill 80 must prevail. Judge Hays, in the case of State ex rel Crutcher vs. Koeln, 61, S. W. (2) l. c. 756, in considering this, states as follows:

> "Acts Nos. 110 and 115, covering only a part of the general taxes in their limited field of operation, would produce confusion and duplication of service in the collection of the taxes and would introduce a note of disharmony in the established uniform rule and system of the state, a rule and system which No. 80 would follow, and are inconsistent with the latter, which is a general act and covers the whole subject-matter of said special act.
>
> No. 80 is a valid and presently effective and operative temporary law and effectually, during the limited period of its operation, suspends the effectiveness and operation of Nos. 110 and 115, and also suspends, during the same period and by necessary implication, such statutory provisions contained in said chapter on taxation as are in conflict with No 80,* * **."

It is therefore the opinion of this office that no sale of property for the payment of taxes should be or can be legally held under Senate Bill 94 until November of 1934.

Your fourth inquiry is rather broad. It reads as follows:

> "If the first sale is in November of 1934, what about taxes five years delinquent January, 1934?"

A portion of Section 9963b, found on page 444 of Missouri Laws of 1933, reads as follows:

> "All taxes assessed or levied prior to the taking effect of this act remaining due and unpaid at the date when such taxes would have become delinquent as provided in the act under which they were assessed and levied, and which taxes are not merged in judgment prior to the effective date of this act, shall be deemed to be delinquent under the provisions of this act, and the same proceedings shall be had to enforce the payment of such unpaid taxes, with interest, penalty and costs, and payment enforced and liens foreclosed under and by virtue of the provisions of this act and the same rights of redemption shall attach."

All taxes which under the law were delinquent on July 24, 1933, are delinquent under the terms of this Act, and are subject to all its provisions. There can be no doubt as to this. While there appears to be no limitation in the Act as to what delinquent taxes it is applicable, Section 9961, R. S. of Mo. was not repealed by the Act. This section reads as follows:

> "Section 9961. LIMITATION OF ACTIONS. No action for recovery of taxes against real estate shall be commenced, had or maintained, unless action therefor shall be commenced within five years after delinquency, excepting taxes now delinquent, on which suit may be commenced at any time within five years after this chapter shall take effect, but not thereafter."

Whether or not the foregoing section would apply to and outlaw the 1928 taxes after January 1, 1934 depends on the nature of the proceeding provided for the collection of taxes under Senate Bill 94 and the proper construction to be given the word "action" as contained in Section 9961 above quoted.

Considering Senate Bill 94, we find that Section 9952a provides that lands and lots upon which taxes are delinquent "shall be subject to sale to discharge the lien" of such taxes. Section 9952b provides for the publication of list of such lands and lots annually before the first monday of November of each year. Section 9952c requires the collector to hold a sale of such lands and lots annually, beginning on the day mentioned in such notice (the first Monday of November). Section 9953 d provides for the issuance of

a certificate of purchase to the purchaser. Section 9954a provides for the time and manner of the purchaser obtaining possession of the land or lot bought. Section 9957 provides for the issuance of a deed to the purchaser in case no redemption of the land from tax sale is made. Various other sections provide for the redemption of the property. It is to be noted that in no section is any provision made for the institution of any "action" or "suit" before any court of tribunal for the enforcement of the payment of the taxes. The most that can be said is that the course prescribed by Senate Bill 94 for the collection of delinquent taxes is a "summary proceeding" by a county officer without the aid or intervention of any judicial body.

Having this in mind, we shall consider what construction is to be placed upon the term "action" as used in the above quoted statute of limitations. Under the civil law, we find that an "action" was associated with a right proceeded upon before a judicial tribunal. See Bouvier's Law Dictionary, Third Revision, 1 volume 128.

> "In the Institute of Justinian an action is defined as jus persequendi in judicio quod sibe debetur (the right of pursuing in a judicial tribunal what is due one's self); Inst. 4. 6. In the Digest, however, where the signification of the word is expressly treated of, it is said, Actio generaliter sumitur; vel pro ipso jure quod quis habet persequendi in judicio quod suum est sibive debetur; vel pro hac ipsa persequtione seu juris exercito (Action in general is taken either as that right which each one has of pursuing in a judicial tribunal his own or what is due him; or as the pursuit itself or exercise of the right); Dig. 50. 16. 16."

Bouvier defines "action" as follows:

> "The formal demand of one's right from another person, made and insisted on in a court of justice. In a quite common sense, action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court."

Judicial definitions from each state could be supplied, by far the largest proportion of which interpreted "action" as being the enforcement of a right associated with a hearing or proceeding before a judicial tribunal.

The Courts of Colorado, in considering whether a foreclosure of a deed of trust was an "Action" within the meaning of their statute of limitations, states as follows, in the case of Rowe vs. Mulvane, 139, Pacific 1041:

> "(1) It is settled law in this state that the six-year statute of limitations does not operate as a bar to proceedings for the foreclosure of a deed of trust, when foreclosure is made by advertisement and sale by the trustee named in the deed of trust, without the aid or intervention of a court proceeding; that such proceedings are not an "action" within the provision of our statute, which reads: 'The following actions shall be commenced within six years next after the cause of action shall accrue and not afterwards'* * * *."

The foreclosure of the state's tax lien is analogous to the proceeding above referred to. The collector is required by law to conduct the sale, and convey title to the property sold. No judicial proceeding is contemplated or necessary to completely execute the purpose of the law.

In 1865 the procedure in this state for enforcing the payment of taxes was very similar to this present law. The law of 1865 provided for a sale by the collector, of land upon which there were taxes delinquent and unpaid. Section 116 provided that tracts not sold for want of bidders would be forfeited to the state. Section 117 provided for redemption of the property sold within two years of the sale, upon compliance with certain conditions. The 99th section provided for the county clerk making a "sale book" in which he was required to keep a record of the sales. Later, in 1872, a law was passed authorizing a suit to enforce payment of back taxes. Under this law, and subsequent similar laws, a suit was brought in 1877 to recover taxes delinquent since 1868. In 1868 there was a general statute of limitations barring "civil actions" after five years of the accrual of the action. The Supreme Court, in the case of The State to the use of Rosenblatt, Collector, vs. Herman, 70 Mo. 441, states as follows at 455:

> "The statute of limitations provides (2 Wag. Stat., p. 917) that 'civil actions upon a liability created by a statute,' other than a penalty or

> forefeiture, which latter are barred in three years, shall be barred in five years after the cause of action shall have accrued; and section 33 declares that 'the limitations prescribed in this chapter shall apply to actions brought in the name of this State, or for its benefit, in the same manner as to actions by private parties.' The summary proceedings authorized by the acts of 1865 and 1867, which resulted in a judgment against the land, could not be regarded as a 'civil action' within the meaning of this clause in the general statute of limitations. The act of 1872 for the first time gives an action against the owner of the land for the back taxes now sued for. There was no act of the Legislature before that authorizing any suit against the owner, and that act expressly repealed the limitation in the general statute by declaring that the action might be brought at any time, 'before the expiration of said fifth year as well as after the expiration thereof'".

There is no essential distinction, so far as our point is concerned, in the term "civil action" as used in this limitation statute of 1865, and the term "action" as used in the instant statute. The word "civil" denotes such actions as being distinguished from "criminal" actions, and do not affect the application of the term "action" in any other sense. This is made clear in the case of the State ex rel Kochtitzky, et al. vs. Riley, et al, a decision of the Supreme Court en banc reported at 203 Mo., 175. Judge Woodson, after considering various definitions of "civil suit", etc, stated at page 186 as follows:

> "It will be seen from an examination of these various definitions that the phrases, 'civil case' and 'civil suit', refer to the legal means by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words 'criminal cases,' which refer to public wrongs and their punishment; and that the word 'case,'

> when considered alone, means the facts, or the state of facts which constitute the rights of the individual, or his cause of action, which the 'proceeding,' 'action' or 'suit' protects or enforced."

And considering "suit", "action" and "case", stated on page 187 as follows:

> "It might not be out of place here to state that the authorities before cited attach to the word 'suit' a broader and more comprehensive meaning than is given to the word 'action' or 'case,' and it is some significance that the broader term is used in the change of venue statute rather than the one employed in the Constitution regarding the jurisdiction of the circuit court."

It therefore unquestionably appears that the summary proceeding provided for by Senate Bill 94 is not an "action" and accordingly is not within the bar of Section 9961.

Insofar as the general limitation statutes are concerned, we find them to be as follows:

> "Sec. 860. Period of limitation prescribed—Civil actions, * * * * can only be commenced * * * *."

> "Sec. 861. What actions shall be commenced within ten years.—* * * * First, an action upon* * * *; second, actions brought* * * *, and actions or* * * *; third, actions for* * * *."

> "Sec. 862. What within five years.* * * * First, all actions upon * * * *; second an action upon a liability created by a statute,* * * *; third, an action for trespass* * * *; fourth, an action for taking* * * *; fifth, an action for * * * *."

> "Sec. 863. What within three years.—* * * * First, an action against* * * *; second, an action upon* * * *."

"Sec. 864. What within two years. * * * * An action for libel* * * *. All actions against* * * *."

"Sec. 865. No action to foreclose mortgage after note barred.--No suit, action or proceeding under power of sale to foreclose any mortgage* * * *."

It is apparent that sections 860, 861, 862, 863, and 864 are inapplicable to Senate Bill 94 for the same reason that Section 9961 does not barr the proceeding. It is interesting to note that in Section 865, pertaining to the foreclosure of deeds of trust, the insufficiency of the use of the word "action" to barr the foreclosure of a deed of trust by the trustee, is recognized, and in this section, "action" is supplemented by the term "suit" and "proceeding". As said section applies only to the foreclosure of deeds of trust, it is unapplicable to a proceeding to enforce payment of taxes, and consequently does not barr the proceeding under Senate Bill 94.

It is accordingly the opinion of this office that Sections 9961, 860, 861, 862, 863, 864 and 865 R. S. of Mo. 1929 do not barr a sale of property in November, 1934 under Senate Bill 94, for 1928 delinquent taxes.

Your fifth inquiry reads as follows:

"If suits for 1928 taxes were filed before July 24, 1933, could collector dismiss same in 1934 and proceed under new law without these taxes becoming outlawed. 9962 B."

In the event suit was brought before the effective date of Senate Bill 94, to-wit, July 24, 1933, the collector may, at his option, either proceed to collect the taxes under the law as existing prior to July 24, 1933, or he may dismiss his action theretofore instituted and proceed under the provisions of Senate Bill 94. This is by direction of the specific provisions of the Act.

The pertinent parts of Sections 9962b as found on page 444 of the Missouri Laws of 1933 read as follows:

"Provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had

> been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to the suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

Accordingly, as the Act particularly permits the discontinuance of the suit and authorizes the collector to proceed to sell the property under the Act, and as Section 9961 does not apply to the foreclosure proceedings as prescribed by Senate Bill 94, it is the opinion of this office that 1928 taxes would not become outlawed upon the dismissal of the suit referred to, so as to preclude a sale of the property for such taxes under said Act in November 1934.

Your sixth inquiry reads as follows:

> "If S. B. 94 is effective on July 24, will the collectors have to make new delinquent land books. Sec. 9952."

We stated, in answering the second portion of your second inquiry, that this section was effective on July 24, 1933, except as it apparently required the collector to duplicate the work of the county clerk respecting the delinquent land book. As heretofore stated, it is the opinion of this office that the collector is not required to make up this book until between the first day of January and July of 1934.

Your seventh inquiry reads as follows:

> "What fees allowed collectors and county clerks for making and recording delinquent land list. Sec. 9945 - 23 to 45. Sec. 9969 - 6 to 9."

The appropriate parts of these Sections read as follows:

> "Sec. 9945. When taxes are hereafter delinquent. * * * *that for making and recording the delinquent land list, the collector who makes such book* * * *shall receive only ten cents per tract, city or town lot, and the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot."

> "Sec. 9969. Fees and Compensation.* * * * To the county collector, for recording the list of delinquent land and lots twenty-five cents per tract, to be taxed as costs and collected from the party redeeming such tract."

By comparing these two sections with the two sections amended, we find them to be the same except that the collector now receives these fees, whereas the clerk received them in the past. Portions of these sections, as contained in the 1929 Revision read as follows:

> "Sec. 9945. When taxes are hereafter delinquent.—* * * *that for making the same into the 'back tax book', the clerk or other officer who makes such book shall receive only ten cents per tract, city or town lot.* * * *."

> "Sec. 9969. Fees and Compensation.—* * * * To the county clerk, for making the 'back tax book', twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract.* * * *."

Under these sections, the clerk received twenty-five cents per tract

on taxes delinquent for the first time for making up the back tax book, and ten cents per tract for transferring the taxes remaining unpaid at the end of the year, to the "consolidated back tax book". It appears that the only logical interpretation that can be placed upon these amended statutes is that the collector is entitled to twenty-five cents for placing each tract upon which taxes are delinquent for the first time, in the original list of lands and lots remaining delinquent and unpaid, and to ten cents per tract for the transferring such of the tracts as remain delinquent and unpaid to the "back tax book". By reason of the last clause of Section 9945 as amended, the clerk is entitled to five cents per tract, for comparing and authenticating the delinquent list of land and lots as made by the collector. Such is the opinion of this office.

Your eighth inquiry reads as follows:

> "At what exact date or time do taxes become levied and assessed as to the collector's duty to certify. Sec. 9963 B. 6-7."

The following portions of the section are pertinent to this inquiry:

> "Sec. 9963b. MANNER OF COLLECTING INSURANCE ON PROPERTY---WHO SHALL RECEIVE SAME---FORM. In the event of the destruction by fire, windstorm or tornado of any permanent building * * * * situate upon any land* * * *which* * * *at the time of destruction were situate upon any land* * * *against which taxes were then levied and assessed, and was so situate at the time of such levy and assessment, the lien of such taxes shall attach to and follow any insurance that may be upon said property at the time of its destruction* * * *provided however, if in the opinion of the county collector the destruction of such building* * * *will not prejudice the collection of such taxes* * * *the county collector shall be authorized in writing,* * * *to waive and* * * *release the lien by this section given. * * * * Theassured* * * * shall file with such company a statement from the collector* * * *inwriting,* * * * that there are no taxes against said building* * * * or that taxes exist against the same and the

amount and description thereof, and whether or not such lien is waive, * * * *."

Taxes levied and assessed have at all times been a lien upon the real estate taxed. To further secure these taxes, the insurance upon the improvements on the land was made amenable to this lien. A study of the foregoing section leads us to believe that no new lien was created, but the lien heretofore existing on real estate is simply extended to the insurance. The phrase "the lien of such taxes shall attach to and follow" does not contemplate a new and separate lien on the insurance, as distinct from the lien on the real estate, but refers to one lien upon the real estate and insurance.

While we have not overlooked the clause that states that the insurer shall pay the taxes, etc., then due, levied and assessed, it is our opinion that the lien extended to such insurance is the lien as exists upon the land, i.e;- for taxes levied and assessed, whether due or not. It is possible that under these circumstances, the collector could not state the amount of such taxes. In this event, he could only state such taxes had been levied and assessed, but the exact amount thereof was undertermined.

It is the opinion of this office that whatever lien exists upon the land for the payment of taxes, is by the terms of Senate Bill 94 extended to the insurance in the event of a "destruction" occuring under the circumstances provided for in section 9963b, and the statement required of the collector should cover all such taxes.

Your ninth inquiry reads as follows:

"Can City Collectors sell lands for delinquent taxes or do they have to certify delinquent lands up to county collector for sale. Sec. 9963 C."

Section 9963c, as found on page 448, Missouri Laws of 1933, is as follows:

"Sec. 9963c. ACT SHALL APPLY TO COUNTIES AND CITIES AND CERTAIN OFFICERS.—In all counties that have adopted or may hereafter adopt township organization, wherever the word 'collector' is used in this act, as to such counties such designation shall be construed to mean 'treasurer and ex-offico collector,' or in Section 9962 may be township collector. Where applicable the word 'county' as used in this act shall be construed 'City' and the words 'county clerk' shall be construed 'city clerk' or other

proper officer.'"

It would at first appear that the intent was to establish one general system to be used in the collection of all delinquent taxes, whether state, county, city, township, municipal or otherwise. The passage of Senate Bill 96, amending Section 9970, might further indicate this to be the intention. Section 9970, as amended, is found on page 451, Missouri Laws of 1933, and is as follows:

> "Sec. 9970. COLLECTOR SHALL RECEIPT FOR DELINQUENT TAXES.--The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first Monday in March, annually, return to the county collector a list of lands and lots on which the taxes or special assessment levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer of the city or town, and shall stand as evidence of indebetedness upon the part of the county collector and his bondsmen to such city or town, until settlement in full has been made by payment of said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

The only change made was to change the date of "the first day of May" to "the first Monday of March". The sections are identical except for this change. This was made to conform to the provisions of Senate Bill 94 respecting the making of the list of delinquent lands by the collector; Section 9952 providing the collector shall make such list,

> "including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county collector, separately stated, * * * *."

It must be kept in mind, that Senate Bill 94 amended only Chapter 59, and did not purport to amend or repeal any other Chapter.

A number of sections of said Chapter were repealed, and some fifty-seven new sections enacted. No mention, directly or indirectly, is made in the Act of the statutes which pertain particularly to the collection of delinquent city taxes, which are to be found in Chapter 38, entitled "Municipal Corporations". Section 6206, et seq. of Chapter 38 provides for a summary proceeding to collect delinquent taxes due Cities of the First Class, which proceeding prescribes a sale of the property for delinquent taxes, and in general, provides for a system of tax collection similar to that provided for the collection of state and county taxes by Senate Bill 94. Section 6605 et seq. of Chapter 38 provides for the method of collecting delinquent taxes due Cities of the Second Class. The sections provide for suit being brought by the City Attorney in the name of the City to enforce the general and special taxes with penalties and costs. These sections contain a complete procedure, separate and distinct from that referred to, both before and after the passage of Senate Bill 94, in Chapter 59. Section 6780 et seq. of Chapter 38 provide for the method of collecting delinquent taxes due Cities of the Third Class. Portions of Sections 6780 and 6781 are as follows:

> "Sec. 6780. DELINQUENT TAXES--LIEN FOR TAXES.--* * * *The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."
>
> "Sec. 6781. COLLECTOR; DUTIES OF--DELINQUENT TAXES, ETC.--* * * *The city council shall cause the land and lot delinquent list and the personal delinquent list to be returned to the <u>city collector</u>, who shall be charged therewith, <u>and who shall proceed</u> to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes: Provided, that all suits for the collection of city taxes shall be

> brought in the name of the state, at the relation and to the use of the city collector."

Section 6995 et seq. of Chapter 38 provide for the method of collecting delinquent taxes due cities of the fourth class. The appropriate portions of Sections 6995 and 6996 are identical with the portions of sections 6780 and 6781 above quoted, insofar as the issue involved here is concerned. Sections 7108 et seq. of Chapter 38 provide for the method of collecting delinquent taxes due Towns and Villages. Portions of Section 7109 are as follows:

> "Sec. 7109. ASSESSMENT AND COLLECTION OF REVENUES.- * * * *it shall be the duty of the board of trustees to require the collector, annually, to make out and return, * * * *a list of delinquent taxes remaining due and uncollected on the first day of January of each year, to be known as the delinquent list. It shall be the duty of the board of trustees, * * * *carefully to examine the same,* * * *and shall * * * cause said delinquent list * * * *with bills therefor, to be placed in the hands of the county collector, who shall give a receipt therefor and proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected.* * * *."

The issue at hand is, which of the foregoing classes are affected by Senate Bill 94 and to what extent.

It is clear that Article 2, of Chapter 38, pertaining to Cities of the First Class, and Article 3 of Chapter 38, pertaining to Cities of the Second Class, each prescribe a complete system or procedure for the collectionof delinquent taxes. These systems are provided especially to apply to the particular class of city affected. The systems so provided are not repealed and apparently were not within the purview of the legislative intent at the time Senate Bill 94 was placed on the Statute Books. To apply Senate Bill 94 to delinquent taxes due Cities of the First and Second Class would be to invite confusion and uncertainty, as there would then be two methods by which such taxes might be enforced.

It is our opinion that by the common rules of construction Senate Bill 94 cannot be applied to delinquent taxes due to Cities of the First and Second Classes.

We shall consider taxes due Cities of the Third and Fourth Classes together, as the statutes respecting them are of the same legal effect. We call attention to the wording of Sections 6781 (pertaining to Third Class Cities) and 6996 (pertaining to Fourth Class Cities) 1929 Revision, each of which provides that

> "the land and lot delinquent list (is) to be returned to the City Collector * * * who shall proceed to collect the same, in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes. * * * *."

Under the foregoing provisions City Collectors in the past enforced the payment of delinquent taxes by suit following the procedure prescribed by Chapter 59 for collection of State and County taxes. However, such suit was brought by the City Collector, and not by the County Collector, and by virtue of Sections 6781 and 6996, as the case required, and not by virtue of any Section of Chapter 59, including 9970 heretofore quoted. The Supreme Court has held that these two sections (6781 and 6996) were the ones applicable to city delinquent taxes, rather than section 9970, or any other section of Article 9 or 10 of Chapter 59.

Section 1604 of the Revised Statutes of 1889 pertained to the collection of taxes in Cities of the Fourth Class. This was the predecessor of Section 6996 of the 1929 Revision. Section 7672 of the 1889 Revision pretained to City and Town delinquent taxes, and was the predecessor of Section 9970, Revised Statutes of 1929. The City of Aurora was a City of the Fourth Class at the time in question. In the case of City of Aurora ex rel Williams, Collector, vs. Lindsay, 146 Mo. 509, the question was raised as to whether the suit should be brought by the County Collector under Section 7672 or by the City Collector under Section 1604, 1889 Revision. The Court stated as follows: l. c. 516.

> "The tax suit was brought under the provisions of section 1604, Revised Statutes of Missouri 1889, and it is claimed by the parties to the motion that it should have been brought under section 7672 et seq., Revised Statutes 1889, that section 1604 is a mere continuation in 1889 of the laws of 1881 (Acts 1881, p. 59) and that the act of 1881 was repealed, by implication by the Act of 1883 (Acts 1883, p. 150), and that the Act of 1883 is now section 7672 et seq. of the Revised Statutes of

1889.

> On the other hand it is claimed that section 1604 is an act duly enacted by the 35th General Assembly, and being later in date than the Act of 1883, and special in its nature, it repeals, by implication, the conflicting provisions of the Act of 1883, and its requirements must be observed in collecting taxes due cities of the fourth class.
>
> An examination of the history of section 1604, as it appears in the Revised Statutes of 1889, discloses that the 35th General Assembly regularly adopted it as a part of the act revising the cities, towns and villages law of this State, with the exception that in the last sentence of the section the revisers have substituted the word 'article' for the word 'chapter' as it is in the original bill.
>
> It is therefore the law now, and its provisions must be followed, rather than those of the Act of 1883 (being now section 7672 et seq.) in actions for the collection of taxes due cities of the fourth class."

This position was affirmed in the case of State ex rel Duble, Collector of the City of Princeton vs. Lewis, 256 Mo. 121, wherein suit was brought to collect delinquent City taxes, and in which Judge Faris stated at page 122:

> "* * * * We agree with learned counsel * * * *that the statute now in force requires these suits to be brought in the name of the State of Missouri at the relation and to the use of the City Collector, naming him, and the city for which he sues (Sec. 9348, R. S. 1909): * * * *."

Section 9348, R. S. of 1909 is identical with Section 6995, R. S. 1929.

In the case of The State ex rel Bauer, Collector of the City of Jefferson vs. Edwards, 162 Mo. 660, the Supreme Court applied the same construction to Cities of the Third Class. On page 667 Judge Gantt quotes what is now a portion of Section 6781, 1929 Re-

vision, and states that by reason of said section

> "The City Collector" * * *is fully empowered 'in the same manner' to certify the back tax bills for delinquent city taxes and his certificate is prima facie evidence that the taxes just and correct. * * * *."

The foregoing case also shows the application to city delinquent taxes that is to be made of the law relating to delinquent State and County taxes.

As the enforcement by suit is no longer possible under Senate Bill 94, the method of collecting delinquent taxes due Cities of the Third and Fourth Classes must follow the procedure established for the collection of State and County taxes; to-wit, the procedure provided for in Senate Bill 94. This by reason of the portions of sections 6780 and 6995 which provide for the enforcement of taxes

> "in the same manner and under the same rules and regulations" * * *as may be provided by law for the collection and enforcement of the payment of state and county taxes," * * *."

It is therefore the opinion of the office that Senate Bill 94 is applicable to Cities of the Third and Fourth Classes insofar as it prescribes the method and manner of the collection and enforcement of the payment of the taxes, but any proceedings had relating thereto are to be conducted by the city collector consistent with the requirements of Articles 4 and 5 of Chapter 38, 1929 Revision.

We shall lastly consider the collection of delinquent taxes due Towns and Villages. By reason of Section 7109, heretofore quoted, the proper officers of the town or village are required to place the delinquent list in the hands of the collector, who shall

> "proceed to collect the taxes due thereon, in like manner and with same effect, as delinquent taxes for state and county purposes are collected."

As to such taxes, the collector is to proceed to collect as though they were county and state taxes. He is to do all things necessary to effect the collection of the taxes. Under such circumstances he should proceed to sell the property as required by Senate Bill 94 for such taxes.

It is,therefore, the opinion of this office that delin-

quent taxes due Towns and Villages are to be collected by the County Collector under the provision of Senate Bill 94.

Your tenth interrogatory reads as follows:

> "Is it mandatory that the collector sell all real estate delinquent every year, or could he allow several years' taxes and penalties to accumulate before advertising the real estate for sale."

We shall first consider the statutory provisions concerning this problem. Section 9952, which we have already quoted, provides for the making of a list of lands upon which taxes remain delinquent and unpaid. This list is to include all property upon which State and County taxes are delinquent. Section 9952a provides in part as follows:

> "Sec. 9952a. LANDS AND LOTS SUBJECT TO SALE--WHEN.--All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, * * * *."

Section 9952b provides in part as follows:

> "Sec. 9952b. SHALL PUBLISH LIST OF DELINQUENT LANDS--EXPENSE.--The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper* * * *. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the court house door of such county, on the first Monday in November next thereafter; * * *."

Section 9952c provides in part as follows:

> "Sec. 9952c. PERIOD OF SALE--MANNER OF BIDS.--On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue* * * *until so much of each parcel assessed

> * * * *shall be sold as will pay the taxes, interest and charges thereon * * * *."

From the foregoing excerpts, it is plain that the list prepared by the collector, including each and every tract upon which taxes remain delinquent and unpaid, is required to be published in the notice of the sale, said notice to state that so much of "said lands and lots" shall be sold as necessary, and that on the day of sale, the collector "shall commence the sale of such lands". At no point in the procedure is the collector given any discretion as to what lands shall be sold. The only exemption from sale is in the event lands are offered for sale but no bid is received sufficient to pay the tax, penalties and charges. (Sections 9953 and 9953a). But they must be subjected to sale.

This conclusion is irresistible when we consider the object of Senate Bill 94. Primarily, it is expected to effect the regular payment of taxes, thus assuring the annual income necessary to support the government. Secondarily, it is to ease the penalty burden upon the delinquent taxpayer. To permit taxes to accumulate year after year without a sale of the property would defeat both purposes. The state and the counties would be no better off than under the former system of permitting taxes to accumulate five years, then instituting a suit that was permitted to pend in court for an additional period. As to the taxpayer, penalties accrue on the tax at 10% per annum, till sold (section 9952), after sale, the taxpayer is only required to pay the interest provided for in the certificate of purchase. See Section 9953d, page 453 Laws of 1933, part of which is as follows:

> "Such certificate of purchase shall also recite* * * *the rate of interest that such certificate of purchase shall bear, which rate of interest shall not exceed the sum of ten percent per annum."

It is to be expected that the rate of interest these certificates will actually bear will be far less than the maximum rate, thus saving the delinquent taxpayer a substantial portion of the penalty which would accrue if the sale of the property were delayed a number of years and penalties accrued at the rate of 10% per annum.

It is, therefore, the opinion of this office that it is the mandatory duty of each collector to subject to sale each year, all property upon which taxes remain delinquent and unpaid.

We have not overlooked the fact that Section 9952a provides all such land "shall be subject to sale" each year, instead of "shall be sold" each year, but believe that in view of Section 9953 of the Act forbidding a sale when a sufficient bid is not received, the wording as found in Section 9952a is as mandatory as possible.

Your eleventh interrogatory is as follows:

> "Would the enactment S. B. 94 and H. B. 44 give the collectors the option of proceeding to the collection of taxes under either bill?"

In treating your first inquiry, we have stated our views as to what effect is to be given House Bill 44. Our opinion is that no option is given, or was intended to be given, to the collector to proceed under House Bill 44 after the effective date of Senate Bill 94. This conclusion is further supported by the fact that Section 9953, providing the manner in which suit shall be instituted, against who it shall be instituted, the form of the petition, the form of certification and proof and the manner of service; Section 9954, providing for the employment of an abstractor and his duties; Section 9955, providing for the compensation of the abstractor; Section 9956, providing for the form of the judgment, if against the defendant, the issuance of a special scire facias and the lien of the judgment; Section 9957 providing that suits are to be tried at the return term; and Section 9958, providing, in the case of a sale of the property, that the sheriff shall execute a deed thereto and the prima facie character of such deed; have all been repealed by Senate Bill 94, and nothing enacted in their place consistant with a collection of the taxes by suit. The one section contained in House Bill 44 is but the crank to the car, and entirely useless by itself, except as hereinbefore stated.

Your twelfth inquiry is as follows:

> "Would Section 9961 which has not been repealed give collectors authority to enter suit for back taxes?"

Section 9961, which has heretofore been considered carefully in respect to your fifth inquiry, could not be considered in any respect as authorizing the collector to enter suit for back taxes. It is entirely a statute of limitation, withdrawing a remedy, not granting one. This section provides no procedure for the col-

lection of taxes. It provides for a defense for the taxpayer, not a cause of action for the collector.

It is our opinion that Section 9961 can in no way be construed to authorize the entry of a suit for back taxes.

Your thirteenth inquiry is as follows:

> "Are Senate Bills 110-115 changed or amended by subsequent passage and approval of Senate Bill 94?"

We quote Section 9975c from Senate Bill 110 and Section 9975b from Senate Bill 115, as found on pages 451 and 452, Missouri Laws of 1933, before proceeding with this question.

> "Sec. 9975c. MAY PAY TAXES IN INSTALLMENTS.—In all cities in this State which now have, or which may hereafter have 700,000 inhabitants or more, all general taxes for school and city purposes that are delinquent for the year 1931 and prior years, may be paid in whole or in installments of at least twenty-five per cent. of such tax prior to January 1, 1935, at the face amount of the tax plus 6% interest per year, from the date of delinquency. Out of such interest shall be deducted all legal fees and costs and the balance of such interest shall be paid to the School Board or City. If the fees and costs shall exceed the interest, then the amount to be paid as interest shall be the amount of such fees and costs, without additional interest for penalty. The collector shall issue temporary receipts for partial payments made."

> "Sec. 9975b. MAY PAY DELINQUENT TAXES IN INSTALLMENTS.—In Cities that now have or which may hereafter have 700,000 inhabitants or more, all delinquent general taxes for School and City purposes for the year 1932 and thereafter may be paid in whole or in installments of at least twenty-five per cent. of such tax with interest on the amount paid, at the rate of 2/3 of 1% per

> month from the date of delinquency, without any additional fees for collection or attorney's charges. The Collector shall issue temporary receipts for partial payments made."

The foregoing statutes are not as explicit as they could have been, in stating that "taxes" were meant to be included in "taxes for school and city purposes". However, after careful consideration, we have arrived at the conclusion that Senate Bills 110 and 115 apply only to general city taxes for school and city purposes. The following sentence from Section 9975c was one of the factors considered:

> "Out of such interest shall be deducted all legal fees and costs, and the balance of such interest shall be paid to the school board or city."

The "school board" referred to is unquestionably the School Board of the City of Saint Louis. Such a term does not properly designate the state school fund, but is indicative of the recipient of city taxes collected for school purposes. Senate Bills 110 and 115 are companion Acts. The first refers to taxes for 1931 and prior years, the second refers to taxes for 1932 and subsequent years. The same purpose resulted in the passage of both bills. In each bill the classes of taxes referred to are described in identical language. Any phrase in one act identifying the taxes referred to in that act controls the construction to be placed upon the same term in the other.

To construe "taxes for school* * * *purposes" to include state and county taxes levied for school purposes would be to raise a serious constitutional question. Section 3 of Article 10 of the Missouri Constitution provides:

> "All taxes shall be levied and collected by general laws."

Subdivision 32 of Section 53 of Article 4 of the Missouri Constitution provides:

> "In all other cases where a general law can be made applicable, no local or special law shall be enacted;"

State and county taxes must be collected by general laws. To apply these two Bills to the state and county taxes delinquent

in the City of Saint Louis would be to collect these taxes by a special, not a general law. An inequality between taxpayers in Saint Louis City and in the counties of the state would be evident. There can be no question but that the general law (Senate Bill 94) is applicable to the delinquent state and county taxes levied in Saint Louis City. Any such construction applying Senate Bills 110 and 115 to State and County taxes for school purposes would conflict with both the quoted sections of the Constitution of this State.

Having concluded that Senate Bills 110 and 115 apply only to city taxes for school and city purposes, and having determined, in considering your ninth inquiry, that Senate Bill 94 is inapplicable to city taxes, except as there stated, it is the opinion of this office that said Bills are not changed or amended by the subsequent passage of Senate Bill 94.

Your fourteenth inquiry is as follows:

> "What effect does subsequent approval of Senate Bill 80 have on interest and penalties provided for in Senate Bill 94?"

In considering your third inquiry, we stated the effect that is to be given Senate Bill 80 and the extent to which it modifies Senate Bill 94. We quote a paragraph of Judge Hays in the case of State ex rel vs. Koehn, supra l. c. 756:

> "No. 80 is a valid and presently effective and operative temporary law and effectually, during the limited period of its operation, suspends the effectiveness and operation of Nos. 110 and 115, and also suspends, during the same period and by necessary impliaction, such statutory provisions contained in said chapter on taxation as are in conflict with No. 80, and particularly the provisions relating to the compensation of the respondent for any and all his services rendered and to be rendered during said period incident to back or delinquent taxes or the collection thereof."

Senate Bill 80 is the latter of the two. The penalties and interest prescribed by Senate Bill 94 are not different in principal from those assessed under the statutes repealed by said Bill. There is no evidence of any legislative interest to exclude such penalties from the operation of Senate Bill

80. It is the opinion of this office that the interest and penalties provided for in this Act are subject to and are to be collected only in accordance with the terms of Senate Bill 80, so long as the same is operative.

Having answered your inquiries to the best of our ability, we respectfully direct your attention to Section 9960d of the Act, which in part provides:

> "Sec. 9960. TAX COMMISSION TO PRESCRIBE FORMS.—The state tax commission" * * * shall, with the advice of the attorney general, decide all questions that may arise in reference to the true construction or interpretation of this act, or any part thereof, with reference to the powers and duties of county or township tax officers, and such decision shall have force and effect until modified or annulled by the judgment or decree of a court of competent jurisdiction."

The Commission is authorized to decide questions of construction and interpretation of the Act with reference to the powers and duties of the tax officers. Any decision made by the Commission in accordance with the foregoing opinion shall be considered as having been made "with the advise of the Attorney General". We trust that the foregoing may be of assistance to you.

Respectfully submitted.

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

SUPPLEMENTAL OPINION.

TAXATION: Various problems concerning the application of Senate Bill 94 to the collection of delinquent State and County taxes. Should be cross indexed under Delinquent taxes.

11-23

November 15,1933

FILED
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State Tax Commission
Jefferson City, Missouri

Attention Hon. Andrew J. Murphy.

My Dear Judge Murphy:

In accordance with my conference with you of this date respecting the opinion heretofore rendered the Commission, dated August 8, 1933, entitled "Taxation--Various problems concerning the application of Senate Bill 94 to the collection of delinquent State and County taxes," I herewith render you a supplemental opinion in respect to your inquiry No. 8, which inquiry reads as follows:

> "At what exact date or time do taxes become levied and assessed as to the collector's duty to certify. Section 9963b. 6-7."

The following portions of the section are pertinent to this inquiry:

> "Sec. 9963b. MANNER OF COLLECTING INSURANCE ON PROPERTY--WHO SHALL RECEIVE SAME--FORM. In the event of the destruction by fire, windstorm or tornado of any permanent buildings* * situate upon any land* * *which* * *at the time of destruction were situate upon any land * * *against which taxes were then levied and assessed, and was so situate at the time of such levy and assessment, the lien of such taxes shall attach to and follow any insurance that may be upon said property at the time of its destruction* * *provided however, if in the opinion of the county collector the destruction of such building* * *will not prejudice the collection of such taxes* * *the county collector shall be authorized in writing,* * *to waive and* * *release the lien by this section given. * * *The assured* * *shall file with such company a statement from the collector* * *in writing, * * *that there are no taxes against said building* * *or that taxes exist against the

same and the amount and description thereof, and whether or not such lien is waived.* * **

Taxes levied and assessed have at all times been a lien upon the real estate taxed. To further secure these taxes, the insurance upon the improvements on the land was made amenable to this lien. A study of the foregoing section leads us to believe that no new lien was created, but the lien heretofore existing on real estate is simply extended to the insurance. The phrase "the lien of such taxes shall attach to and follow" does not contemplate a new and separate lien on the insurance, as distinct from the lien on the real estate, but refers to one lien upon the real estate and insurance.

While we have not overlooked the clause that states that the insurershall pay the taxes, etc., then due, levied and assessed, it is our opinion that the lien extended to such insurance is the lien as exists upon the land, i.e;- for taxes levied and assessed, whether due or not. It is possible that under these circumstances, the collector could not state the amount of such taxes. In this event, he could only state such taxes had been levied and assessed, but the exact amount thereof was undertermined.

It is therefore the opinion of this office that whatever lien exists upon the land for the payment of taxes, is by the terms of Senate Bill 94 extended to the insurance in the event of a destruction, contemplated in Section 9963b, and that the statement required of the Collector by this act should cover alb taxes levied and assessed whether or not the amount of the tax is ascertainable from his records. However, it would be our further opinion that in the event there are taxes levied and assessed but the amount of which is not ascertainable from the tax books in the possession of the Collector, the Collector would be carrying out the intent of the act by waiving the lien for such taxes providing there has not been a total destruction of the improvements or that the destruction has not materially damaged the improvements thereon situated, so as to jeopardize the collection of the taxes.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

HGW:MM

SHERIFF'S RESIDENCE - County court's duty in relation thereto. Sections 8524 and 8526, R. S. Mo. 1929.

February 17, 1933.

FILED
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Hon. M. E. Montgomery
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Mr. Montgomery:

Your letter addressed to the Attorney-General requesting an opinion from this department, on behalf of the county court of your county, has been handed the undersigned for attention. In your request you state the following:

> "I am writing you at the request of the Sheriff and the County Court of Sullivan County. The question has arisen as to whether the Sheriff of our County, under the present circumstances, is entitled to receive from the county his house rent, light and heat bills?
>
> For a number of years Sullivan County has not maintained a county jail. Our prisoners have been boarded out in the jails of other adjoining counties. In taking prisoners to and from these jails the Sheriff of Sullivan County has been allowed the statutory mileage rates and deputy hire when it was necessary. The question appears complicated only in this sense, for a number of years in the past the County Court of Sullivan County have allowed the Sheriff house rent and also his light and water bills and also his coal bill for his private dwelling. Occasionally the Sheriff may keep and board a prisoner, who is a trusty, in his private home, but this is the exception rather than the rule."

Under the facts as given we understand your request to be as follows:- You are desirous of an opinion upon the question of whether or not it is encumbent upon the county court to furnish to the sheriff at the expense of the county a dwelling for the private occupancy of himself and family, and, in addition thereto to pay, in connection with such private occupancy, his fuel, light and water bills.

We are unable to find any statutory provision authorizing the county court to make an expenditure of the county funds for the purpose as designated. The courts uniformly hold that county courts are not the general agents of the county, or of the state; their powers are limited and defined by law. If the power to make such expenditure on behalf of the sheriff is not provided by statute, then, in order to justify such action upon the part of the county court, the authority would necessarily have to be implied as an essential and necessary expenditure by reason of the peculiar duties imposed upon the sheriff and which under the law he is required to perform.

Section 8524, R. S. Mo. 1929, provides as follows:

"There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

In the case of Markreader v. Vernon County, 216 Mo. 696, a sheriff brought suit against the county for his outlay of expenditure on behalf of said county to recovery for the following items: gas and water service in the county jail: stamps used in his official business and for janitor service in his office. The opinion in this case and the companion case of Ewing v. Vernon County, same report, p. 681, was written by Judge Lamm. It will be noted from a reading of these cases that a very liberal construction was given the statutory provisions, and a recovery was permitted upon the theory that the expenditures as made by the representative officials were necessary expenditures incident to the proper performance and discharge of official duties.

Section 8526, R. S. Mo. 1929, provides as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and

charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible: but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Under Section 9524, supra, it is made mandatory upon every county to keep and maintain in good and sufficient condition and repair a common jail. If the sheriff of your county uses his residence as such jail, the county, of course, should pay the expense in connection therewith. It is permissable and sometimes necessary that the sheriff reside at the jail in order to at all times be in close proximity to the persons confined or incarcerated in that institution. If, upon the other hand, the residence is not so used, we are of the opinion that the county court would be unauthorized to pay for the rental of such residence, light, fuel and water used therein. The matter of occupancy, therefore, resolves itself into a question of fact to be determined by the county court.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA:EG

TOWNSHIP BOARD HAS AUTHORITY TO APPROPRIATE MONEY from the General Road Fund to secure right-of-way and turn same over to State Highway Commission for construction and maintenance of state highways thereon.

March 1, 1933.

FILED
64

Hon. Merrill E. Montgomery
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

Replying to your letter of February 23, 1933, wherein you say,

> "The people of Sullivan County are confronted with the proposition of whether or not a Township Board has the authority to appropriate money from the general road fund of their township treasury to the State Highway Commission to use for the purposes of condemnation in securing the right-of-way for "Farm to Market Roads", or for "Supplementary Highways"?

Under Sections 12256 and 12257 R. S. Mo. 1929, if construed alone, it would seem doubtful if the Township Board had the power, but in the light of Sections 8131 and 8132 R. S. Mo. 1929, their powers and duties with reference to road funds in the township treasury seems to be very materially changed and enlarged upon.

Section 8131 R. S. Mo. 1929, says,

> "Any civil subdivision as defined by this article shall have the power, right and authority, through its proper officers, to contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of rights-of-way for the state highways, and convey

> such rights-of-way, or any other land, to the State of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges. **********"

Section 8132, R. S. Mo. 1929, says,

> "Whenever in the preceding section the words "civil subdivision" are used they shall be deemed and taken to mean a county, township, road district, or other political subdivision of the state or quasi public corporation having legal jurisdiction of the construction and maintenance of public roads."

The last two sections, which were enacted in 1929, undoubtedly modify and enlarge the scope of Sections 13256 and 13257 R. S. Mo. 1929, and give the Township Board powers that they did not possess before.

Sections 8131 and 8132 R. S. Mo. 1929, expressly give this authority to the township board, so in reality it is not in conflict with the first two sections referred to.

See Harris v. Bond 344 Mo. 1. c. 888, which states,

> "It is the consensus of opinion in this country that the Legislature in the creation of municipal and public corporations of every description is absolute and unlimited, in the absence of some specific state or federal constitutional provision restricting such powers **********.
>
> It may also confer upon such corporations such public power and authority as it may deem wise and best."

Since the Legislature has seen fit and proper by Section 8131 R. S. Mo. 1929, to give the township board through its proper officers the right "to contribute out of funds available for road purposes all or part of the funds

necessary to purchase of rights-of-way **********, we are of the opinion that it is legal and constitutional for them to do so.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:KO

RE: Suit for taxes delinquent Jan. 1, 1933
Cannot be joined in suit begun in 1933 for taxes delinquent Jan. 1, 1932

VV

FILED
64
12

March 17, 1933.

Hon. Morgan M. Moulder,
Prosecuting Attorney,
Camden County,
Camdenton, Missouri.

Dear Sir:

Your letter reads as follows:

'"Section 9936 provides that all real estate upon which taxes remain unpaid on January first annually shall be delinquent. Section 9945 provides that the collector shall not bring suit for taxes, for one year after such taxes become delinquent "but thereafter he shall proceed with such delinquent taxes in all matters the same as provided in this chapter in reference to taxes now delinquent."

Section 9953 R.S. of Missouri, 1929, provides that the petition in a suit for delinquent taxes shall in one count " for the taxes for all such years as taxes may be due thereon. I have read case of State ex rel v. Carr 178 Mo. 229 and State ex rel v. Wilson, 216 Mo. 215 and I thought that the true construction of all the statutes would allow suit for delinquent taxes be brought for all years due or delinquent when the taxes became delinquent twice, and that suit could be brought for both years even tho a year does not pass after the year for last year of tax. That is that taxes delinquent Jan. 1, 1932 and taxes delinquent Jan. 1, 1933, for both years, can be included in the suit for the taxes for both years, even tho a year as not passed since the tax became delinquent on the year of Jan. 1, 1933. However Sec. 9945 created some doubt in my mind as to whether or not I, as tax attorney, can file suit for the taxes due and delinquent Jan. 1, 1933, together with the taxes delinquent Jan. 1, 1932, because the year had not passed.

There is a large estate in Camden County upon which taxes were not paid Jan. 1, 1932, and thereby became delinquent, now the year has gone by and suit can be brought, but there is now another year of taxes delinquent Jan. 1, 1933; can I bring the suit for both years?

I brought suit for taxes for years of 1928 and 1929 for the collector. The property sold and brought $50 more at the sale than the taxes and costs, for the years of 1928 and 1929, can such surplus be applied to the taxes yet due for years of 1930, 1931 and

1932? Or will the purchaser be compelled to pay the taxes yet due, and the balance turned over to the treasury to await the owner or go to school fund as provided by statute?"

All parts of the General Revenue Statute must be considered as a related Code of Laws on the same subject, to-wit, taxation, and must be construed so as to give effect to each part thereof if practicable so to do.

Section 9936 says:

> "All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent **"

This section fixes date of delinquency clearly. Under this section real estate taxes payable in 1932 are delinquent January 1, 1933 if same are unpaid on said January 1, 1933.

Section 9945, referring to collection of delinquent taxes by suit, reads as follows:

> "*** The collector shall proceed to collect taxes due thereon but shall not bring suit thereon for <u>one year</u> after such taxes become <u>delinquent</u>.***"

Under these two sections, 9936 and 9945, real estate taxes payable in 1932, if not paid on or before January 1, 1933, become delinquent on January 1, 1933 and after January 1, 1934; if not paid on or before January 1, 1934, suit can be begun to collect same.

Section 9953 provides for filing petition and among other matters, says:

> "And all lands owned by the same person or persons may be included in one petition and in one count thereof, for the taxes for all such years as taxes may be due thereon, and said petition shall show the different years for which taxes are due."

The statute of 1879, now Section 6845, contains practically the same privisions as Section 9945 R.S. of Mo. of 1929, and Section 6837 R.S. of Mo. 1879 providing for actions to collect delinquent taxes, among other things, provides as follows:

> "And all lands owned by the same person or persons may be included in one petition and in one count thereof for the taxes for all such years as may be due thereon and said petition shall show the different years for which taxes are due with the respective amount due to each fund ***"

You will observe Section 6837 of Statute of 1879 carries the same provision as Section 9953 R. S. of Mo. 1929. Construing this Section 6837 R.S. Mo.1879 in the case of

State to use of Begeman v. Robyn, 93 Mo., l.c. 399

the court said:

> "This suit was brought to enforce the collection of taxes for the year 1884, and was commenced on the twenty-second of September, 1885. Now, Section 6848, Revised Statutes, is the same as section 8 of the act of 1879, before mentioned. If this section be examined in connection with that entire law, it will become clear that, as to all taxes accruing after 1880, no suit can be brought thereon until one year after the tax becomes delinquent. This prohibition applies alike to state and county taxes, and to delinquent taxes of towns and cities having less than five thousand inhabitants, all of which taxes, in contemplation of the law, are to be extended in the county 'back tax book'. The prohibition applies also to the delinquent taxes of cities of five thousand or more inhabitants, and which taxes are to be extended on the city 'back tax book'".

I cannot find where this case has been overruled.

My construction of language used in Section 9945, R.S. 1929 saying in suit for taxes all taxes may be included in one count for all such years as taxes may be due, is that it means suit may be begun and joined in one count; therein may be included taxes which on real estate have been <u>delinquent</u> for more than one year, and this construction gives full effect to the provision in Section 9945 barring suit before lapse of one year from time same becomes delinquent, which means one year from the January 1 following the year in which the taxes are payable.

As to the cases you refer to in 178 Mo., l.c. pp. 239-240, and 216 Mo. 215, I see nothing in either case that tends to a different construction than that of the Supreme Court in the above cited case in 93 Mo., 305.

In the case in 178 Mo., l.c. pp. 239-240, the court was deciding whether or not the five-year statute barred the action to collect the taxes and held none of the taxes barred. The court ordered judgment rendered below for years 1894, '95, '96 and '97 and suit was filed December 14, 1899. Now the last taxes due were in '97 and not being paid, they became delinquent January 1, 1898, and suit could not be begun for one year from that date, which would be January 1, 1899, and suit was actually begun eleven months and fourteen days after January 1, 1899.

In the 216 Mo. case, l.c. pp. 290-91-92, the petition was filed December 28, 1900 and the court said:

> "According to these statutes, the taxes mentioned in the first two counts became due January 1, 1895, but did not become delinquent until January 1, 1896, and the second assessment not being due until July 1, 1895, would not become delinquent until January 1, 1896."

It will be observed the date on which the last taxes became delinquent in last mentioned case was January 1, 1896 and one year from that date would be January 1, 1897, and suit was filed December 28, 1900.

For reasons above set forth, it is my opinion you can commence the suit for the taxes on the real estate delinquent January 1, 1932, but you cannot at this date commence the suit for the taxes for the year 1932 now delinquent since January 1, 1933.

Section 9959 R.S. of Mo. 1929 says:

> "When real estate has been sold for taxes or other debt by the sheriff of any county within the State of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, ***and then presented to the county court of the county *** and on approval of the statement by the court, the sheriff making the same shall pay the said surplus money into the county treasury. *** And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. ***"

The history of this legislation discloses the reason for its enactment. It was enacted first in 1881, (Session Laws of Missouri, 1881, p. 192) and in the emergency clause it was stated many sheriffs had sums of money coming into their hands as surplus from tax sales and were holding same because no provision for paying it to any one was by statute provided, and therefore this enactment should be effective at once. The Act was amended in 1883 (Session Laws of Mo. of 1883, p. 147) and in form then amended has been carried forward in each R. S. of Mo. since that date.

You will notice phraseology is such that it applies equally to sheriff then or thereafter having possession of such money. The law would be without the statute the surplus money belonged to the owner and the statute expressly recognizes that right by other provisions thereof not herein quoted which provide on proof of his ownership of land sold when sold the money should be paid to him. This statute is remedial and directs a specific manner in which owner may have the remedy enforced for his benefit and excludes any other disposition of the money, in my opinion.

The language of the section confines the payment into the county treasury to the amount beyond the taxes then due and the costs

in the case. If some one purchased at the sale and claims title and his claim is valid, therefor taxes subsequently accruing and in default , the purchaser should pay the taxes or the land should be sold again for taxes.

In my opinion the surplus money cannot be used to pay taxes accruing subsequent to the sale producing the surplus.

Yours very truly,

EDWARD C. CROW

APPROVED:

ATTORNEY GENERAL

ECC:AH

OSTEOPATH: Right to practice medicine & surgery
Write prescriptions.

FILED
64

April 10,1933.

Hon. M.E. Montgomery,
Prosecuting Attorney - Scott Co.,
Benton, Missouri.

Dear Sir:

Your letter reads as follows:

"Complaint has been made to me that a certain osteopath in this county has been issuing and prescribing medicines for his patients, and it is complainant's idea that this osteopath is violating the law relating to practicing medicine, and that he should be dealt with under the provisions of Section 9118, R.S. 1929 ***"

The legally historic setting of the battle between the different classes of our medical brethren discloses that like Banquo's ghost, it will not down. As I read the Missouri decisions, often times the deciples of the elder school of medicine have fought their way into the forum of the Missouri Appellate Courts hoping to have their judicial legal brethren settle the question whether or not an osteopath is a physician entitled to all the privileges and standing of those who as healers of human ills for centuries have used only drugs and the surgeon's blade, but so far the Missouri Appellate Courts have not squarely decided this question, and the fond hopes of a victory for one side or the other have, beneath the shadow of some technical point, vanished like the childish vision of a dream.

This contest, no doubt, grew out of the high standard of ethics set by the older school of medicine, to whose labor and patience and skill along with the factors of hygiene and advanced physical comfort, we owe the lengthened span of life of this generation in which men now have an average working life double what it was three centuries ago when "old John of Gaunt", time honored Lancaster, was a patriarch at 58, and Admiral Coligny, murdered at 53, was described by his contemporary biographer as a "very old man"; but now at the age of 80 life "seems but just fair ripeness for the sickle", and so medicine and the medical profession must stand first as benefactor of the human race; and so we laymen look with concern on these clashes between classes of our medical schools and will cast our benediction on the close thereof.

You are confronted with the question whether or not an osteopath licensed in Missouri under Chapter 102, Article I, R.S. of Mo., 1929 to practice osteopathy only, by issuing medicine or prescriptions to his patients, violates the provisions of Chapter 53, Article I, R.S. of Mo., 1929 relating to practice of medicine and surgery and which Chapter 53, Article I provides for licenses to the older school of medicine. In briefer language, can a Missouri licensed osteopath issue medicines and prescriptions to his patients? If there are any decisions of the Supreme Court or the Courts of Appeals in Missouri directly deciding this question, I have been unable to find same.

Chapter 102, Article I, R.S. of Mo., 1929 provides for licensing those qualifying thereunder to practice osteopathy in Missouri, but the first section of said chapter and article reads as follows:

> "The system, method or science of treating diseases of the human body, commonly known as osteopathy, and as taught and practiced by the American School of Osteopathy of Kirksville, Missouri, is hereby declared not to be the practice of medicine and surgery within the meaning of Article I of Chapter 53 and not subject to the provisions of said article."

There are, as you doubtless know, two recent Court of Appeals decisions that touch upon but do not decide whether or not a Missouri licensed osteopath can issue medicine and prescriptions to his patients. In

State v. Carlstrom, 224 M.A. 439

the defendant, a licensed osteopath was charged by information filed, with violating the law by practicing medicine by issuing medicines and prescriptions to his patients without having a license from the State Board of Health as provided for in what is now Chapter 53 of Article I, R.S. of Mo., 1929. To this criminal information defendant filed a Plea in Abatement alleging he was a graduate of the American School of Osteopathy of Kirksville, Mo. and licensed by the State Board of Osteopathic Registration (as provided for by Chapter 102, Article I, R.S. of Mo., 1929) to practice in Missouri; that he issued medicine and prescriptions to his patients because the Kirksville college of osteopathy taught the disease for which he treated the patients as an osteopath called for the use of the medicines he issued and prescribed; the Plea in Abatement further alleged that the issuance of the medicines and prescriptions by the defendant was not the practice of medicine as provided for in Chapter 53 of Article I, R.S. of Mo., 1929. The State filed a demurrer to the Plea in Abatement. The Court overruled the demurrer and sustained the Plea in Abatement. The State appealed, and the Springfield Missouri Court of Appeals May 20, 1930 decided the case and held, as the demurrer admitted the defendant was not practicing medicine within the terms of Chapter 53, Article I, R.S. of Mo., 1929, the trial court rightly sustained the Plea in Abatement, and in the opinion the Court said:

> "It was not, under these pleadings, for the trial court to say that an osteopathic physician had a right under the law to prescribe these particular drugs, for we think the State admitted it by its demurrer, and we think it is not for us to say now whether the facts pleaded in the plea in abatement are true or not. In other words we think a determination of this case does not settle and cannot settle how far an osteopathic physician may go in writing prescriptions and issuing drugs in his profession, and we do not mean for this opinion to be construed as holding that an osteopathic physician has an unlimited right to prescribe and issue drugs. We are simply saying that under the pleadings as submitted here the court did not err in sustaining the plea in abatement."

Here the Court says, of its own opinion, "This case does not settle and cannot settle how far an osteopathic physician may go in writing prescriptions and issuing drugs in his profession."

The next and last case so far as I can ascertain is

State v. Reisman, 225 M.A., 637

which was a prosecution for unlawful practice of medicine against an osteopath duly licensed to practice osteopathy in Missouri. The defendant filed a Plea in Abatement substantially the same in form as in the above cited case in 224 M.A., 439. The State demurred and Plea and demurrer were submitted without hearing evidence upon the Plea in Abatement. The Court overruled the demurrer and sustained the Plea in Abatement. Motion for new trial was timely filed, overruled, and proper affidavit for appeal in proper time filed. The Kansas City Court of Appeals on April 6, 1931 decided the case and held no right of appeal existed in behalf of the State from a judgment or order of the trial court sustaining a sufficient plea in abatement, and the Court refused to decide any question in the case because it took no cognizance of the appeal. (225 M.A., l.c. 642-3)

The courts in different states have taken opposite sides on the question you submit and each has with judicial vigor and sometimes with legal eloquence maintained their respective positions. A fine legal review of the questions litigated between osteopathic and other schools of medicine will be found in the exhaustive opinion of a Federal Judge in the case of

Waldo v. Poe, Collector of Internal Revenue
14 F. (2d) 749

wherein the entire field of battle is surveyed and the victories of either side catalogued and the present legal condition set forth.

The Missouri cases from the earliest to the latest show the teachings of the osteopathic school have been gradually enlarging, thereby approaching the curriculum of the older schools of medicine

and which condition is tersely and clearly stated by the court in the case of

> State v. Bonham, 93 Wash. 489, 161 Pac. 377, L.R.A. 1917, D. 996

wherein at p. 381 of the Pac. Rep., it is said:

> "When tested by the foregoing definitions it is manifest that the practice of osteopathy, as it was originally understood and as it was understood at the time of the enactment of our Medical Act, did not sanction the internal administration of medicines or the surgical use of the knife as a means for curing diseases. *** A perusal of the successive catalogues of its schools will show that their teachings are gradually being expanded, and that the more modern of them now teach in some degree much that is taught in the older schools of medicine. The parent school has been more marked in this respect than perhaps any of them. It now teaches that in 'child birth lacerations' in 'certain types of congenital deformities, certain kinds of tumors, etc., surgery must step in', and that surgery must be resorted to for the removal of tissues so badly diseased or degenerated that regeneration is impossible by the process of adjustment. But this advance is modern. ***"

Discussing the legal meaning of the section which is now Chapter 102, Revised Statutes of Mo., 1929, recognizing osteopathy as a method of treating diseases, our Court in 240 Mo., l.c. 353, said:

> "Our statute, already recognizes osteopathy as a 'system, method or science of treating diseases of the human body', and the defendant's school as the exponent of its method and practice. It also expressly authorizes persons having diplomas from that or any other legally chartered and regularly conducted school of osteopathy to treat diseases of the human body according to such method.

The supreme courts of New York, Illinois, Wisconsin, Connecticut, North Carolina and the District of Columbia recognize an osteopath as a "physician", as shown by the following cases:

> Bandell v. Health Dep't., 193 N.Y. 133, 85 N.E. 1067 21 L.R.A. (N.S.) 49;
> People ex rel Gage v. Simian, 278 Ill. 256, 115 N.E. 817;
> State v. Schmidt, 138 Wis. 53, 119 N.W. 647;
> Towers v. Glider and Levin, 101 Conn. 169, 125 A. 366, 40 A.L.R. 1263;
> In Re Hunter, 60 N.C. 372;
> State v. Johnson, 84 Kan. 411, 114 Pac. 390, 41 L.R.A. (N.S. 539;
> Howerton v. District of Columbia, 53 App.D.C. 230, 289 F. 628

Section 13519, Chapter 102, Revised Statutes of Missouri, 1929, as to osteopaths, provides as follows:

> "Every person holding a certificate from the State Board of examination and registration shall have it recorded in the office of the county clerk in the county in which he expects to practice, and in the cities of St. Louis, Kansas City and St. Joseph they shall record the same with the same official which records the certificate of graduates of any other school of medicine, and the date of the recording shall be indicated thereon."

The regulations of the Federal Government approved April 1, 1931 by the Secretary of the Treasury and the Attorney General of the United States permit osteopathic physicians to qualify on same basis as physicians of other schools of medicine for permits to prescribe and use intoxicating liquors for medicinal purposes in so far as same is permitted by state law. In twenty-two states the prescription by any physician of liquor is prohibited; Missouri is not one of those states. In the remaining states under Federal rules physicians of any school of medicine authorized under their state law to administer and prescribe drugs and therapeutics agencies of therapeutic value internally for the cure or relief of diseases and who are so engaged may secure permits to prescribe and use intoxicating liquor for medicinal purposes.

Your letter further states: '"In view of the provisions of Article 1 of Chapter 102, R.S. 1929, relating to the examination and registration of osteopaths, and particularly Section 13514, defining osteopathy as a "method or science of treating diseases of the human body, as taught and practiced by the American School of Osteopathy of Kirksville, Missouri", I am wholly unable to determine whether this person is violating the law or not."'

It goes without saying no one can forecast what our Supreme or Courts of Appeals may finally decide on this question. My opinion is, one licensed to practice osteopathy in Missouri by the Missouri State Osteopathic Board can, as an osteopath under the provisions of Chapter 102, Article I, R.S. of Mo., 1929 and not otherwise, and not under the provisions of Chapter 53, Article I, R.S. of Mo., 1929, issue medicines and prescriptions to those he treats in the regular course of an osteopathic practice, provided the medicines or prescriptions he issues for the disease or diseases he is treating are the medicines and prescriptions a legally organized and operating osteopathic college which the practitioner attended regularly teaches are a part of the regular osteopathic treatment for the disease or diseases the practitioner issued said medicines or prescriptions for.

If I am right in my conclusion that our upper courts in Missouri have not definitely settled this question, you, as a Prosecuting Attorney, would be wholly within your official prerogatives if on an affidavit filed with you, you should file an information charging

a violation of the statute by an osteopath who issues medicines or prescriptions for his patients. On the other hand, at the trial you would probably be met with the same situation which confronted the prosecuting officers in the two Court of Appeals cases I have hereinabove referred to.

If I can aid you further, advise me.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

ECC:AH

BANKS AND BANKING: Par value of shares of stock--Amount necessary for director to own discussed.

May 3, 1933

FILED
64
19

Mr. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of April 26th, 1933 which reads as follows:

> "I desire to call your attention to Sections 5349 and 5363, Revised Statutes of Missouri for 1929, and to Section 5349, page 323, Session Acts of 1931.
>
> You will note that Section 5349, Revised Statutes of Missouri, 1929, provides that the capital stock of a bank shall be divided into shares of not less than one hundred dollars each. Section 5363, Revised Statutes of Missouri, 1929, reads in part as follows:
>
> > "****Every director of a bank having a capital of twenty-five thousand dollars or over shall be a stockholder of the bank owning in his own right an amount equal to at least five shares, and of a bank having a capital of less than twenty-five thousand dollars, a stockholder in his own right in an amount equal to at least two shares;****"
>
> Section 5349, Session Acts of 1931, which repeals Section 5349, Revised Statutes of 1929, provides that the capital stock of a bank shall be divided into shares whose par value shall be not less than twenty dollars per share.
>
> I shall appreciate an opinion from y u as to whether a stockholder owning in his own right five shares of stock having a par value of

> $20.00 per share, in a bank having a capital of twenty-five thousand dollars, can qualify as a director in that bank; also whether a stockholder owning in his own right two shares of stock having a par value of $20.00 per share, in a bank having a capital of less than twenty-five thousand dollars, can qualify as a director in that bank."

As stated in your letter, Section 5349 R. S. Mo. 1929, has been repealed and in lieu thereof, a new Section known as 5349 Laws of Missouri 1931 page 223 was enacted. The 1929 section provided that the par value of shares of stock shall be not less than $100.00. This same section did not provide a way in which the par value of the stock could be changed.

Section 5349 Laws of Missouri 1931, p. 223, reads in part as follows:

> "The capital stock of such corporation shall be divided into shares whose par value shall be not less than twenty dollars per share. The par value of the shares of any such corporation may be changed by the stockholders at either a special or annual meeting of the stockholders. If such change is made etc.," * * * *"

You will note that this section changed the par value of shares so divided from not less than $100.00 to not less than twenty dollars. This section also provides a manner in which the par value of shares may be changed.

Section 5363 R. S. Mo. 1929, is captioned "Business directors--qualifications--election--duties," and in reading this section you will observe that it simply regulates the manner of conducting the bank as between the officers and the bank. The section provides in part the following:

> "Every director of a bank having a capital of twenty-five thousand dollars or over shall be a stockholder of the bank owning in his own right an amount

> equal to at least five shares, and of a bank having a capital of less than twenty-five thousand dollars a stockholder in his own right in an amount equal to at least two shares; * * * **

This provision is self explanatory and we believe means just what it says. That is, to be a director of a bank having a capital of twenty-five thousand dollars or over he shall own in his own right at least five or more shares of said stock without regard to the par value thereof. The same conclusion follows on banks having a capital of less than twenty-five thousand dollars.

It is therefore our opinion that a stock holder owning in his own right an amount equal to at least five shares of stock having a par value of $20.00 per share may qualify as a director in a bank having a capital of twenty-five thousand dollars or more.

It is our further opinion that a stock holder owning in his own right two shares of stock having a par value of $20.00 per share in a bank having a capital of less than $25.000 may qualify as a director in that bank.

Yours very truly.

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED_____
Attorney General.

J H:MM

SCHOOLS NEW OR OLD DISTRICTS--Should be left with at least $50,000 assessed valuation and 20 school pupils **OR** 8 square miles and 20 school pupils.

May 11th, 1933

FILED
64

Hon. J. H. Mosby,
Prosecuting Attorney,
Osage County,
Linn, Missouri.

Dear Sir:-

Answering your letter of April 13th, wherein you ask,

> "Can the boundary lines of a School district be changed, transferring a part of the land in one district to another School District, leaving in the one district an area of less than 8 square miles with an assessed valuation of less than $50,000.00?
>
> Upon what assessment will the valuation be determined? The assessment upon which taxes are collected for the year 1932, or the assessment of the Assessor for the year 1932, payable in 1933?
>
> (The proposition was voted upon at the annual school meeting held in April 1933.)
>
> Also: Can the School District employ an attorney and pay his fees out of the Incidental Fund of the School district? The purpose of such employment being to defend the rights of the School District."

Answering your first question, it is our opinion that your reference to leaving a district with less than eight square miles and a valuation of less than $50,000 is the law, which applies to ordinary districts and should be complied with if possible. Sections 9275 and 9277, Revised Statutes of 1929.

In regard to the $50,000 assessed valuation, it would apply to your community. While you do not mention it, the change, taking off part of your district and adding it to another undoubtedly was under the above Sections or Sections 9351-9358 inclusive. Assuming these facts to be correct, under the liberal construction given district consolidations, it is our opinion that it would probably not in-

validate the proceedings by the district referred to not having exactly eight square miles or assessed valuation of $50,000.

State ex rel. Barnhill v. Thompson, 260 S. W. 84.
State ex Inf. Thompson v. Scott, 304 Mo. 685, and
Section 9345.

An ass ssed valuation applies to the current fiscal year in which the change took place.

Lastly, ordinarily speaking the districts have no authority to employ attorneys out of the revenue of the school as that is for school purposes, but there have been a few cases where the Court permitted the employment of attorneys out of the Incidental Fund where it was plainly to the school interest to do so.

Yours very truly

Geo. B. Stother

GEO. B. STOTHER,
Assistant Attorney General

GBS/mh

APPROVED:

ROY McKITTRICK
Attorney General

BANKS AND BANKING: Preferred stock set out in articles of agreement must be subscribed and paid up before incorporation.

May 25, 1933

FILED
64

Mr. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of May 16th, 1933, which is as follows:

> "An Attorney called at this office yesterday and submitted articles of incorporation for a trust company with a capital stock of $100,000.00, represented by 1200 shares of common stock with a par value of $50.00 per share, all subscribed for and paid up in cash, and 800 shares of preferred stock with a par value of $50.00 per share, authorized but not issued and paid for in cash.
>
> Paragraph 3 of Section 5412, Revised Statutes of Missouri, reads as follows:
>
> > "The amount of the capital stock of the corporation, the number of shares into which it is divided, and the par value thereof; that the same has been subscribed in good faith and all thereof actually paid up in lawful money of the United States and is in the custody of the persons named as the first board of directors or managers."
>
> In view of the provision in Section 5412, Revised Statutes of Missouri, 1929, I will appreciate an opinion as to whether preferred stock can be authorized and not issued and paid for at the time a bank or trust company is incorporated.
>
> Kindly give this matter your immediate attention

You ask if a trust company when it incorporates may authorize preferred stock and not have it issued or paid for at the time it is incorporated.

Section 5412 R. S. Mo. 1929, in part reads as follows:

> "The articles of agreement mentioned in this article shall set out: * * *
>
> 3. The amount of the capital stock of the corporation, the number of shares into which it is divided, and the par value thereof; that the same has been subscribed in good faith and all thereof actually paid up in lawful money of the United States and is in the custody of the persons named as the first board of directors or managers." * * *

The words used in the above section are plain and unambiguous and should be given their usual and ordinary meaning. This section is likewise mandatory.

Thus a trust company seeking incorporation must set out the amount of its capital stock, how it is divided, the par value of the shares, and that such shares have been subscribed and all thereof actually paid up in lawful money of the United States.

Section 5414 R. S. Mo. 1929, provides in part the following:

> "When any trust company shall have filed with the finance commissioner a certified copy of its articles of agreement and * * * the commissioner shall, before such trust company shall complete its incorporation, examine or cause an examination to be made, in order to ascertain whether the requisite capital of such trust company has been subscribed in good faith and paid in actual cash and is ready for use in the transaction of business of the proposed trust company." * * *

House Bill No. 653, a recently enacted law, provides for the issuance and sale of preferred stocks by banks, trust companies doing a banking business, and other financial institutions.

Section 3 of said Act (House Bill No. 653) reads as follows:

> "Any bank, trust company, or other financial institution hereafter organized and incorporated under the laws of the State of Missouri for the purpose of doing a banking business, subject to control and supervision by the Finance Commissioner of the State of Missouri, may, in its articles of agreement for incorporation provide for the issuance and sale of its shares of preferred stock, subject to the provisions of this act."

Section 3 supra, uses this language:

> "may, in its articles of agreement for incorporation provide for the <u>issuance and sale</u> of its shares of preferred stock, subject to the provisions of this act."

Therefore, if a trust company wishes it may provide for preferred stock in its articles of agreement, and if it does then such preferred stock would be subject to the provisions of Sections 5412 and 5414, supra, relative to being subscribed and paid for at time of incorporation. In other words, if the articles of agreement provide for preferred stock such stock must be subscribed for and paid up in lawful money of the United States before the completion of incorporation.

It is the opinion of this department that preferred stock cannot be authorized and not issued and paid for at the time a trust company is incorporated. But preferred stock if authorized or provided for must be issued or subscribed and paid for at the time a trust company is incorporated.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

BANKS & BANKING: Sec. 5312 R.S. of Mo. 1929 and subsequent sections thereto provide that the Commissioner of Finance must consider certificates of indebtedness issued in pursuance to said sections of the statutes as restoration of capital for the purpose of determining whether banks should be closed or not in the interest of creditors.

May 27, 1933.

FILED
64

Mr. O.H. Moberly,
Commissioner of Finance,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of a request for an opinion of even date herewith, which is as follows:

> "I shall appreciate an opinion from you regarding the issuance and sale of Certificates of Indebtedness in accordance with Section 5312, Revised Statutes of Missouri, 1929.
>
> Under Section 5312 Revised Statutes of Missouri, 1929, is this department required to consider the proceeds from the sale of certificates issued thereunder as capital of the bank or trust company, when the capital of such bank or trust company had become impaired?
>
> For your information I am enclosing herewith a letter received from Honorable W.T. Jones, Attorney, St. Louis, Missouri, and desire to refer you to paragraph 3 on page 2 thereof. I also desire to refer you to copy of my reply to this letter under date of May 3, 1933.
>
> Please return the enclosures with your opinion."

In reply thereto it is the opinion of this department that when the capital of a bank or trust company has become impaired and the amount of this impairment has been covered by proceeds from the sale of certificates of indebtedness issued under the provision of Sec. 5312 R.S. of Mo. 1929 and subsequent provisions, your department shall treat the capital of the bank or trust company as having been restored and the impairment made good.

The above in our opinion conforms to the intention of the Legislature as expressed in said section of the statutes of Missouri, as well as Secs. 5313 and 5314 R.S. of Mo. 1929. We believe that the purpose of said sections of the statutes of this state was to provide a method whereby banks with impaired capital could by protecting its creditors, remain in business through the sale of such certificates, and if that were the purpose, it appears to us that the only possible way such intention could be effectuated would be through the construction which has been adopted above.

In other words, if you are not under the above sections of the statutes to treat the capital of the bank or trust company as having been restored and the impairment made good, then it would be your duty in a case where such impairment had reached an unlawful point to close the bank, and we do not believe that that was the intention of the Legislature, but instead, that the intention of the Legislature is clearly to the effect that under such circumstances the bank is to remain open and hence, you will consider the funds received from such certificates as capital of the bank or trust company.

The above opinion is based upon principles announced in the following cases, among many other cases in Missouri, announcing like principle:

> In STATE v. HACKMANN, 258 S.W. 1011, 302 Mo. 558, the following rule as quoted from 36 Cyc. 1128 is approved:
>
> "In construing a statute, the legislative intent is to be determined from a general view of the whole act, with reference to the subject matter to which it applies, and the particular topic under which the language in question is found."

And in DODD v. INDEPENDENCE STOVE & FURNACE CO., 51 S.W. (2d), l.c. 118, the Supreme Court of Missouri said:

"In construing a statute, the evil sought to be remedied and the benefit intended to be conferred thereby should be considered. It is plain from the whole scope and tenor of the statutory provisions, of which the section in question forms a part, that the legislative purpose was to provide regulations for safeguarding the lives and health of laborers in occupations in which, without such safety regulations, they would be liable to injury or disease. Such statutes should be construed, so far as their language permits, with the view of effectuating their beneficent purpose."

Respectfully submitted,

POWELL B. McHANEY,
Assistant Attorney General.

APPROVED:

Attorney General

PBM:AH

COMMISSIONER OF FINANCE--Authority to appoint special deputy to supervise liquidation and pro rate expense to defunct institutions.

July 24, 1933 7-24

FILED 64

Hon. O. H. Moberly
State Finance Commissioner
Capitol Building
Jefferson City, Missouri

Dear Mr. Moberly:

We acknowledge receipt of your request for an opinion of this office, parts of which reads as follows:

> "I am enclosing herewith copy of a letter written on June 15th to Mr. W. F. Keyser, Secretary, Missouri Bankers Association, Sedalia, requesting that he give consideration to the matter of appointing a Deputy or an Assistant in this Department, whose duties would be the supervision of the Closed Bank Division, in which we have at the present time about three hundred and fifty banks."
>
> "In order that these closed banks may have proper supervision, I feel it urgently important that an Assistant be appointed and that his salary and expenses, as well as the salary of the young lady in the office who devotes her entire time to the Closed Bank Division, be paid by the closed banks that are benefitted by this supervision."
>
> "I shall be pleased to have an opinion from your office as to whether or not we can pro rate the salary and expenses of this Assistant and the salary of the stenographer in the Closed Bank Division among the banks that are benefitted. In this connection I wish to state that I think thousands of dollars a year can be saved these unfortunate institutions through proper supervision."

We are of the opinion that you have the authority to appoint such an assistant under the provisions of Section 5323 R. S. of Mo. 1929, portions of which read as follows:

> "The Commissioner may by certificate, under his hand and official seal, appoint <u>one or more</u> special deputy commissioners as agent or agents to assist him in liquidating the business and affairs of any corporation or private banker in his possession*****

It is apparent that the Commissioner is not limited to but one deputy for any institution, as the statute plainly authorizes the appointment of "one or more" such deputies. We take it as a settled matter that a special deputy may assist in liquidating more than one institution, as there is nothing in the chapter contrary to such an appointment, and such has been the practice of the Department for many years. So, although a Special Deputy may be the liquidating agent of a particular institution, his capacity to act as such agent is only limited by the Commissioner in delegating matters to him.

We find that your suggestion is in accord with the Report of Defunct Banks and Trust Companies submitted to the 57th General Assembly by the Legislative Committee of the House of Representatives. (p.9)

> "Fifth* * * * that a special deputy be app appointed in the office of the Finance Department in the State of Missouri, whose only duty it shall be to look after the matters pertaining to defunct banks and trust companies, looking towards a shorter period of liquidation at a minimum of expense and looking toward the curtailment of the current monthly expenses of liquidation."

Having determined that such an appointment is authorized by the Statutes, and undoubtedly expedient under present conditions, we shall next consider the method and manner of payment.

An examination of this Chapter shows that the Department of Finance is self-sustaining. In other words all expenditures shall be met from fees collected for services rendered. We find this clause in Section 5301 to the following effect:

> "* * * * The aggregate sum collected from the banks, private bankers, savings and safe deposit institutions, trust companies and other corporations shall be reckoned upon a basis sufficient to cover the entire expenses of the department of banking, including salaries of officers and employes, traveling expenses of the commissioner, his deputy and examiners, and the preparation of the reports and all other expenses made necessary by this chapter. * * * *"

It is further apparent that it was the desire of Legislature to require these fees to be paid by those who received the benefit.

Insofar as the payment of fees by operating institutions is concerned, Section 5301 R. S. of Mo. 1929 provides as follows:

> "Section 5301. * * * * The expense of every annual or special examination shall be paid by the bank, private banker, savings and safe deposit institution, trust company or such other corporation examined in such amount as the commissioner shall certify to be just and reasonable, * * * *. Any special expenses incurred and services performed on account of any such corporation or banker, or on account of any foreign corporation or its agency to which this chapter is applicable, outside of the expense of any annual or special examination shall be charged to and paid by the corporation or banker for whom they were incurred or performed. * * * *"

As the payment of fees or expenses by defunct or liquidating institutions is concerned, Section 5324, R. S. of Mo. 1929 provides as follows:

> "Sec. 5324. PAYMENT BY COMMISSIONER OF EXPENSES OF LIQUIDATION.--The Commissioner shall pay out of the funds in his hands, of such corporation or private banker, <u>all expenses of liquidation</u>, subject to the approval of the circuit court, or judge thereof in vacation, in the county or city in which the principal office of such corporation or banker is located, and upon notice of the application for such approval to such corporation or banker. He shall, in like manner, fix and pay the compensation of special deputy commissioners, assistants, counsel and other employes appointed to assist him in such liquidation sursuant to the provisions of this article. * * * *"

From a reading of the foregoing, it is certain that there was not intention to limit the charges against defunct banks to the salary of the liquidating agent, expert assistants and counsel, for such expense is specifically provided for in the second sentence of the foregoing quotation.

We are of the opinion that the phrase "all expenses of liquidation" is sufficiently broad, and was meant and intended to include the expense of any and all appointees and employees made necessary by the liquidation of the institution by your department. There is no distinction to be made between those employees which are temporily employed at the situs of the institution and those locatedat your office. Each is performing a service for the institution and the employment of each is necessitated by the liquidation. Such part of the salary of each employee as is properly chargeable to the defunct institution should be paid by such individual institution.

In your request, you did not definitely state in what manner you expected to pro rate these expenses. However, it is our opinion, that any expense which is charged to any defunct institution will be allowed by the judge of the Circuit Court of the county in which the institution is located, so long as the same is a reasonable charge for the services rendered or work done. We find nothing in Chapter 34 which would prohibit an equitable pro rating of these expenses, so long as such a pro rated charge could truly be included within the clause "all expenses of liquidation".

Respectfully submitted

HARRY G. WALTHER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TRUST COMPANIES: No power to purchase the majority of the Stock of a National Bank

July 25, 1933. 7-27

FILED
64
35

Hon. O.H. Moberly,
Commissioner of Finance,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your request for an opinion as to the following state of facts:

> "A trust company organized under the laws of the State of Missouri purchased stock of a national bank. Both the trust company and the national bank are now insolvent.
>
> 1 - Does a trust company organized under the laws of the State of Missouri have the power and authority to purchase stock of a national bank?
>
> 2 - Is the liability of a trust company as a stockholder in the national bank entitled to a preference in the distribution of the assets of the trust company?"

In the case of Allen v. McFerson, 235 Pac. 346, the court held:

> "A stockholder of a bank assumes a contractual liability when he becomes a stockholder and the terms of his contract are legally statutory."

In the case of Saussy v. Liggett, Sup. Ct. of Florida, 78 South. 534, the court held:

> "****The liability of a stockholder of a banking company arises ex contractu (McNeill v. Pace, 69 Fla. 349, 68 South. 177; Whitman v. Oxford Nat. Bank, 176 U.S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587) and even if the additional obligations and liability of the stockholder which is insisted upon here may

> be imposed by the statute, such obligations and liability depend upon the statute creating it, and as it is in derogation of the common law, the statute cannot be extended beyond the words used. 1 Michie on Banks and Banking, p. 162; Brunswick Terminal Co. v. National Bank of Baltimore, 192 U.S. 386, 24 Sup. Ct. 314, 48 L. Ed. 491; Smathers v. Western California Bank, 135 N.C. 410, 47 S.E. 893. ****"

Therefore, the trust company's liability as a stockholder in the national bank is contractual and dependent entirely for validity upon the provisions of the national banking act. Being a mere contractual obligation the creditors of the national bank have no priority over other contract creditors of the trust company unless there be a priority specifically given by statute.

Section 5151 of the National Banking Act, insofar as it is pertinent, provides as follows:

> "The stockholders of every national banking association shall be individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. ****"

Section 5238 of the National Banking Act provides as follows:

> "That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the share-holders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The above sections of the National Banking Act merely provide for the amount of the stockholders' liability and the creditors' procedure for establishing their claim. However, when the claim has become adjudicated, it becomes subject to the laws of the State of

Missouri insofar as the question of whether or not the claim is entitled to a preference. Section 5333 R.S. of Mo. 1929 provides as follows:

> "When the commissioner shall have taken possession of such corporation or private banker, and shall have determined to liquidate its affairs, he shall notify all persons who may have claims against such corporations or banker to present the same to him and make proper proof thereof within four months from the date of said notice and at a place specified therein and shall specify in said notice the last date for presenting said proofs. ****"

Section 5336 R.S. of Mo. 1929 provides as follows:

> "The commissioner shall, not later than thirty days after the time has expired to file objections to claims duly presented, approve or reject every duly filed claim except claims as to which objections are still pending undetermined by the court or judge. Every claim approved by him, he shall indorse 'approved' and file so indorsed in his office. If he doubts the justice or validity of any claim, he shall reject such claim and shall indorse the same 'rejected' and file said claim so indorsed in his office. He shall cause notice of such rejection to be served upon the claimant either personally or by mail. The commissioner shall not determine priorities in approving or rejecting claims; but approved claims shall be presented to the circuit court pursuant to Section 5339 for determination as to their priority of payment. Within thirty days after the commissioner has approved or rejected all claims duly filed, he shall list all claims approved and all rejected by him and file one copy of said list in his office and one copy in the office of the recorder of the county or city in which the principal office of such corporation or private banker is located."

Under Chapter 34 R.S. of Mo. 1929, the Circuit Court must determine whether or not a claim against an insolvent bank or trust company is to be preferred over the claims of other creditors. It is the opinion of this department that the obligation of a stockholder in a national bank, being purely a contract obligation and there being no statute providing for its priority over other contract creditors, that the creditors of a national bank should not be entitled to a preference with respect to the assets of an insolvent trust company in Missouri purely for the reason that said trust company was a stockholder in the national bank.

However, under the facts as furnished this department by Mr. Moberly, the trust company purchased practically all of the stock of the national bank. This action of the trust company was null, void, and of no legal effect whatsoever, and the trust company is not now and has never been in point of law a stockholder in the National bank.

Section 5421 R.S. of Mo. 1929, relating to the powers of trust companies in the State of Missouri, provides as follows:

> "To buy, invest in and sell all kinds of government, state, municipal and other bonds and all kinds of negotiable and non-negotiable paper, stocks or other investment securities."

Section 5429, R.S. of Mo. 1929, sub-section 9 provides as follows:

> "Shall not invest or keep invested in the stock of any private corporation an amount in excess of fifteen per centum of the capital and surplus fund of such trust company; nor shall it purchase or continue to hold stock of another bank or trust company if by such purchase or continued investment the total stock of such other bank or trust company owned and held by it as collateral will exceed fifteen per centum of the stock of such other bank or trust company: Provided, however, that this limitation shall not apply to the ownership of the capital stock of a safe deposit company, the vaults of which are connected with or adjacent to an office of such trust company, nor to the ownership by such trust company or its stockholders of a part or all of the capital stock of one bank organized under the laws of the United States or of this state, nor to the ownership of a part or all of the capital of one corporation, organized under the laws of this state, for the principal purpose of receiving savings deposits or issuing debentures or loaning money on real estate or dealing in

> or guaranteeing the payment of real estate securities, or investing in other securities in which trust companies may invest under this chapter, nor to the continued ownership of stocks lawfully acquired prior to the first day of January, A.D. 1915."

The principal case which we find in Missouri bearing directly on this point is "State of Missouri ex rel Herbert L. Hadley, Plaintiff, v. Bankers Trust Company, Defendant, and H.A. Lee, Receiver, Garland State Bank, Plaintiff in Error v. Bankers Trust Company and Ira M. Cobe, Purchaser of the Assets of the Bankers Trust Company, Defendant in Error, 157 Mo.App. 557. Judge Johnson held:

> "'The facts alleged in the petition show beyond dispute that the Bankers Trust Company purchased seventy-three per cent of the stock of the Kansas bank for the purpose of controlling and managing its business and affairs and that while the bank apparently continued to do business in its corporate name and in the guise of a separate and independent corporate entity, in reality its identity was merged into that of a trust company which absorbed its business and assets and managed and controlled them as though they constituted a mere branch or department of the business of the Trust Company. In short, the latter corporation swallowed the bank and used its name and corporate machinery for its own purposes.
>
> The Bankers Trust Company had no power or authority to engage in the banking business either directly or indirectly. The powers of such corporations are defined in Section 1124 Revised Statutes 1909, and under that definition, are exclusive of all others under the rule that 'the enumeration of the powers conferred upon trust companies by the statute must be held to exclude all others'. See State ex inf. v. Lincoln Trust Co., 144 Mo., l.c. 588, where it was expressly held that a trust company has no authority to engage in the banking business.
>
> The ninth clause of Sec. 1124, Revised Statutes 1909, authorizes trust companies 'to buy and sell all kinds of government, state, municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities.'

> The grant of authority to buy and sell stocks and other investment securities as commercial commodities carries with it neither the express nor implied authority to purchase the stock of other corporations for the purpose of controlling their management. (DeLavergne Co. v. Germain Savings Inst., 175 U.S. 40). Nor to use the power conferred by law for the purpose of indirectly engaging in business activities forbidden to the corporation by the express provisions of the statute. The act of the Bankers Trust Company in controlling the management of the Kansas Bank through ownership of a large majority of the stock of the stock of the bank was not buying and selling stocks within the meaning of the statute, but was a clear and flagrant evasion and violation of the law. But it is argued by plaintiff in error that since the trust company received the benefits of the contract of purchase and the contract should be regarded as fully executed, the respondents are estopped from interposing the defense of ultra vires ****."

In the case of Anglo-American Land Co. v. Lombard, 132 Fed. Rep., l.c. 736, Judge Van Deventer said:

> '"The only authority of the Missouri company to purchase stock in another corporation is found in sub-division 9, Sec. 2839 R.S. of Mo. 1889, which reads: 'To buy and sell all kinds of government, state, municipal and other bonds and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities'. The context shows very clearly that the purpose was not to authorize the purchase of all of the stock of another company for the purpose of controlling its management, but to authorize the buying and selling of stocks as investment securities, in like manner as government bonds and other securities named are bought and sold.
>
> Controlling the management of a corporation of another state to the ownership of its entire stock is not buying or selling investment securities, nor is it fairly incidental thereto. The hazards of such venture are altogether repugnant to the purposes for which the Missouri company was formed, which included the handling and investing of the moneys of others, executing trusts under deeds and wills,

acting as guardian of infants and insane persons, and guaranteeing the fidelity of persons holding places of public or private trust; all requiring the maintenance of high standard of credit and stability on the part of that company. It is impossible to escape the conclusion that the purchaser of the Kansas Company's stock was beyond the power of the Missouri Company.

In the absence of any established rule of decision in the State of Missouri in respect of the effect of corporate acts which are ultra vires (and no local rule of decision has been called to our attention by counsel), we must apply to this case the rule recognized in the Supreme Court of the United States. That rule, as stated in Central Transportation Company v. Pullman's Car Co., 139 U.S. 24, 59, 11 Sup Ct. 478, 35 L. Ed. 55, and as applied in many subsequent cases is: 'A contract of a corporation which is ultra vires in the proper sense--that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon them by the Legislature--is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws.'"

It may be contended that the Trust Company, having received the benefit of the contract, should not be allowed to repudiate it. However, this theory of law rests upon the principle that the contract

was an innocent and lawful one and in this respect differs from the case where the act was illegal and expressly prohibited by law. This principle is well brought out in the case of State ex rel Hadley v. Bankers Trust Co., 157 Mo. App. 557, 138 S.W. 669, wherein the court held:

> "The rules of estoppel and of the sole right of the state to complain obtain only in cases where the excessive act of the corporation is not absolutely void but only voidable; not wrong per se or against public policy and good morals, but wrong merely because the act is not within the scope of the powers conferred by law on the corporation. We know of no case in this state where the rules under consideration have been applied where the corporation has become a party to a contract void for the reason that it was wrong in itself and a violation of sound public policy and good morals. ***."

Therefore, it is the opinion of this department that the creditors of the National Bank have no claim, preferred or otherwise, upon the assets of the Trust Company, the Trust Company not being in law a stockholder of the National Bank.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,

OLLIVER NOLEN,

Assistant Attorneys-General

APPROVED:

Attorney General

JWH-ON:mm

Process against corporations charged with a crime is obtained - how

July 25, 1933.

7-26

FILED
64

Hon. Morgan M. Moulder,
Prosecuting Attorney,
Camden County,
Camdenton, Missouri.

Dear Sir:

I am answering your letter of July 11, 1933. Your request for an opinion was in the following words and figures:

> "Please inform me of the procedure necessary in prosecuting a corporation for obstructing a public road. Should I first give the President of the Company notice and inform him of the obstruction? Then do I file an information and make the defendant in the name of the Corporation or name the Corporation and also the name of the President, or should I make only the President the party defendant? Then, after filing the information, should ordinary state warrant issue for the arrest of the President and be served upon him as upon any other defendant?
>
> Perhaps I should explain that the President of the Corporation did not personally obstruct or supervise the obstruction of the road. I find one case in 96 Mo. Appeal at page 34, but can not gather the desired information from that case."

In Fletcher'sCyclopedia, Corporations - Permanent Edition, Vol. 10, starting on p. 688, I find the following law set out:

> "'It has been held that where a statute provides that violation of its provisions shall be deemed a misdemeanor punishable by fine, the fine cannot be collected from a corporation in an action of debt, since

process for violation of criminal statutes must be by information or indictment, although at common law an action of debt is the proper remedy for the recovery of a statutory penalty.

It has been said, generally, that the fact that there is no previous complaint nor binding over, in the prosecution of a corporation, is immaterial, and that the appropriate first step in such a prosecution is the finding of an indictment.

An indictment against a corporation should allege that it is a corporation, although there is a conflict in the decisions as to whether it is necessary to allege incorporation, at least where the name imports incorporation, but the details as to incorporation need not be stated.

A corporation being subject to indictment in a proper case and the law being powerless to enforce its commands, it follows that an indicted corporation may be brought into court by compulsion, if necessary, and where the statutes make no specific provision relative to the matter, the court having general jurisdiction to try an indicted corporation 'may as a necessary incident to such jurisdiction issue any appropriate writ for the purpose of bringing the defendant before it.' Undoubtedly, the proper manner of bringing an indicted corporation into court, no statute providing otherwise, is by summons, and when a summons has been duly served on such a corporation and it fails to appear, a judgment by default may be entered against it.'"

In the same text, but starting on page 659, I find the following law set out:

"'If the penalty prescribed for an offense is both fine and imprisonment, the statute cannot be applied to corporations in so far as regards the imprisonment, but the inability to punish by imprisonment does not prevent an indictment against a corporation and its punishment by fine. According to Justice Holmes of the Supreme Court of the United States, 'If we free our minds from the notion that criminal statutes must be construed by some artificial or conventional rule, the natural inference, when a statute prescribes two independent penalties is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape.

> The statutory provision as to service of summons must be complied with to give the court jurisdiction unless the right to service in the prescribed manner is waived by the corporation, and such waiver occurs where a corporation makes a voluntary appearance by attorney and demurs to the indictment. Where an appearance is entered on behalf of an indicted corporation by attorney, the corporation has the burden of proving that the appearance was unauthorized'".

Answering your query, we suggest that you draw up indictments charging each guilty defendant separately for the misdemeanor described under Sec. 7932 R.S. of Mo. 1929, which section provides as follows:

> " *** Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. ***"

Said indictment should be executed as indictments are prescribed to be executed by the statutes. It is not proof of the President's guilt or the corporation's guilt in the trial of the case for you to be able to show that you notified the President of the corporation that a crime had been committed by the obstruction of a public highway. Such a notice would amount to nothing more than an accusation of guilt. To prove the corporation criminally liable, you will have to have evidence that the corporation authorized the obstruction. To prove the corporation's agents and officers personally liable, you must have evidence that they participated in the crime.

By starting the proceeding by indictment, you are given access to a court of record in the issuance of any and all process,

and since a warrant, which is the usual process, would not be appropriate against a corporation, the court having jurisdiction will be forced to issue an extraordinary process.

Sec. 3565, R.S. of Mo. 1929 provides in part as follows:

> "Upon the trial of any indictment or information, the court may at any stage of the proceeding, in furtherance of justice, amend or supply the pleading, writ, process, entry, return or other proceedings; ***"

Sec. 3566 R.S. of Mo. 1929 provides as follows:

> "A warrant or other process for the arrest of the defendant indicted may be issued by the court in which such indictment shall have been found or may be pending, or by the judge or clerk thereof, or by any judge of the supreme court, and by no other officers, and may be directed to and executed in any county in this state."

Since our statutes as underscored above contemplate that process other than by warrant might be necessary in the interest of justice that indicted defendants may be brought in court in peculiar criminal cases, and since the process of summons was the common law method of calling a corporation to answer for a crime, it is our opinion that in your case the process to be issued against the corporation by the court is a summons served in the statutory manner.

If we have not fully answered your query, you may call upon us further.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General

APPROVED:

Attorney General

WOS:AH

A. Ferries: Grant of license by county court does not authorize in itself the use of landing.

B. Highways: Public has no right to use as landing places.

July 28, 1933 7-29

FILED
64

Hon. Morgan M. Moulder
Prosecuting Attorney
Camdenton County
Camdenton, Missouri

Dear Sir:

This department is in receipt of your letter of July 17th, in which you request an opinion from this department on the following state of facts:

> "* * *Does such license grant to the owner of the license the exclusive use of the landings for the purpose of operating the ferry, or does the license merely grant such operator the right to charge a fee or toll.
>
> I have another question which has caused me considerable trouble. A number of people have been using the points where public roads meet the lake as boat landings or place of docking boats, taking the position that the land or road is public and belongs to the public and can be used for docking boats. Of course the public merely has an easement for highway purposes that is for use of vehicles such as cars, wagons, horses and motor vehicles; does such an easement grant the public the right to use same for parking, tying and landing boats thereon, or would such use be an additional burden or usage not granted in the grant of easement for road purposes?"

In order to answer your requests it is necessary to assume certain factual situations. First, ferries whose termini are private properties. Second, public ferries whose termini are public highways.

Section 14199 R. S. Mo. 1929, provides as follows:

> "Any person may petition the county court of the county for license to keep a ferry; and if the court believe such ferry necessary for the accommodation of the public, and that the petitioner is a suitable person to keep the same, it shall order the clerkto issue a license, upon the payment of the tax assessed in such order."

Under the hypothetical case as set out in number one supra, that is, where this license is granted to a public ferry at places other than public highways, the legislative grant of the franchise does not of itself confer upon the grantee the right of landing and embarking upon private property on the shores of the water over which the ferry is operated. In order to render his franchise effective the grantee of the franchise must acquire the right to use the landing on both sides of the water for the purpose of landing and embarking. 25 C. J. 1061.

Where these landings are acquired from owners of private property the right to use these landings is personal to the owner of the ferry and of course exclusive.

In the case of Bryant v. West, (Sup. Ct. Mo), 219 S. W. 355, the court held:

> "License from landowners to land a ferry on their premises was a mere personal license terminated by transfer of an interest in the firm operating the ferry."

In the case of Chapman v. Hood River County, (Sup. Ct. Oregon), 178 Pac. 379, the court held that the mere licensing of a ferry by the county court would not give to the owner of such ferry the right to make landing upon private property. The court said:

> "* * *Assuming that the plaintiff is the owner of the lands in question, any attempt of the county court to issue a license to Larson which would authorize him in the operation of a ferry to make a landing thereon would be null and void. The county court would not have jurisdiction to make such an order, and such

> license would not be a cloud upon the title to plaintiff's land. * * * "

Under hypothetical case number two supra, that is, where the termini of public ferries are public highways, the grant of the franchise carries with it whatever rights the public then has or may afterwards acquire to the use of the highways for this purpose. It is the opinion of this department that the public has an easement for passage over public highways and that the use of the highway for landing and embarking is not so much a public use as a use by the holder of the ferry franchise for his own gain and that it is an additional burden upon the land for which compensation must be made to the owner.

In the case of Pearsall v. Post, 20 Wendell (N.Y.), 111, the court said:

> "* * * The right in question was to a highway over Manown's farm on the Monongahela, which has been judicially pronounced within the local rule. 14 Serg. & Rawle, 79, per Tilghman, C.J. Still inasmuch as there the owner has a free-hold as against all except the state, down to low water mark, it was held that even a road to that point would not sanction the landing with ferry boats and passengers on his land. The amount of these cases is, that roads are made to be travelled on, and not to be occupied, much less blocked up by sloops and scows. If the contrary were allowed, the ferryman might derive a profit from his toll, which belongs to the owner, under pretense of a free passage. The intention of laying out a public highway, is to make a free passage, not a profit to the owners of water craft. The easement is for land, not for water carriage, and therefore is not to be touched by the latter, without the permission of the owner. * * * "

There is but one more question involved, and that is where a city, town or municipal corporation leases a wharf. The right to use this wharf cannot be made exclusive under Section 14221 R.S. Mo. 1929, which provides as follows:

> "Any city, town or other municipal corporation may, for a just compensation, in its discretion, lease to any owner or association of owners of any steamboat, or boats, or vessels, any portion of the wharf or landing of such city or town, for a term of years, for the purpose of maintaining wharf boats thereat for the accommodation of steamboats and merchants and others in the reception and discharge of freights: Provided, that no part of any wharf or landing shall be so leased for the use of any particular owner of any boat or boats, or association of owners of boats, if such lease shall give to such owner or association of owners a monopoly of said portion of such wharf or landing, or work a serious injury or inconvenience to other owners of boats landing at such wharf or landing."

As to your question as to whether or not the easement to the public to use the highways permits the public to use the highways for parking, tying and landing boats thereon, it is the opinion of this department that the easement doesnot include the landing of boats on public highways.

A public road is a way open to all the people without distinction for passage and repassage at their pleasure. Sumner County v. Interurban Company, 213 S. W. 412; 141 Tenn. 193.

What was said in the case of Pearsall v. Post supra, with reference to ferries applies with equal force to owners of private boats. The court held:

> "* * *The landing of wagons, horses and passengers on the shores of a river, a sea or an ocean, even though it be upon a dedicated or recorded highway on the land connecting with the watery way, and for the direct purpose of going onward, is still a trespass on the riparian owner, unless we could suppose such acts to be performed without any contact between the vessel and the shore." * *But ...

> in Chess v. Manown, 3 Watts, 219, the very point was decided that you cannot moor your boat, and land from the river on a road, though it be regularly laid out and connected with the boat highway on the river. The court said, 'the franchise of the public was to pass over the soil and no more.'" * * *The amount of these cases is, that roads are made to be travelled on, and not to be occupied, much less blocked up by sloops and scows." * * **

Therefore, it is the opinion of this department, first, that the grant of a license by the county court to the owner of a ferry does not in itself give to the owner of the license the exclusive use of the land for the purpose of operating the ferry. Second, that the easement of the public on public highways does not include the right to use the highways for parking, tying and landing boats thereon.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:MM

PUBLIC OFFICERS: Vacancies by resignation or abandonment.

FILED 64

August 1, 1933

Honorable Morgan M. Moulder
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Mr. Moulder:

Your letter which you presented in person requesting an opinion from this Department as to the matter of a resignation of a county superintendent of schools of your county, has been handed to me for reply. Your letter is as follows:

"W. S. Allison, County Superintendent of Schools of Camden County, Missouri, presented and caused to be filed a written resignation as County Superintendent of Schools aforesaid, which written resignation was filed in the office of the County Clerk of Camden County, Missouri, a copy of which is hereto attached.

Mr. Allison has not been in his office during the past three weeks and when last heard from was in some Eastern state, and has vacated and absented himself from the office and has refused to perform the duties of the office during his absence. Considering the facts stated I would appreciate your opinion on the following questions:

First: Does the written resignation a copy of which is attached and which was addressed to the Presiding Judge of

> our County Court, together with the acts of Mr. Allison in vacating and abandoning his office and going to another state create a vacancy in the office of County Superintendent of Schools of Camden County, Missouri?
>
> Second; Would a certified copy of the written instrument or resignation filed in the County Clerk's office presented to the Governor of this state, together with authenticated information that Mr. Allison has vacated his office and is in another state, be sufficient proof that there now exists on this first day of August, 1933, a vacancy in the office of County Superintendent of Schools of Camden County, Missouri?
>
> Third; Does the County Court of Camden County, Missouri, have any jurisdiction or control or authority to appoint a temporary County Superintendent of Schools or to appoint the County Superintendent of Schools. Does the County Court have any authority whatever in connection with the resignation herein referred to or the vacancy created thereby?"

In answer to your first question as to whether or not the actions of the county superintendent, along with the inclosed copy of his purported resignation, constitute a vacancy of that office, we are of the opinion that a vacancy does exist in the office.

Section 9454 Revised Statutes Missouri 1929, omitting the parts which have no bearing on the question, is as follows:

> "****All county school superintendents elected on the first Tuesday of April, 1927, and thereafter, shall hold said office for a term of four years from

> and after the first Monday in July following their election, or until their successor is elected and qualified, and all vacancies caused by death, resignation, refusal to serve, or removal from the county, shall be filled by the governor by appointment for the unexpired term;***"

Words and Phrases defines resignation as follows:

> "The resignation of an office is the act of giving it up and is synonymous with surrender, relinquishment, abandonment or renunciation."

In the case of Jacobsen v. City of Chicago, 191 Ill. App. 511, the court said:

> "A resignation of a public office by implication may take place by abandonment of official duties without leave or absence or without good cause shown. A resignation of a public office may be made by parol, no written resignation being necessary."

Corpus Juris, Volume 46, page 979, states as follows:

> "A resignation of a public office to be effective must be made with the intention of relinquishing the office, accompanied by the act of relinquishment. It is not necessary that a resignation from public office be cast in any particular words, it being only necessary that the incumbent evince a purpose to relinquish the office. Where no particular mode of resigning an office is provided by constitutional or statutory requirements no formal method is necessary. It may be by parol or it may be implied."

The statutes of Missouri do not provide any particular mode or form for the resignation of any public officer. However, the general rule is that the resignation should be made to the person or party who has the power to fill the vacancy. In this case the county superintendent should have addressed his resignation to the Governor of the state. However, we recite the above as proof that by the purported resignation which was addressed to a member of the county court the county superintendent has shown clearly that he has abandoned the office, is evidently leaving the county, he is refusing to further carry out his duties as county superintendent, and that a vacancy now exists in your county in the office of county superintendent. He states that he desires to abandon and resign his office, to be effective August 1, 1933.

It is therefore the opinion of this Department in answer to your second question; that the evidence you will be able to offer to the Governor of the State of Missouri is sufficient proof that there is a vacancy in the office of county superintendent of schools of Camden County, Missouri.

In answer to your third question there is no statutory provision providing for the county court to have any jurisdiction or authority to appoint a temporary county superintendent. Therefore the county court has no authority whatever in the matter of the vacancy created.

Owing to the fact that you wish this opinion as quickly as possible, we have not had sufficient time to give the matter as complete and exhaustive study as we would desire.

Very truly yours,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

Banks abd Banking: Liabilities of stockholders in a National Bank.

8-25

August
Fifth,
1 9 3 3.

FILED
64

Hon. O. H. Moberly,
Commissioner of Finance,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 4th, wherein you request a supplemental opinion to our opinion of July 25th. We herewith quote that portion of your letter:

> "We have two such institutions in St. Louis, the Lafayette-South Side Bank & Trust Company which owns the capital stock of the South Side National Bank and the Wellston Trust Company which owns the capital stock of the Grand National Bank. All of these institutions are presumably insolvent and have been closed for several months. The question of double liability on the ownership of the National Bank stock is of vital importance in the liquidation of these institutions and I, therefore, will appreciate a final opinion from your Department on this matter. The general concensus of opinion is that the double liability constitutes a general claim and not a preferred claim against the assets of the trust company owning the stock."

Section 5151, R.S. of U.S. reads as follows:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking

> association now existing under state laws, having not less than five millions of dollars of capital actually paid in, and the surplus of twenty percentum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty percentum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty percentum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptrolled of the Currency may compel the association to close its business, and wind up its affairs under the provisions of Chapter 4 of this Title."

This was the statute for the guide in the liability of shockholders, until 1913. The section amended now reads as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagement ** of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transfer fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Upon reading this statute, we find that it is plain, definite and unequivocal in its language. It exempts no individual, person, bank or corporation, nor do we find in any other statute any class of stockholders are exempt from double liability.

In the case of The Ohio Valley National Bank vs. Hulitt, 204 U. S. 186, Justice Day, mentioning the above statute, utters the following:

> "Assuming then the established doctrine to be that the mere pledgee of national bank stock cannot be held liable as a shareholder so long as the shares are not registered in his name, although an irresponsible person has been selected as the registered shareholder, we deem it equally settled, both from the terms of the statute attaching the liability and the decisions which have construed the act, that the real owner of the shares may be held responsible, although in fact the shares are not registered in his name. As th such owner the law books through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong.
>
> Applying these principles to the case at bar, we think there can be no doubt of the liability of the Ohio Valley National Bank in this case. Conceding that it was exempt so long as the relation which it held to the stock was that of a pledgee, and that Otjen was the registered stockholder holding for the benefit of the bank as pledgee and not as owner, what was the attitude of the parties after the death of Price and the credit of the supposed value of the stock upon the note and its presentation for allowance and acceptance by the representatives of Price's estate? As the foregoing statement shows, the stock was originally delivered to the bank, with a power of public or private sale for the liquidation of the pledge. After the death of Price the bank caused the stock to be registered in the name of Otjen. After proof of the claim the dividends paid out of the Price estate were credited upon the note. If the bank had followed literally the authority of the power of attorney attached to the note and sold the stock at public or private sale, and itself become the purchaser, we take it there could be no question that it would thus have become the real owner of the stock, and, within the principles of the cases, heretofore cited, the shareholder liable under the terms of the statute. We think what was in fact done necessarily had the same effect; the bank applied the value of the stock with the consent of the pledgor, and thus vested the title in the bank."

In the above opinion we find that no shareholders are exempt and it is merely a question as to who owns the stock, and if such party owns the stock he is then liable in double the amount.

In the case of National Bank v. Case, 99 U.S., 629, this being a case wherein one national bank acquired some shares in another national bank, Mr. Justice Strong utters the following:

> "From this testimony, as well as from other in the record, it is evident that Waldo held the stock as a cover for the Germania Bank; that notwithstanding the transfer to him, it remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The bank continued after it was made a pledgee with the legal title in itself or in its representative, and Phelps, McCullough & Co. were no longer the owners.
>
> Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors."

In the case of Hytower et al. v. American National Bank of Macon, Georgia, 263 U. S. 351, wherein the court said:

> "A contract between two national banks under which the assets of the one were transferred to the other and the latter assumed the liabilities of the former and advanced money in excess of the assets paid the liability, it was construed as intending not to be a sale, but a pledge of the assets as security for payment of the money advanced."

From this case we have the right to assume that had one national bank purchased the stock of another, and the same had been a sale instead of a pledge, that the national bank so purchasing would have been liable in double the amount.

From the foregoing statute and the cases herein cited, it is the opinion of this department that, in view of the fact of the statute which is quoted in your letter, namely, Sec. 5429 R. S. Mo. 1929, sub-section 9, wherein the authority for the Lafayette-South Side Bank and Trust Company was given to purchase capital stock of the South Side National Bank Co. and the Wellston Trust Company to purchase the stock of the Grand National Bank, it is the opinion of this department that both the Lafayette-South Side Bank and Trust Company and the Wellston Trust Company are liable in double the amount of the stock.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

Attorney General.

BUS AND TRUCK LAW: Prosecutions for violation of sub-division (c) Sec. 5270, Laws of Mo. 1931 in county where acceptance was made.

September 19, 1933.

FILED
64

9-25

Hon. M. E. Montgomery,
Prosecuting Attorney,
Scott County,
Benton, Missouri.

Dear Sir:

This department aeknowledges receipt of your letter relating to subdivision (c) of Sec. 5270, Laws of Missouri 1931, p. 309, in which you inquire as follows:

> '"Subdivision 'C' of Section 5270 of the trucking laws, shown at page 310 of the 1931 Session Acts, makes it a misdemeanor for a 'contract hauler to accept persons or property for transportation from a point on a regular route to a point on a regular route.
>
> Section 5979 (5279), at page 316 of said Act, provides that a suit may be brought against any contract hauler in any county where the cause of action arises, or where such carrier operates or maintains an office or agent, but this last Section seems only to apply to civil suits.
>
> I would like to have your opinion as to whether or not a licensed contract hauler, who accepts property in St. Louis, Missouri, at a point on a regular route for transportation to a point on a regular route in this (Scott) County, and transports and delivers same in this county at such point, is subject to prosecution in this county, or only in St. Louis, where the merchandise was accepted for transportation.
>
> In other words, is the acceptance of merchandise for transportation the offense, or is the transportation and delivery also an offense? And, is the jurisdiction of the

> prosecution only in the county where the acceptance was made, or may the offender be prosecuted in any county in which he transports the merchandise or makes a delivery?
>
> Section 3378 to 3380 provides that embezzlement, larceny and murder may be prosecuted in more than one county under certain circumstances, but I can find no authority for the prosecution of a contract hauler in this county, where the merchandise was not accepted in this county.
>
> If you conclude that the prosecution in such cases may be had in Scott County, I would appreciate you advising me of the proper wording for the charging part of my information in prosecutions of this sort.'"

The situation presented in your letter differs from what we term "continual offense" in that several special sections in Missouri governing the venue in particular instances are not applicable in the case under consideration. The circumstances governing the venue and general rule in criminal cases is set out in Wharton's Criminal Law, Vol. I (12th Ed.), p. 434, Sec. 334, as follows:

> "Conflicts of jurisdiction also arise when an offense is begun in one country to take effect in another. Supposing a libelous or forged writing be mailed in one place to be published in another, or an explosive package be expressed in one place to be opened in another, or a gun shot in one place and the shot takes effect in another, which is the place of the commission of the offense? Arguing by analogy from the law which makes the place of performance the seat of a contract, it might be said that the place of consummation is the peculiar seat of the crime, So, in fact, under the common law, it has frequently been decided, though it is settled that a concurrent jurisdiction exists in the place of starting the offense, supposing that the offense is indictable in the place of consummation. The same distinctions apply to obtaining goods by false pretenses by letter. As has already been seen, attempts to commit crimes are cognizable in the place of the attempt,

> and such, also, is the case with conspiracies, and accessoryships. But there can be no question that all parties concerned are also responsible at the place where the offense is consummated. The mere fact, however, that a forged check has been drawn on a Kansas bank, does not give Kansas jurisdiction when the check was drawn and paid in Missouri.
>
> Since, however, a crime may be organized in one country, advanced in a second, and executed in a third, it is necessary to conceive of the crime in question as broken up into several sections, committed in distant jurisdictions, and severally cognizable in each. That such is the case is the opinion of several eminent jurists, and such would, no doubt (e.g. under indictments for treason or conspiracy, where every overt act would give the local court jurisdiction), under similar circumstances, be the practice of the English common law. And the same reasoning applies to all offenses which are carried on in two or more jurisdictions. At the same time it must be kept in mind that an attempt to commit in a foreign state an act lawful in such state, though unlawful in the domestic state, may not be punishable in the latter state."

In the case of State v. Mispagel, 207 Mo.557, l.c. 578-79-80-81, the case being one of embezzlement in which there is a special statute governing the venue, several general principles of law are contained. We quote as follows:

> "'Having reached the conclusion as heretofore indicated, that the actual conversion of the money charged in the information as shown by the evidence in this case, occurred in the city of St. Louis, and that such act of conversion was done in said city by and through the defendant's authorized agent, we are next confronted with the exceedingly interesting as well as important proposition in this case as to where the venue of the commission of the offense by the defendant should be laid. The record sharply presents the question as to whether the embezzlement of the money as charged in the information should have been charged to have occurred in the city of St.Louis

or in St. Charles county. Defendant's place of employment was in St. Charles county and it must be conceded that it can be reasonably inferred that the criminal intent was formed in St. Charles county, but the criminal act of conversion was in the city of St. Louis. Ordinarily the venue would be in the city of St. Louis. To illustrate: If I form an intent while in Cole county to steal a horse, which I know I can find in Callaway County, and pursuant to that intent cross the river, and actually steal the horse, the crime is complete in Callaway county, and that is the only jurisdiction for prosecution, unless I take the stolen animal to some other county, where, by force of our statute, I may be prosecuted elsewhere.

The learned Attorney-General representing the State insists that in the case at bar there are two jurisdictions and the State may elect, as it has in this case. It is manifest that the defendant, Mispagel, did not convert any money of the St. Charles Savings Bank which he had in his possession in St. Charles county. Directing our attention to the proposition urged by the State that in this case there was jurisdiction either in the county of St. Charles or in the city of St. Louis, we will say at the very inception of the consideration of that question that the evidence shows the existence of the relation of bank and cashier, and the by-laws, which were introduced in evidence, gave the cashier of this bank, who was the defendant, the right to exercise certain powers and imposed upon him certain duties which are ordinarily performed by cashiers of banks, without specifically mentioning what the powers or duties are. The defendant had to account for the moneys and other property received by him belonging to the bank, and presumably at the place of business of said bank, and it is urged by the State that, having formed the intent in St. Charles county, and having to account for the money to his employers in said county, this conferred jurisdiction upon the circuit court of St. Charles county, notwithstanding the fact that the actual money was both received and converted in the city of St. Louis, and we frankly confess that this contention is not wholly without some weight. It must, however, be observed that our statute does not make a failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund, and while failure to account for such fund may constitute very material evidence tending to

> establish the act of conversion, yet the failure to account by no means constitutes the offense of embezzlement of the fund.
>
> In Works on Courts and Their Jurisdiction, page 471, it is announced that the general rule is that where no statute on the subject prevails, the jurisdiction exists where the crime is consummated or completed. In this State we have no special statute fixing jurisdiction in embezzlement cases. 'At common law an indictment can be found in that county only in which the crime has been committed.' (12 Cyc. 229) In the same volume and on the same page of the Cyclopedia above cited, the American rule as applicable to this subject is thus stated: 'In the United States most of the State constitutions and declarations of rights expressly provide in substance that all criminal prosecutions shall be brought to trial in the county in which the crime shall have been committed. These provisions are strictly construed in favor of the accused, and with a recognition of the principles of the common law, and the Legislature cannot authorize a trial in any other county.'
>
> This court has announced in no uncertain or doubtful terms the rule that the Legislature cannot under our statute arbitrarily place the jurisdiction of a criminal cause in a county other than the county in which the offense was committed, and it has been expressly ruled by this court that where the lawmaking power undertakes to indicate and enforce such laws it is the province of the court to declare them unconstitutional and void. (State v. Smiley, 98 Mo. l.c. 607-608, and cases cited; State v. Hatch, 91 Mo. 568; State v. Anderson, 191 Mo. 134).'"

Under the above decision and definitions, we would have no hesitancy in saying that the venue, in the facts as you present, could be in either St. Louis County or Scott County; but the language of the statute is "from a point on a regular route destined to a point on a regular route". It would, therefore, appear that as soon as the contract hauler had made the contract he would be subject to prosecution solely in the county in which the contract was made. However, we do not believe that the crime would then be complete, as there would be no overt act; but if he should accept the merchandise and start to transport the same, the crime would be complete, or at least he could be prosecuted for an attempt, and the venue in that instance could in no wise be in Scott County, because no part of the crime had been committed within the borders of Scott County.

We interpret Sec. 3377, R.S. Mo. 1929, same being as follows:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law,"

to mean that if the crime is committed and is complete in a county, then, of course, the venue must necessarily be in that county, and likewise, under the general rule set out in C.J., Sec. 260:

> "Generally speaking, it is a fundamental rule in criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed and in all criminal prosecutions in the absence of statutory provision to the contrary the venue must be laid in the county or district of the offense and must be proved as laid."

Referring again to the word "destined", as used in the statute, if the Legislature had seen fit to omit the word and insert the words "transported to a point on a regular route", then, even under the decision above quoted, we could readily see that the venue could be either in St. Louis County or Scott County. But let us, for the sake or argument, under the section in question, have the contract hauler accept the merchandise destined from a point on a regular route to a point on a regular route, and the transportation be carried to a conclusion, i.e., the merchandise be deposited in your county. It is then possible that part of the crime has occurred in your county, but under the decision in the Mispagel Case, supra, bearing in mind that there is a special section relating to the venue in embezzlement cases, it was held that the venue was in St. Louis instead of St. Charles County.

It is therefore the opinion of this department that the crime would be complete at the time the contract hauler accepted the merchandise destined from a point on a regular route to another point on a regular route, and that the mere fact that the contract hauler was not arrested until he had deposited the merchandise in your county would not in itself place the venue also in your county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN.AH

Relating to Fees of Prosecuting Attorneys in Change of Venue.

September 26, 1933

10-2

FILED

64

46

Hon. Morgan M. Moulder,
Prosecuting Attorney,
Camdenton, Missouri

Dear Sir:

This department acknowledges receipt of your letter dated August 26, 1933, in which you state and inquire as follows:

"Recently I followed and prosecuted a criminal case which was sent to Polk County, change of venue from Camden County, Missouri, the charge was first degree murder. Defendant at second trial entered a plea of guilty and was sentenced to the State Penitentiary.

Section 11316, R. S. of Missouri, 1929, provides, among other things, that "And in all cases, civil and criminal, in which change of venue may be granted, it shall be his (Prosecuting Attorney) duty to follow and prosecute or defend, as the case may be, all said causes, for which in addition to the fees now allowed by law, he shall receive his actual expenses." Prior to the part of section quoted the Section refers and provides that Prosecuting Attorney shall represent in their respective counties the State and County. I represented the State and State only in the prosecution of the case of State vs. J. H. Hardy, which was changed to Polk County, and at the first trial there was a hung jury, and I made several trips and charged state what I thought was a very small expense, considering the distance and time spent in Bolivar at the two trials. I charged a total of $24.00 expense, and the State Auditor refused to allow the same for the reason that it was his opinion that the

State was not required to pay such expense. County officers exist and the Sheriffs and other law enforcing officers are handicaped because of the lack of funds to enforce the law. I refer to the small counties and when the high and mighty at Jefferson City, without reason or law, strikes out a charge or fee of county officers and yet continues to employ plenty of fancy help for himself, causes me to believe that I certainly was not justified in rubbing the rubber off of my tires in the last primary and general elections for Democracy and the former candidates that are now in office at Jefferson City.

Now, that I have relieved myself of the tension, I request and will appreciate your opinion as to who, State or County, shall pay the expenses of the Prosecuting Attorneys in prosecuting a State case on change of venue.

I call attention to the fact that the last part of Section 11316 providing for County to pay expense of Prosecuting Attorney or the $25.00 fee on cases to Court of Appeals, would be in cases of appeals where defendant was convicted of misdemeanor. I am sure that Sections 3826 and 11316 covers the question."

Section 11316 R. S. 1929, reads as follows:

"The Prosecuting Attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record

> and briefs . . . . . .
> to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city.

This statute makes it the duty of the prosecuting attorney to represent the state and county in all criminal and civil cases, where change of venue is taken, and specifies that in the performance of that duty he shall, in addition to the fees now allowed by law, receive his actual expenses. Those duties are required of him unconditionally and therefore it is mandatory upon the County Court to pay a prosecuting attorney his actual expenses in such cases.

We hold that it is not such cost in the case, as is chargeable in the cost bill certified to the State Auditor to be paid by the State, but an obligation of the County. The intention of the Legislature clearly appears from this part of said section,

> "To be audited and paid as other claims are audited and paid by the county court of such county."

We further hold that section 3826 R. S. 1929, has no application here. The Legislature has made no provision for the pecuniary compensation of those who prosecute in criminal cases to be paid by the State.

Yours very truly,

W. W. Barnes

Assistant Attorney General

APPROVED

Attorney General.

BANKS AND BANKING: Proper parties to distribute special deposits in restricted banks.

September 28, 1933.

10-2

FILED
64
47

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

Your letter of September 20th, received, in which you enclose a copy of a letter of date of March 14th, 1933, directed to all State banks which were put under restrictions in accordance with Laws of 1933, at pages 402 to 406, inclusive, and, to get the matter clearly outlined, both of your letters, March 14th, 1933 and September 20th, 1933, are herewith set forth:

> "I am sorry to advise you that the condition of your bank, as we find it, does not appear to justify permitting you to open upon a normal basis and you will, therefore, be guided by the following restrictions:
>
> 1. Depositors, including demand, savings and time, may, for a period of six months, beginning with the date of opening, withdraw not to exceed five per cent of their deposits as at close of business March 3, 1933, provided that, if conditions justify, additional withdrawals may be permitted upon prior written consent from the Commissioner of Finance. In the case of time deposits, not exceeding five per cent may be paid upon maturity but not before maturity if maturity comes within the six months' period mentioned above. No time deposits are to be paid before maturity and the balance of ninety-five per cent may be renewed on the basis as heretofore, but, if the holders of time deposits do not wish to renew, they may deposit same as demand deposits, without interest, subject to restrictions for withdrawals as provided above.

2. During the period that the bank is operating under these restrictions, it is to create no additional bills payable without the prior written consent of the Commissioner of Finance.

3. The present outstanding bills payable should be liquidated as rapidly as possible from the collection or sale of collateral pledged as security therefor.

4. No amount is to be paid on bills payable out of new deposits coming into the bank after its opening under these restrictions.

5. Upon opening the bank new deposits may be received only from your present customers. Such new deposits shall be kept separate from the old or frozen deposits and shall be kept in cash or with some State Bank, approved by this Department as a reserve depositary, and no part of such funds so deposited shall be loaned, except upon United States Bonds or other securities of the Government of the United States or upon the bonds of the State of Missouri as collateral, allowing a safe margin to meet fluctuations in the market price of such collateral. Such funds shall be considered trust funds and not an asset of the bank and shall be paid out on the check of such customers drawn against their respective balances.

6. Until further authorized, in writing, by the Commissioner of Finance, you shall make no new loans from old deposits or from collections on old loans made prior to March 4, 1933, but this shall not prohibit renewal of loans made prior to March 4, 1933, although it is strictly understood that all collections possible will be made on such loans and renewals accepted only where necessary.

7. These rules and regulations may be changed from time to time by the Commissioner of Finance or may be extended not beyond February 1, 1935.

8. These restrictions and regulations are made in accordance with the provisions of Senate Bill No. 293, of the General Assembly of the State of Missouri of 1933. Penalties provided in said Bill shall apply if any of the regulations or requirements therein set out are violated."

"I am enclosing herewith a copy of a letter which was sent to all banks that were permitted to open under restrictions after the banking holiday in March, and wish to call your attention to paragraph 5 thereof, relative to the new deposits which these banks were permitted to accept as trust funds.

The question now arises as to how these new deposits or trust funds shall be paid to the depositors in case the bank passes into liquidation. In your opinion would the Special Deputy Commissioner appointed to liquidate the bank be permitted to pay out these funds immediately or would he be obliged to wait until the four months' period for filing claims had elapsed and these claims declared preferred claims by the Court? These funds, of course, were deposited with the understanding that they were not to be considered as assets in these banks.

In the event the Special Deputy Commissioner is not permitted to pay out these funds immediately, it will be necessary for the officers of the bank to pay out these deposits before the bank is placed in the hands of this Department for liquidation."

You ask for our opinion as to who should distribute the new special deposits or trust funds deposited in restricted banks under Section 5 of your official letter of March 14th, which is hereinbefore set forth.

For one to get a proper understanding of the matter and a fair interpretation one must have some knowledge of the trying times the financial institutions were going through with at that time and the unrest among the people relative to financial matters and moneys on deposit in our banking institutions. It was to the interest of all of the people that the confidence of the people in our banking institutions be restored. At the time your letter of March 14th was issued, as an official promulgation of the Commissioner of Finance of the State of Missouri, the restoration of the confidence of the people in our banking institutions was one of the guiding influences and the thing aimed at when said Section 5 of your letter was written.

Your request for an opinion as to whether these special or trust funds should be paid out by a special deputy commissioner of finance appointed to liquidate the bank, immediately, or would the depositors of these new deposits be obliged to wait until the four-months period, as required by statute for filing claims against closed banks, had elapsed and then these claims be declared preferences by a court of competent jurisdiction.

Of course, as stated in your letter, these funds were deposited with the understanding and agreement with the people so depositing said moneys that they were not to be considered as assets of these restricted banks and, with this distinct understanding, they deposited their moneys in these banks, thereby putting their moneys in the channels of trade and back into circulation, which was essential at that time.

It is the opinion of this Department that these special deposits, and they are in truth and in fact trust funds, should be paid out by the present officers of the bank before the bank is placed in the hands of the Commissioner of Finance for liquidation, and thereby not compel the depositors to wait four months time before receiving their moneys. However, in the event that all of these moneys had not been returned to the depositors at the time that the bank is placed in the hands of the Commissioner of Finance, and it is desirable that they should be paid out before that time, in our opinion, it would be proper and right for you to designate some person, and this might be the special deputy commissioner in charge of that particular bank,

to distribute these deposits to the rightful owners thereof, and in this way these funds would not be involved or commingled with the assets of the bank before the new deposits were taken.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

NEPOTISM: Where Board votes unanimously in favor of a teacher, director who is first cousin of teacher violates Section 13 of Article XIV of the Constitution of Missouri.

October 6, 1933.

10/7

FILED

64

Mr. J. H. Mosby,
Prosecuting Attorney,
Linn, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I would be pleased to have an opinion from your office on the following proposition:
>
> A school teacher is employed by the Board of Directors of a School District, without a dissenting vote. Contract is duly made and executed. The teacher so employed is a cousin of the wife of one of the Directors. All members of the Board are present at the meeting at which the teacher is employed. Is this a violation of the Constitution and laws relating to Nepotism?
>
> A copy of the minutes of meeting above mentioned is enclosed.
>
> I would appreciate an early reply, inasmuch as the Board of Directors will be called upon for salary for the teacher of the school soon."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

You state that a school teacher was employed by the Board of Directors of your district without a dissenting vote. The teacher elected was the cousin of the wife of one of the directors.

Under the rule laid down in 12 C. J. page 511, the relationship is computed as follows:

> "One by the canon law, which has been adopted into the common law of descents in England and the other by the civil law which is followed both here and there in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

The civil law method is the one to be used in determining the relationship under the above constitutional provision. The first cousin of the wife is related by affinity to the director within the fourth degree as prohibited by the constitution. The question then remains as to whether or not, under the facts given by you, the director was guilty of naming or appointing this relative.

It appears from the minutes of the meeting of the Board that all of the directors agreed to the selection of the related teacher. When the three members of the Board, by their unanimous action, elected this teacher, each of them exercised his right to name or appoint in favor of that teacher. The Supreme Court in the case of State ex rel. v. Otto Whittle (not yet reported) in which they ousted the director for voting in favor of a related teacher, said:

> "Respondent also argues that the amendment is only directed against officials who have all the right (power) to appoint. We do not think so. The question must be determined upon the construction of the amendment. It is not so written therein. The amendment is directed against officials who <u>shall have</u> (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a Board acts through its official members or a majority thereof. If, at the time of the selection, a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment."

The Supreme Court says that if the director who has the

right, either by casting a deciding vote or otherwise, to name or appoint a person to office and exercises that right in favor of a relative, he violates the amendment. When three members, which make up the entire Board, vote or consent to the election of a teacher, each member of that Board has exercised the right he had to name or appoint in favor of the relative. We believe that the Supreme Court meant that whenever a director votes in favor of a relative within the prohibited degree and such relative is elected to office, that he violates the constitution provision.

We believe that there is a great misunderstanding among the directors as to what is meant by the "deciding vote." Take for an example: A board consisting of six members, four is a majority and necessary to elect a teacher. Assume that director No. 1 is related to the teacher. Assume that directors 2, 3 and 4 vote in favor of the teacher and directors 5 and 6 vote against the teacher. When the time comes for director 1 to cast his vote the vote stands three in favor of the teacher and two opposed. Director 1 votes with the other three and makes it four to two in favor of the related teacher. Certainly in such instance he has cast a deciding vote. If, on the other hand, in the order of voting, director No. 1 voted first and in favor of the teacher and then three more voted in favor of the teacher and two against, the vote of director No. 1 was just as necessary to the election and was exercised in favor of the related teacher to the same extent as if he had been the last member to vote. We do not believe that the constitutional provision is to be nullified by the directors adopting any particular method of voting or by them juggling their votes. We believe the constitution means, as interpreted by the Supreme Court, that whenever any director exercises his right to name or appoint a teacher in favor of a relative within the prohibited degree, he has violated the constitutional amendment. It would be absurd to take the view that director No. 1 forfeited his office in the first example given because he was the last to vote, and did not forfeit his office in the second illustration because he was the first to vote. In both events he had the right to name the appointed teacher within the meaning of the constitution, and in both events he exercised that right in favor of a teacher within the prohibited degree.

According to the facts contained in your inquiry, the Board unanimously, without a dissenting vote, selected a teacher related to one member of the Board. It is not necessary to a violation of this amendment that a formal vote, either orally or written, be taken. But the Board unanimously consenting to her selection is the same thing as the Board unanimously voting in her favor. Every member of the Board, under such circumstances, must legally be deemed to haveexercised his right to name or appoint in favor of the teacher so selected.

When one member of your Board exercises his right to name or appoint in favor of the related teacher, either by formally casting his vote or otherwise, he has violated the constitutional provision.

It is therefore the opinion of this Department that when the Board of Directors of your school district, without a dissenting vote, elected to office a teacher related to one member of the Board, each director will be deemed to have exercised his right to name or appoint in favor of the teacher so selected. As one of the directors was a first cousin to the selected teacher he was related within the fourth degree as prohibited by the constitution and when he exercised his right to name or appoint that teacher he was guilty of violating Section 13 of Article XIV of the Constitution.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

AXATION: Personal property of World War Veteran not exempt from taxation. Cross reference under exemptions.

October 10,1933

10-13

FILED
64
50

Hon. George A. Moore
Assessor Jefferson County
Hillsboro, Missouri

My Dear Mr. Moore:

I acknowledge receipt of your request for an opinion of this office in the matter of taxation of the estates of War Veterans. Your request reads as follows:

> "There are in my County Estates belonging to Soldiers under Guardianship N.C.M. amounting in one case at least to $15,000.00. Generally speaking this is supposed to be exempt.
>
> If the money was necessary for the support of the Soldier it should be exempt, but where only a small portion of the income is used for the support and the principal is growing, when does the exemption cease and should the whole principal remain exempt, just because it comes from the Federal Government.
>
> Your opinion will be appreciated.
>
> I wish also to know if Real Estate purchased with such funds are also exempt."

In considering your inquiry we call your attention to the fact that the general exemption statute of this State, Section 9743 R. S. Mo. 1929, does not contain any phrase or clause which can be construed as exempting the property of ex-service men or war veterans held by them directly or through their guardians. While you did not state under what law the compensation or funds

have been paid we presume that they accrued under Chapter 11 Title 38 of U. S. Code Annotated entitled "World War Veterans Adjusted Compensation." The two sections providing for compensation and insurance and their exemption from taxation read as follows:

> "Section 454-Assignability and exempt status of compensation, insurance, and maintenance and support allowances. The compensation, insurance, and maintenance and support allowances payable under Parts 2, 3 and 4, respectively,* * *shall be exempt from all taxation.* * **

> "Section 618. Benefits exempt from seizure under process and taxation. No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this Chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate, shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation."

The property exempt under the first Section quoted is "compensation, insurance and maintenance and support allowance payable", and in the second section, "sum payable under this chapter". In other words, so long as the compensation, insurance and maintenance and support allowance are "payable" the same are not subject to taxation. Whether or not this exemption continues after the same has been received by the guardian is the problem presented by your inquiry. It is the rule of law in this State that the title to property of ward is in the ward and not in the guardian or curator. This is very plainly put in the case of Judson v. Walker, 155 Mo. l.c. 179, wherein it is stated:

> "A curator does not stand in the same relation to the estate of which he has charge as does an administrator. In case of an intestate's estate the title to the personal property vests in the administrator for the purpose of administration and he can sue and defend as such in his own name because of that title. But in the case of an infant's estate the title is in the infant alone and not in the curator. In such case the curator has only the custody

> care and management of his ward's estate. (Section 5297 R. S. 1889; Duncan v. Crook 49 Mo. 116.) It is the duty of the curator to represent his ward in all legal proceedings, to prosecute and defend for him, and is entitled to so represent him in any suit without being especially appointed as guardian ad litem unless in a particular statutory proceeding a different requirement should be made. (Section 5298 R. S. 1889) But in all cases the ward is the party and the curator is the representative; the act either in suing or defending is the act of the ward by his curator. * * * *"

The title of the property therefore vesting in the ward and not in the guardian it could hardly be said that after the sum has been received by the guardian that it is still "payable" to the Veteran. The Supreme Court of Alabama, in considering a situation such as we are now discussing, stated in 140 Southern 584, as follows:

> "It is a well settled rule of statutory interpretation, that provisions for exemption from taxation must be construed strictissimi juris, and claims of exemption not clearly within the imported language of the statute must be rejected.
>
> When this rule of interpretation is applied to the quoted portions of the statute it is clear that the exemption applies only to "compensation, insurance and maintenance and support allowance," "adjustment certificates", and "sums payable" under the act of Congress, and does not extend to privately owned property purchased with money arising from such sources and which was at the time of its purchase within the jurisdiction of the State and subject to its powers of taxation."

The same reasoning has been applied in the decision of the Kansas City Court of Appeals in the case of Duzan v. Cantley, 55 S. W. (2d) 711:

"It is argued that the money shall not be subject to the claims of creditors, and since there can be no assignment or garnishment or other proceeding against the beneficiary, therefore the relationship of debtor and creditor cannot exist, especially where the bank takes the fund with knowledge of source thereof.

This contention is on the theory that the purpose and intent of the legislation in behalf of veterans is to protect the money from all claims, except the United States Government, not only until it comes into the hands of the beneficiary, but also until the latter has himself spent it. We think this is not the correct construction or interpretation to be placed thereon. In our view, funds thus arising are not thus protected after they have once come into the hands of the beneficiary. They have then become his absolute property, and having once come into his hands are no longer an object of solicitude or care on the part of the Government. The latter is careful to protect the fund until the beneficiary receives it, but no further. This seems to be clear from the use and subsequent reiteration of the word 'payable'. So long as a fund is 'payable' to a person it has not yet reached his hands, but when it has, it can no longer be paid to be payable to him. This is borne out by the plain intent of section 54, p. 81, of the above-mentioned USCA, where, in protecting money due pensioners, attachment, levy or seizure of such funds is prohibited, it speaks of money 'due, or to become due' to any pensioner, 'whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner.' It is not exempt after it is paid to the pensioner."

While it is true that in the Duzan case the court was not considering an effort to tax the property of the veteran still the logic of these decisions is equally applicable in interpreting

the portion of the Federal Statutes pertaining to exemption from taxation. Under the rule heretofore announced it is evident that there can be no distinction drawn by reason of the funds being paid to the guardian instead of the ex-soldier. As heretofore shown the title to the property remains in the ward just as surely as though there were no guardianship. Nor can there be any logical distinction drawn between the investment of these funds in personal property and the investment of such funds in real estate. The title to each is in the ex-soldier and the fund is no longer "payable" to him in either case. The property in which it has been invested should under all rules of equity and justice remain taxable by the proper taxing authorities. This construction of the law gives full effect to the statute as it is written. The sums having become invested in property which demands the protection of the state the beneficiary should bear its just share and proportion of the burden of such protection.

We are therefore of the opinion that the funds of the ward whether invested by the guardian in real property or in personal property are proper subjects of taxation.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

_____
Attorney General.

HGW:MM

BANKS & BANKING: Construction of House Bill 91- Laws 1933, page 405. Depositors permitted to participate in reorganization plan of bank.

October 11, 1933.

10-13

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

We are in receipt of your letter of September 20th, 1933, with request for an opinion from this Department, which letter is as follows:

> "In some of the banks operating under restrictions a large percentage of the deposits represents public funds. In the particular cases brought to my attention these funds are secured by personal bonds of the directors.
>
> Paragraph 3 of House Bill No. 91, found on page 405 of the Session Acts of 1933, reads in part as follows:
>
> > "*** if said bank or trust company shall be permitted to continue in business, and, when said State Finance Commissioner shall approve a contract or plan whereby such bank or trust company is permitted to receive deposits, pay checks and continue to do a banking business, or reorganize, entered into between the depositors or (of) such institution, owning or controlling eighty-five percent or more of the deposits therein, which are not preferred claims, special deposits or deposits secured by bonds or collateral, on the one hand, and the bank or trust company or its board of directors on the other, then and in that event,

> all other depositors and creditors shall be held to be bound by such contract or plan to the same extent and with the same effect as if they had joined in the execution thereof, ###.'
>
> In your opinion do public deposits, secured by personal bonds, come within the meaning of preferred claims, special deposits or deposits secured by bonds or collateral, and are they to be excluded from the eighty-five percent of deposits required to perfect the reorganization under said House Bill No. 91, the understanding being that these public deposits are to be paid in full."

Your request calls for a construction of the Laws of 1933, found at pages 404 to 406, inclusive, and particularly Section 3 of said statute. Replying to the question asked in the last paragraph of your letter will say that it is the opinion of this Department, assuming the constitutionality of said statute, that public deposits secured by personal bonds would, generally speaking, "come within the meaning of preferred claims, special deposits or deposits secured by bonds or collateral" found in said section 3, and should not be included in the eighty-five per cent of the deposits required to perfect the reorganization plan under this law, being House Bill No. 91, Laws of 1933, pages 404-406. Deposits secured by bonds or collateral mentioned in the statute we understand the word "bonds" refers to the personal bonds required to be given as security for public deposits in public depositaries.

It is our opinion that it was the purpose and intention of the Legislature to permit a reorganization contract or plan whereby a bank or trust company is permitted to receive deposits, pay checks and continue to do a banking business when depositors of said institution owning or controling eighty-five per cent or more of the deposits therein, excluding from this eighty-five per cent group those having preferred claims, special deposits or deposits secured by bonds or collateral, and when said plan is agreed to by the bank or trust company or its board of directors and approved by the Commissioner of Finance. The reason for excluding therefrom those which are

preferred claims, special deposits or deposits secured by bonds or collateral is that the claims being preferred and having preferences and security not possessed by the common depositors should not be permitted to hold up or block the common depositor, who is not so favored, in a reorganization plan.

Where the personal bonds securing the public deposits have been executed in a proper and statutory manner and approved by the proper public officials and complying with the statutes in every particular, they would not come within the eighty-five per cent group of depositors for the reason that their deposits are secured by a personal bond contemplated by the statute and if there was a non-compliance with the statute in the selection of the public depositary the public funds would be within the term "preferred claims" as used in this statute for the reason that the public funds would be preferred on account of the non-compliance with the statute which, under the law, gives the county, city or school district, whichever the case might be, a preference. So, whichever way you take it, if the public deposits are properly secured by personal bonds they are excluded from the eighty-five per cent group and if they are not properly secured by personal bonds, executed and approved in the manner provided by the statute, they would have a preferred claim and therefore would be excluded from the eighty-five per cent group.

It is, therefore, our opinion that public deposits, secured by personal bonds, should not come within the eighty-five per cent group necessary in the reorganization plan or contract under said Section 3, Laws of 1933, at pages 404-406.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

BANK BANKING:

Public deposits of State, county, cities and school districts come within the exception of the Federal Reserve Act permitting member banks to pay interest on demand deposits.

10-23 October 13, 1933.

FILED
64
52

Mr. C. [illegible] Moberly,
Commi[illegible]er of Finance,
Jeffer[illegible]ity, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "The Banking Act of 1933 provides certain exceptions to the prohibitions against payment of interest on demand deposits. One of the exceptions applies to 'any deposit of public funds made by or on behalf of any State, county, school district or other subdivision or municipality, with respect to which payment of interest is required by State law.'
>
> We are receiving inquiries as to whether deposits of State, county, city, town and school district funds in Missouri which are payable on demand fall within this exception."

Section 11 of the Banking Act of 1933, passed by the last session of Congress, added a new Section to follow Section 19 of the Federal Reserve Act. Such Act reads as follows:

> "No member bank shall, directly or indirectly by any device whatsoever, pay any interest on any deposit which is payable on demand: Provided, that nothing herein contained shall be construed as prohibiting the payment of interest in accordance with the terms of any certificate of deposit or other contract heretofore entered into in good faith which is in force on the date of the enactment ofthis paragraph; but no such certificate of deposit or other contract shall be renewed or extended unless it shall be modified to conform to this paragraph, and every member bank shall take such action as may be necessary to conform to this paragraph as soon as possible consistently with its contractual obligations: Provided, however, that this paragraph shall not apply to any deposit of such bank which is payable only at an office thereof located in a foreign country, and shall not apply to any deposit made by a mutual savings bank, nor to any deposit of public funds made by or on behalf of any State, county, school district, or other subdivision or municipality,

with respect to which payment of interest is required under State law."

In substance the above Section prohibits member banks from paying interest on demand deposits. The Section, however, excepts, among other things, "deposit of public funds made by or on behalf of any State, county, school district, or other subdivision or municipality, with respect to which payment of interest is required under State law." The Legislature by a great number of sections in various statutes has provided that the state, counties , school districts and cities of all classes shall deposit their public funds in public depositories. A quoting of each of these sections would unduly lengthen this opinion. They are in substance the same. They require the advertisement for public depositories and the successful bidder is obligated to pay interest to the depositor on its average daily balances. The statute, in each of these instances, requires that interest be paid on public moneys so deposited and we believe that member banks, under the foregoing Section, may still pay interest upon their demand deposits when made by the state, counties, school districts or municipalities; that the state, counties, school districts and municipalities of Missouri come within the exception contained in said Section.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

COUNTY WARRANTS: (1) Warrants are acceptable in payment of taxes;
(2) The County Treasurer should accept and give credit to the collector for county warrants accepted in payment of taxes in the monthly settlement of the collector;
(3) Must the county warrant be presented by the original payee, or is it acceptable from the assignee?

October 17, 1933.

FILED

10-23

52

Hon. M.E. Montgomery,
Prosecuting Attorney,
Scott County,
Benton, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 30, 1933 requesting an opinion from this office based on the following facts:

> "This county, like most counties, does not have funds available to meet its current expenses, consequently, its protested warrants, issued against its several funds (County Revenue, Special Road & Bridge, etc.), are negotiated at a discount wherever the holder can find a purchaser. And the same situation obtains in many of our school, drainage and levee districts. Many such instruments are tendered to the County Collector for payment of taxes. In this connection, the Collector requests that I secure an opinion from you as to the following matters.
>
> Is the Collector required to accept these instruments in payment of taxes, where the one presenting same owes taxes to the fund against which the instrument is drawn equal to or in excess of the amount of the instrument? For example, is the Collector required to accept a $30.00 County Revenue warrant where the one tendering the warrant owes taxes to the County Revenue Fund of $30.00 or more?
>
> If the Collector does accept such instruments, whether required to or not, can he compel the County Treasurer to accept and give him credit for same on making his monthly turnover to the County Treasurer?
>
> Does it make any difference whether the instrument is presented by the one to whom it is originally issued, or by a vendee thereof?"

I.

Warrants are acceptable in payment of taxes.

Under Sec. 9911, R.S. Mo. 1929 warrants are acceptable in payment of taxes under certain conditions, said section in full being as follows:

> "Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

By this section the warrants must (1) be presented by the legal holder; and (2) be issued and received in payment of a tax during the year for which the tax was levied.

Under this section, it is the opinion of this department that the warrants in question are acceptable for taxes, and the fact that a party presenting a warrant which is less in amount on the fund on which it is drawn than the taxpayer owes to the fund would make no material difference. He should be given credit for that amount on that particular fund.

II.

The county treasurer should accept and give credit to the collector for county warrants accepted in payment of taxes in the monthly settlement of the collector.

The authority for the county treasurer to accept warrants

and give the collector the proper credit is found under Sec. 12140, R.S. Mo. 1929, which is as follows:

> "No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current expenses of the county as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment: provided, however, that nothing herein contained shall prevent the treasurer from receiving from the collector all scrips and warrants lawfully received by him in the payment of county tax: provided further, before the treasurer shall receive such scrips and warrants, the collector shall make out a list of such scrips and warrants, under oath, specifying the number and amount thereof, the date when received, and from whom received; and said list shall be filed and preserved by the treasurer."

You will note in said section that it mentions specifically that the treasurer is not prevented from receiving from the collector such warrants. We therefore conclude that the treasurer should accept the warrants and give the collector proper credit in his monthly settlement.

III.

Must the county warrant be presented by the original payee, or is it acceptable from the assignee?

Under Sec. 12171, R.S. Mo. 1929, said section being as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator;

> and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same,"

the treasurer is authorized to accept a warrant made payable to the person in whose favor it is drawn or by his assignee. The form of assignment that is necessary is set out in Sec. 12172, R.S. Mo. 1929, and is as follows:

> "All warrants drawn on the treasurer of any county shall be assignable, and every assignment of any such warrant shall be in the following form:
>
> For value received, I assign the within warrant to A.B., this ___ day of _____, 19___.
>
> (Signed) C.D.
>
> No blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same."

In view of the provisions of Sec. 12171, supra, if the treasurer has the authority to accept an assigned warrant in the last instance, then the collector should have the authority to accept an assigned warrant in payment of the taxes, and it is the opinion of this department that an assigned warrant can be presented by the assignee in payment of his taxes, provided the assignment is made in conformity with Sec. 12172, supra.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

Liquors

IN RE: PERMIT FOR RECTIFYING WHISKEY IN MISSOURI.

11-3

October 21, 1933

FILED
64
54

Honorable George H. Moore
Attorney at Law
Boatmen's Bank Building
St. Louis, Missouri

Dear Sir:

Your letter of October 11th, reads as follows:

"I have had several inquiries from people who desire to secure permits as rectifiers of whiskey, as to what the possibilities may be establishing such a business in this state at the present time.

In view of the imminence of the repeal of the Federal Prohibition Law, it becomes a matter of practical interest as to the possibility of establishing such a business in the state of Missouri."

LEGISLATURE OF 1931 PASSED
ACT PURPORTING TO REPEAL
STATUTE LICENSING RECTIFIERS.

On page 265, 266 Session Laws Missouri 1931, will be found the following Act:

"AN ACT to repeal sections 6498, 6499, 6500, 6501, 6502, 6503, 6504, 6505, 6506, 6507, 6508, 6509, 6510, 6511, 6512, 6513, 6514, 6515, 6517, 6518, 6519, 6520, 6521, 6522, 6523, 6524, 6525, 6526, 6527, 6528, 6529, 6530, 6531, 6532, 6533, 6534, 6535, 6536, 6537, 6538, 6539, 6540, 6541, 6542, 6543, and 6544, article 1, chapter 52, Revised Statutes, 1919, (not in 1929 R. S.), entitled "Intoxicating liquors," and relating

to 'dramshops'. Also section 6545, 6546, 6547, 6548, 6549, 6550, 6551 and 6552, being all of article 2, chapter 52, Revised Statutes 1919, (not in 1929 R. S.) relating to 'board of excise commissioners in certain cities.' Also sections 6553, 6554, 6555, 6556, 6557, 6558, 6559, 6560, 6561, 6562 and 6563, being all of article 3, chapter 52, Revised Statutes 1919, (not in 1929 R. S.), relating to 'excise commissioners in certain counties. ' Also sections 6564, 6565, 6566, 6567, 6568, 6569, 6570 and 6571, being all of article 4, chapter 52, Revised Statutes 1919, (not in 1929 R. S.), relating to 'local option'. Also sections 6572, 6573,6574, 6575, 6576, 6577, 6578, 6579, 6580, 6581 and 6582, being all of article 5, chapter 52, R. S. 1919, (not in 1929 R. S.), relating to 'licenses of manufacturers, rectifiers, wholesale and retail dealers other than dramshop keepers.' Also sections 6583, 6584, 6584, 6586 and 6587, being all of article 6, chapter 52, Revised Statutes 1919 (not in 1929 R. S.), relating to 'licensing and taxing wholesale liquor dealers and agents. ' Also section 6605, article 7, chapter 52, Revised Statutes 1919, (not in 1929 R. S.), relating to 'prohibition, effective when!"

The above repealing act mentions section, chapter and describes title of act in which repealed sections occur.

Section 6572, article 5, chapter 52, of R. S. Mo. 1919, repealed by act of 1931, reads as follows:

"It shall be unlawful for any person, firm or corporation to manufacture, rectify, sell or expose to sale in this state intoxicating liquors of any kind in any quantity, except wines or spirits made from grapes or fruits grown in this state, without first taking out a license under the provisions of this article; but this article shall not apply to the sale of liquors by dramshop keepers licensed under the laws of this state; Provided, that the possession of an internal revenue license, issued by the government of the United States, for the manufacture, rectifying or sale of malt, fermented, spirituous or other intoxicating liquors within this state, except by

> licensed dramshop keepers and makers and sellers of wines or spirits produced from grapes or fruits grown in this state, shall be prima facie evidence that the person, firm or corporation named in such internal revenue license is engaged in the manufacture or sale of intoxicating liquors in the meaning of this article ."

Section 6572 R. S. Mo. being repealed there is no law now on the statute books authorizing license or permit for rectifying liquors in this State.

Section 4496 R. S. Mo. 1929, defines intoxicating liquor as any potable beverage containing one-half of one per cent by volume.

It is the opinion of this Department no permit nor license can at this time be legally issued to a 'rectifier' in this state.

Very respectfully,

ROY McKITTRICK
Attorney General,

EDWARD C. CROW
Assistant Attorney General.

ECC:LC

, & BANKING: Res judicata applied to judgment against a restricted bank.

11-23

November 16, 1933.

FILED
64
39

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

Your letter of November 7th, 1933, received, requesting an opinion of this Department, in which letter a certified copy of a decree of the Circuit Court of Platte County rendered November 4th, 1933, in the case of John W. Walker, Plaintiff, vs. Wells Banking Company, a corporation, Defendant, was enclosed, and later a certified copy of the petition of the plaintiff, answer and entry of appearance of the defendant in the same suit was delivered to this Office to be used in connection with your letter of request; which letter is as follows:

> "Attached hereto is a Decree of the Circuit Court of Platte County, Missouri, rendered in the case of John W. Walker, Plaintiff, vs. Wells Banking Company, a corporation, Defendant, ordering the payment of the sum of $50,270.23 held by the Defendant in the First National Bank of Kansas City and declaring the same to be a trust and preferred charge upon all of the assets of said Defendant until said contract is specifically performed by the Defendant.
>
> "For your information, the Defendant, Wells Banking Company, is now and has been since the Banking Holiday in March operating under restrictions, and I hereby request that you furnish me with an opinion, setting out what action, if any, I should take to prevent the payment of this sum of $50,270.23."

For our information you state that the defendant Wells Banking Company, a corporation, is now and has been since the Banking Holiday in March, 1933, operating under restrictions, and our further information is that the plaintiff in this suit was at all times mentioned in said petition, Collector of Revenue of Platte County, Missouri.

This is an equity suit for specific performance of an alleged contract and agreement between the plaintiff John W. Walker and the defendant Wells Banking Company, a corporation, doing a general banking business at Platte City, Platte County, Missouri, praying for an order and judgment of the Circuit Court of said county directing defendant corporation to deliver up to plaintiff on demand all moneys, credits, funds delivered and surrendered by plaintiff to defendant under said contract and agreement, or a judgment and decree that all of the assets of defendant be impressed and charged with a trust to the extent the same had been augmented by the wrongful mingling or disposing of said funds, moneys and credits with the general assets of said bank, and for all other such orders, judgments and decrees and equitable relief as to the court may seem meet and just.

John W. Walker who is, and was, the Collector of Revenue of Platte County, Missouri, and the Wells Banking Company, a corporation, are both residents of Platte County, Missouri, and the Circuit Court of Platte County by the answer and entry of appearance had jurisdiction of the parties, plaintiff and defendant, and the petition states a cause of action against the Wells Banking Company and the court had jurisdiction of the subject matter. The Commissioner of Finance was not made a party defendant in this suit and the bank operating under restrictions was not in the charge and under the control of the Commissioner of Finance so far as the contract and agreement alleged in this petition is concerned, it being an alleged contract and agreement between the plaintiff and the defendant and, therefore, you are not involved in said litigation.

The doctrine of res judicata would apply to this case. This doctrine is classified in two main rules which may be stated as follows:

> "(1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and

> directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not."
>
> 34 C. J. p. 743.

And further, it is said in 34 C. J., at page 750:

> "A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled."

And in 34 C. J., page 990, it is said:

> "As a general rule a valid and final judgment is binding and conclusive on all the parties of record in the action or proceeding in which the judgment was rendered."

In the case of Fiene v. Kirchoff, 176 Mo. 516, l. c. 525, the Missouri Supreme Court said:

> "In Hope v. Blair, 105 Mo. l. c. 93, Macfarlane, J., aptly stated the law as follows: 'When the court has cognizance of the controversy, as it appears from the pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the "soundest principles of public policy." "It is one,"

> says the court of Virginia, "which has been adopted in the interest of the peace of society, and the permanent security of titles."'"

In the case of Chouteau v. Gibson, 76 Mo. 38, l. c. 51, Judge Norton said, quoting from the case of Sturgis v. Rodgers, 26 Ind. 1:

> "'A judgment of a court of nisi prius rendered under such circumstances could never be called in question collaterally before the same or any other court. It must be so, also, as to the judgment of the court of last resort when it has jurisdiction, though it mistake the law and err in its judgment. The rule is as essential in the one case as in the other to the repose of society and the stability of private rights. To say that a judgment of affirmance here, within the power of the court to render, when the parties are before the court and the case is brought within its lawful jurisdiction, is not a final end of that litigation, would be a startling doctrine, asserting that a cause can never have a final termination.'"

In the case of Drake v. Kansas City Public Service Company, 41 S. W. (2d) 1067, the court said:

> "It is not necessary to cite authorities to support the proposition that a judgment, legal upon its face, rendered by a court of competent jurisdiction, is binding and conclusive upon the parties to it. Citing Fiene v. Kirchoff, 176 Mo. 516; 34 C. J. 990."

We could cite many other authorities to support this elementary doctrine but we do not think it necessary. Therefore, it is the opinion of this office that this court, having jurisdiction of the parties to the suit and the subject matter, and no timely

motion for new trial was filed and no appeal taken by the defendant, so we are informed, therefore said judgment became a binding decree and judgment of said court and the parties thereto are bound by the decree and judgment. In conclusion, it is our opinion, based on your letter, the petition, entry of appearance and answer furnished us, in the absence of any other qualifying facts outside the record, binding on all of the parties and a final and conclusive judgment and decree of the matter involved.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

BANKS & BANKING: Constitutionality of House Bill No. 92, Senate Bill No. 43, Extra Session - Capital notes issued by bank or trust company.

12-6

November 23, 1933.

FILED
64
61

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This office is in receipt of your letter of November 9th, 1933, with request for an opinion of this Department as to the validity and constitutionality of House Bill No. 92 lately introduced in the Legislature. Your letter of request is as follows:

> "I beg to hand you herewith copy of the above numbered House Bill. You will notice it provides for Missouri banks and trust companies, through authority of their boards of directors, to issue capital notes.
>
> I would appreciate your opinion, as quickly as possible, concerning this Bill and especially your opinion with reference to whether or not it conflicts with Section 8 of Article 12 of Missouri Constitution.
>
> If the capital notes proposed to be issued are not bonds or bonded indebtedness within the meaning of the Constitution, then it seems to me the legislation as proposed would be valid and the securities as offered would be within the constitutional provision."

I.

It is proposed under this bill to repeal Sections 5312, 5313, 5314 and 5315, R. S. Mo. 1929, and to enact four new sections in lieu thereof carrying the same numbers, which has

for its purpose to grant authority to a state bank or trust company, by authority of its board of directors, to issue and sell its capital notes at not less than par for the purpose of rehabilitating and taking care of impairments of the capital of banks and trust companies. Your letter calls for a construction of the proposed legislation and may be divided into two questions:

(1) Is the bill in harmony with the laws of Missouri?

(2) Especially is it in harmoney with Section 8, Article XII, of the Constitution of Missouri?

(1) The proposed legislation, in our opinion, is in harmony with the general laws of Missouri and if enacted will empower a state bank or trust company, through its board of directors, to issue and sell its capital notes for the purposes and in the manner provided by the proposed bill.

(2) On the second proposition you desire to know whether or not the bill, if enacted, would in any way contravene the provisions of Section 8, Article XII, of the Constitution of Missouri, especially that part of the Constitution which provides (a) for a corporation to issue bonds; and (b) whether or not it is necessary to have a vote of the stockholders to issue the capital notes provided in the proposed bill.

We beg to advise it is our opinion that the proposed bill will not in anywise run counter to the requirements of Section 8, Article XII, of the Constitution of Missouri, or any other provision of the Constitution.

Section 8, Article XII, of the Missouri Constitution, reads as follows:

> "No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law."

The above section is divided into two sentences, the first of which, in our opinion, is mandatory and provides that the corporation can not issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock of indebtedness shall be void. In other words, the corporation must receive full value for the stock or bonds issued whether it be in money, labor done, or property, and all fictitious increase of stock or indebtedness shall be void.

In the second sentence of this constitutional provision the same word "stock" is used but the word "bonds" as used in the first sentence is changed to the words "bonded indebtedness". It is our opinion that the words "bonded indebtedness" are included in the word "bond" and mean the accumulated indebtedness of the corporation which is represented by "bonds". Under all of the cases in which this question has come to appellate court as to what are "bonds" and what represents "bonded indebtedness" has come up in connection with business corporations organized under the sections of the law pertaining to business manufacturing corporations and usually a mortgage securing the bonds was authorized.

The above provision of the Constitution is the fundamental law of our State relative to the issuing of stock and bonds by corporations and came into our Constitution in 1875, and we do not find that it appeared in any prior Constitution of Missouri. To throw light on the meaning of the words "bond" and "bonded indebtedness" at the time these words were placed in the Missouri Constitution in 1875 we must look to the meaning of same as interpreted by the courts before and at the time of their use in the Constitution and we must assume that these words were therein used in the sense and the interpretation these terms had been given by our courts at that time.

In the case of Cartmill v. Hopkins, 2 Mo. 220, the question discussed was whether the instrument sued on was a note or a bond.

In the case of Glasscock v. Glasscock & Dodd, 8 Mo. 577 (1844), the same question was involved as to whether the instrument was a note or a bond, in which, quoting from the syllabus of this case, it is said:

> "An instrument of writing will not be considered as sealed unless by some expression

> in the body of the instrument; the maker should show that he intended it to be considered as a specialty. A mere scrawl at the end of the name, with the word 'seal' within it, will not make the writing a bond."

Grimsley v. Riley, 5 Mo. 165, is to the same effect.

The question is discussed in the case of State ex rel. West v. Thompson et al, 49 Mo. 188, l. c. 189:

> "'The common law intended by a seal an impression upon wax or wafer, or some other tenacious substance capable of being impressed.' (4 Kent, 452.) We have been very liberal as to what constitutes a common-law seal (Pease v. Lawson, 33 Mo. 35; Turner v. Field, 44 Mo. 382), but have never dispensed with a seal in bonds and deeds, only as the statute substitutes a scrawl in lieu thereof. It might be very well, as has been done in some States, to dispense with seals altogether, but courts cannot so change the law, and those who desire the change must look to the law-making power."

The word "bond" had a definite meaning at the time it was used in the Constitution of 1875 as defined by the courts prior to that time and under the well known rule that it was used in the Constitution with the same meaning as it was interpreted by the courts at that time. When the word "bond" was used in the above section of the Constitution of 1875 it meant an instrument executed by the formalities required by the common law, that the actual common law seal would be permitted provided the executed instrument would contain a recitation of the maker of the instrument to substitute a scrawl or other symbol of a seal and the substitution should be shown by the instrument to be required in lieu of the seal, or as a seal.

Section 11, Article XII, of the Constitution of the State of California prior to 1926 was identically the same as Section 8, Article XII, of the Missouri Constitution, and the Supreme Court

of California in construing the term "bonded indebtedness", as used in the Constitution of that State, said:

> "The Supreme Court of this state in the case of Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049, in construing the term 'bonded indebtedness' as found in section 11 of article 12 of the Constitution having reference to the obligations of private corporations, has held that a note and mortgage issued by such a corporation is not a bonded indebtedness within the meaning of said provision of the Constitution. To hold otherwise would be to extend the language of the Constitution to practically every form of indebtedness which a private corporation could create, and to require in every case the consent of its stockholders to the creation of such indebtedness and to the issuance of the writing which would evidence the same."
>
> Bank of Newman v. Monterey County Gas & Electric Co., 191 Pac. 970.

The words "capital notes" proposed to be issued by the above act is in our opinion not within the definition of a "bond" contained in the Constitution as interpreted by our Supreme Court prior to the adoption of the constitutional provision referred to and the definition of the word "bond" as interpreted by our appellate courts since 1875 has not changed its meaning, and the word "bond" as used in the above section means a special instrument of writing which the common law required to be under seal whether the instrument was executed by an individual or a corporation.

II.

The power and authority of a bank to borrow money for the purpose of carrying on its banking business has not been questioned in this State. In one of the earlier cases on the subject, in the case of Ringling v. Kohn, 6 Mo. App. 333, l. c. 335 and 337, the court said:

> "The charter gave to the corporation general banking powers in terms such as are usually employed for that purpose. Sess. Acts 1857, p. 642, sect. 6. Nothing is said about borrowing money. But it is elementary law that a corporation may exercise any unforbidden power which is necessary to carry into effect the powers specially granted. It would be a strange limitation of the authority to purchase exchanges, or to loan money, which should deny a simple means of obtaining occasional supplies for the purpose. A specific authority to borrow money rarely, if ever, appears in any bank charter. It has always been esteemed a necessary and inherent privilege, inseparable from the exercise of banking functions. Without it no bank, however ample its assets, could at times avoid insolvency. Curtis v. Leavitt, 15 N. Y. 9."

> "In Barnes v. Ontario Bank, 19 N. Y. 156, the court said: 'That the power to borrow existed was determined by this court in the case of Curtis v. Leavitt. That the cashier, in virtue of his general employment, could exercise the power was not denied upon the argument, and the proposition does not admit of a reasonable doubt.'
>
> Said Story, J., in Fleckner v. United States Bank, 8 Wheat. 357: 'The acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed prima facie evidence that they fell within the scope of his duty.'"

The above case was cited approvingly in the case of Donnell v. Lewis County Savings Bank, 80 Mo. 165.

Michie on Banks and Banking, Vol. 4, page 133, has this to say on the power of a cashier to borrow money for the bank:

> "The cashier of a bank is the proper officer to execute its power of borrowing money and he needs no special delegation of authority to do

> so. If done in the ordinary course of its business, it is presumably done within the scope of his duty and the bank is bound by his acts and representation in the apparent exercise of such authority."

In the proposed bill under consideration action to borrow the money is first taken and approved by the board of directors. Of course, the board of directors has more authority and power to borrow money than the cashier alone.

III.

The Supreme Court of this State has recognized the doctrine of estoppel where a corporation has borrowed money or secured some benefit from the contract although the same has been entered into informally, and this doctrine was recognized by the court in the case of Coerver v. Crescent Lead and Zinc Co., 315 Mo. 276, l. c. 297, and in the case of Farmers and Traders Bank v. Harrison et al, 321 Mo. 815, and at page 823 the Supreme Court touched on the phase of the case in the following language:

> "Whether there is implied power in a bank to secure a mere general depositor is a question that appears never to have been determined in this State. The point was raised but not decided in Cantley v. Little River Drainage Dist., supra, 2 S. W. (2d) l. c. 611, and in Huntsville Trust Co. v. Noel, ante, 749; and it is not open for decision here, because the appellant pleaded estoppel and the evidence tends to show the Auxvasse Bank got at least much the greater part of the money in controversy and held all of it on faith of the bond. The contract was performed by appellant. In these circumstances the defense of ultra vires is not available. (Cantley v. Little River Drainage Dist., supra, 2 S. W. (2d) l. c. 612.)"

In the bill under consideration, in the event the capital notes provided for therein were issued by the bank and it received the par value of the same in cash as provided by the bill, is the corporation or any of its stockholders in a position to question the validity of same?

The Supreme Court said in Cantley v. Little River Drainage District, 2 S. W. (2d) 607, l. c. 612:

> "However, there is another theory of the law which just as effectively disposes of the case. That the bank got the benefit of the funds of the drainage district is uncontroverted. The contract was fully executed by the drainage district, and in such case, ultra vires, even if pleaded, cannot be successfully invoked. McCormick v. Bank, 304 Mo. loc. cit. 288, 289, 263 S. W. 152; Schlitz Brewing Co. v. Poultry & Game Co., 287 Mo. loc. cit. 407, 229 S. W. 813; Hanlon Millinery Co. v. Trust Co., 251 Mo. 579, 158 S. W. 359; National Bank of Commerce v. Francis, 296 Mo. loc. cit. 195 and 196, 246 S. W. 326.
>
> In the Schlitz Brewing Co. Case, supra, J. T. Blair, J., has fully collected the authorities and says:
>
> 'With respect to estoppel to plead ultra vires to a contract fully executed on one side defendants rely upon the federal rule, in the main. This court and the courts of appeals of this state long since adopted the rule in force in most of the states which we said in Millinery Co. v. Trust Co., 251 Mo. loc. cit. 579 (158 S. W. 359), had been tersely stated by Rombauer, P. J., in Winscott v. Inv. Co., 63 Mo. App. loc. cit. 369, to be that: "the defense of ultra vires is not admissible where the contract has been fully executed on one side, unless it is a contract expressly prohibited by law."'"

The court in the case of Merchants' Ice and Fuel Company v. Holland Banking Company, 8 S. W. (2d) 1030, l. c. 1034, had this to say:

> "There is no better authority on that question than Bank v. Lyons, supra, In that case the Supreme Court was considering the right of the lender of money to a bank to recover in assumpsit for money had and received, although the action of the bank's cashier in making

the bank's note and in hypothecating other notes of the bank as security for the money borrowed, was void under the statute. The Supreme Court in banc held the bank was liable, and in the course of the opinion uses this language (220 Mo. loc. cit. 556, 119 S. W. 544):

> 'If it (the bank) repudiates the note for the reason that the Board of Directors had not authorized its execution, then this court would sanction rank injustice to hold that payment of that money need not be made at all. Such is not the law. The bank was not exempt from the common obligation to do justice which binds individuals. Such obligations rest upon all persons whether natural or artificial. If the bank obtained the money and by mistake or without authority of law executed therefor an invalid note, then it was its duty under this general obligation to do justice, to refund it. Under those conditions an implied obligation arose on the part of the appellant to repay the money so obtained.'"

IV.

In conclusion, it is our opinion that there is no reasonable doubt as to the status of the proposed capital notes under the proposed act when issued by a Missouri bank or trust company and sold for full value as required by the act. Capital notes issued thereunder are junior obligations of the bank compared to obligations to depositors and general creditors. They are only superior to the obligations to the stockholders and then only as to the payment of dividends. And then, such bank or trust company must agree upon restriction upon the distribution or payment of dividends upon its capital stock by the board of directors. So then who is left to question the validity of the capital notes?

The general creditors and depositors are not injured and could not question the validity of the capital notes or the power of the bank or trust company to issue them for the reason that they have been benefited by the issuance of the capital notes and not injured, and their validity could not be attacked collaterally and no persons could be heard to question their validity unless it be the stockholders of the issuing bank or trust company. And if their bank or trust company has received full value for the capital notes are not the stockholders estopped from questioning their validity? Their bank having received full consideration for the notes has received full value and so far as the holders of the capital notes are concerned their part of the contract would have been fully executed. The stockholder would have received his pro rata portion of such money by reason of the fact of owning stock in the issuing bank or trust company. In any event, the claim of the noteholders for money had and received against the bank or trust company would be superior to the stockholders of the issuing bank or trust company. Any complaint made by the stockholder as to the transaction would be unavailing.

It is, therefore, our opinion that the bill as proposed would vest in the board of directors of the bank or trust company the power to issue the capital notes for the uses and purposes and under the conditions as provided in the bill and that said bill does not contravene the provisions of Section 8, Article XII, of the Constitution of Missouri, and is in harmony with the general law of Missouri.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

SCHOOLS; SCHOOL BOND ELECTION: Qualifications of voters thereat.

11-27

November 27, 1933

FILED
64

61

Professor J. F. Morrissy
Clifton Hill, Missouri

Dear Mr. Morrissy:

This Department acknowledges receipt of your letter dated November 17, 1933, as follows:

> "We are having a special school election here to vote a bond issue of seven thousand dollars to build a school and community auditorium. The law says nothing but tax payers can vote. Our question is:
>
> 1. Just what constitutes a tax payer?
>
> 2. Is the wife of a tax payer eligible to vote?
>
> 3. Several of our women teachers say they do not pay a tax - are they eligible to vote? "

We take it that in holding the election you are proceeding under Section 9198 Revised Statutes Missouri 1929, which authorizes the board of directors of the respective school districts in the state to borrow money for the purpose of, among other things, erecting school houses. The section provides with reference to the holding of an election to authorize the board of directors to borrow money,

> "**** The qualified voters at said election shall vote by ballot* * *.

In order to determine who are qualified voters at such an election we turn to Section 9287 Revised Statutes Missouri 1929, which in part provides:

> "* * * * A qualified voter within the meaning of this Chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote".

Section 9287 and Section 9198 are both included in Chapter 57 of the Revised Statutes of Missouri 1929, so that the qualifications of voters as set out in Section 9287 would determine the qualifications of the voters at an election held under the provisions of Section 9198. Any person, male or female, who has reached the requisite age and who has lived within this state one year and the county where he or she offers to vote sixty days is entitled to vote for state and county officers at an election held for that purpose. There are no property qualifications required of voters at an election held for the election of state and county officers. Section 9287 further requires a person offering to vote at an election held under Section 9198 to have resided in the school district where such election is being held thirty days immediately preceding the holding of the election at which he or she offers to vote.

It is true that members of the board of directors of common school districts, as well as members of the boards of directors of city, town and consolidated school districts, must be resident taxpayers of the respective districts where elected. It is also true that where an increase of tax levy is voted on under Section 9225 Revised Statutes Missouri 1929, only those are entitled to vote thereon who are taxpayers of the school district wherein the election is held, but the latter section has no application to your situation.

We therefore are of the opinion that any person who has reached the required age and who has resided in the State of Missouri one year, in Randolph County sixty days and in the

school district where the proposed election is to be held thirty days next preceding the date of the holding of the election at which he or she offers to vote, is a qualified voter within the meaning of Section 9198 Revised Statutes Missouri 1929.

This conclusion will answer your questions numbered two and three. If the wife or women teachers referred to are otherwise qualified to vote, the fact that they are not taypayers is immaterial.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

BANKS & BANKING: May the capital of a new bank be provided by assignment of the assets of an old bank?
May the new bank adopt the name of the old bank?

December 4, 1933. 12-4

FILED 64 62

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This Department is in receipt of your letter of November 27th, 1933, with request for an opinion, which letter is as follows:

> "The following facts concern a case which was brought to my attention recently:
>
> Through oversight, a certain bank permitted its charter to expire and, as you know, the charter of a corporation must be extended during its life. The bank has been operating without a charter for several months and, since it cannot extend the corporate existence in the usual manner, the only recourse is to organize a new bank to continue the business of the expired corporation. Paragraph 3 of Section 5345, Revised Statutes of Missouri, 1929, states that the capital stock of a bank must 'actually be paid up in lawful money of the United States' but I am under the impression, since the new bank is to succeed the old bank, the articles of agreement may provide that instead of the capital stock being paid up in lawful money the same is being paid up by an assignment of the assets of the old bank. Of course, the incorporators must certify in the articles of agreement that the net value of such assigned assets is equal to at least the full amount of the stock of the new bank and this Department, as a result of an examination, must be satisfied that such assets are of such value.
>
> I am also of the opinion, after reading Section 4589, Revised Statutes of Missouri, 1929, that the new bank may adopt the corporate name of

the old corporation, since it is organized to continue the business of the expired corporation.

I shall appreciate an opinion from you as to whether or not the capital stock of a bank organized to continue the business of an expired corporation may be paid up by an assignment of the assets of the old bank, as indicated above, and whether or not the new bank may adopt the corporate name of the old bank."

I.

Your letter of request is divisible into two questions, the first being whether or not the capital stock of a bank, organized to continue the business of a banking corporation whose charter has expired, may be paid up by an assignment of the assets of the old bank. It is our opinion that this question may be answered in the affirmative. In your letter you state that, "through an oversight, a certain bank permitted its charter to expire and, as you know, the charter of a corporation must be extended during its life." Upon the expiration of the charter of the bank in question the officers and directors of the bank became the trustees of the old bank and have by the assignment of said trustees and officers assigned all of the assets of the old bank to a newly created bank for the purposes of carrying on the business of this bank.

If the Commissioner is thoroughly satisfied of the solvency of the old bank, and that by the assignment of the assets of the old bank by the trustees of the old bank to the newly created bank, and the incorporators shall have certified in the articles of agreement that the net value of such assigned assets is equal to at least the full amount of the capital stock of such proposed bank, same may be approved by him. It is a matter largely within the discretion of the Commissioner of Finance and he should be satisfied beyond a reasonable doubt of the condition of the bank by an examination by himself, his deputies, or his examiners, that such assets are of such value and that the capital of said new bank is not impaired. It is our opinion that the assignment should be made not only with the approval of the officers and directors of the old bank but with the approval of all of the stockholders of the old bank.

II.

In the second question in your letter, that is, may the new bank adopt the corporate name of the old corporation, it is our

opinion that it may if some other corporation has not adopted the same since the expiration of the charter of the old bank, in which event, the corporate name would have been lost to the new bank. However, this is no doubt a remote possibility, and may be readily ascertained.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

DESIGNATION OF COUNTY DEPOSITORY

FILED
65

April 24, 1933

Hon. G. T. Myers
Missouri House of Representatives
Jefferson City, Missouri

Dear Mr. Myers:

Your letter of April 8, 1933, requesting an opinion from this office, is at hand. I quote from your letter:

> "The question involved is whether or not a bank outside of the county seat may be designated as the county depository as there seems to be a little difference of opinion as to cashing and paying of county warrants?"

Section 12189 R.S. Mo. 1929 provides:

> "If, for any reason, the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositories as provided in Section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, * * *."

Section 12184 R.S. Mo. 1929 provides:

> "* * * that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided but let as an entirety: Provided, also, that in all cases of the letting of township funds, three notices posted in three public places by the township clerk will be a sufficient notice of such letting."

In Denney v. Jefferson County, 272 Mo. 436 l.c. 449, the Supreme Court said:

> "Whether or not the county court acted within its discretionary power in awarding this contract involves consideration of the statute under which it acted. It is not contended that its discretion was judicial in character, that is to say, such discretion as is possessed by courts whose jurisdiction is founded upon notice and opportunity to be heard. The county court, notwithstanding its name, is, in this matter, merely an administrative agency of the county, possessing this power in common with the township boards. (R.S. 1909, Sec. 3803). As in case of all public officers, its official acts carry with them the presumption that it has done its duty, until the contrary is made to appear. But this presumption only applies to acts within its administrative powers done in pursuance of the legislative purpose. Where this power depends upon specific facts, their exercise may always be controverted, and insofar as it is founded upon the exercise of judgment, it must be exercised in good faith, reasonably and with regard to the legislative purpose."

> "It goes without saying that the purpose of this law is to obtain for the public the largest available income from its funds. Their safety in the hands of the depository is required to be safeguarded by ample security in addition to the responsibility of the bank, and it cannot be possible that the Legislature intended to revoke its simple and peremptory command, and by this proviso to substitute a power in the county court to do whatever it might desire to do. * * * This discretion may also be of use in many ways affecting the safety or availability of the funds. * * * But it can never be permitted to substitute a purpose of the court for the expressed purpose of the Legislature, and must always be exercised 'in good faith and with due regard for the best interest of the county'. As we have already stated, we see no reason for interfering with the finding of the court in this respect, and it follows that the award of the county court was properly set aside."

It is the opinion of this office that a bank outside the county seat in an adjoining county may be designated as the county depository. The limitation placed upon county courts is that in the selection of a depository they must act in good faith and with due regard to the best interest of the county. Such was the holding in the Denney case.

Let me hear from you if I have not fully answered your question.

Respectfully yours,

Wm. ORR SAWYERS,
Assistant Attorney General

APPROVED:

_____
Attorney-General

WOS...iac

DEPARTMENT OF PENAL INSTITUTIONS:

Not liable in suit for damages for negligence.

7-21

July 7, 1933

FILED
65
32

Reverend LeRoy Munyon
Chaplain and Physical Director
Penal Institutions
Jefferson City, Missouri

Dear Reverend Munyon:

This Department acknowledges receipt of your letter dated June 22, 1933, as follows:

> "In arranging for wrestling and boxing contests in connection with the athletic activities at the Missouri State Prison, in which, at times past, outside fighters have been brought inside to meet inmate fighters, etc., the question has arisen; would the State be responsible in case of accident or injury incurred by an athlete from the outside while participating prison athletic programs?
>
> At the suggestion of authorities here at the prison, I am writing you for an opinion on this subject".

Section 8316 Revised Statutes of Missouri 1929, establishes the "Department of Penal Institutions", with the right given such Department to complain and defend in all courts and adopt and use a common seal and by which section we understand the Legislature intended to create a separate legal and suable entity, to be known as the Department of Penal Institutions. However, your attention is called to the fact that no provision is made for service of process on the entity known as the Department of Penal Institutions nor any member thereof, and that such legal entity could not be served with process as is provided in Sections 723 and 735 Revised Statutes of Missouri 1929.

State ex rel State Highway Commission of Missouri v. Bates, Circuit Judge, 296 S. W. 418, 422.

We find your question answered in principle in the case of Bush v. State Highway Commission of Missouri, 46 S.W. (2nd) 854, being an action for damages on account of negligence. The State Highway Commission is a quasi public corporation created for specific purposes and the general principles of law applicable to actions for damages on account of negligence against the State Highway Commission of Missouri would apply to such actions against the Department of Penal Institutions. In the latter case at page 857 of the opinion the court said:

> "The proposition that the state is not subject to tort liability without its consent is too familiar to deserve extended citations of authorities. Story on Agency (9th Ed.) Sec.319; Gibbons v. United States, 8 Wall. 269, 19 L. Ed.453.
>
> But appellant has sued respondent as "a corporation duly organized and existing according to law", and he contends that this court ruled in State v. Bates,supra, that the highway commission is a corporation and does not enjoy the immunity from suit which is a prerogative of the sovereign state. It is true that the court in its opinion in State v. Bates, supra, says of the state highway commission (317 Mo. 696, 296 S. W. loc. cit. 420): "It is an entity, with powers of a corporation established and controlled by the state for a specific public purpose, but that does not make this legal entity the sovereign state".
>
> And further on the same page:
>
> "But the views expressed by the court in State v. Bates, supra, do not subject the commission to liability for the tortious acts of its servants and employees".

See also Broyles v. State Highway Commission of Missouri, 48 S. W. (2nd) 78.

We are therefore of the opinion that there would be no liability on the part of the State or the Department of Penal Institutions under the circumstances outlined in your letter.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

RESTAURANTS: City Ordinance governing sanitary conditions.

September 14, 1933 9/18

FILED
65
44

Mr. Joe Myers,
Sanitation Officer,
Columbia, Missouri

Dear Sir:

We acknowledge receipt of your letter as follows:

> "Enclosed you will find a tentative ordinance for controlling the sanitation of restaurants which we, of the health department, propose to make recommendations to the City Council for its adoption. However, we would like to have your decision as to the legality of such an ordinance in a third class city before we carry the matter further."

Several sections of our statutes confer police powers. That cities of the third class have the power to regulate by ordinance any business which has to do with the health of the inhabitants there can be no doubt. Section 680 R. S. 1929, reads as follows:

> "The mayor and council of each city governed by this article shall have care, management and control of the city and its finances and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and health of the inhabitants thereof."

Section 6811 R. S. 1929, reads thus:

> "The City Council shall have power, by ordinance, to secure the general health of the inhabitants of the city by any measure to regulate, suppress or abate, etc."

The power to suppress or abate in said section 6811 Supra, must be enumerated in said section.

In Davison v. Lill, 35 S. W. (2d) l. c., 942, our Supreme Court said:

> "Several sections of our statutes confer police powers. Section 6811, R. S. of Mo. 1929, grants cities of the third class power 'to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health' and by section 6803 (Supra) to pass ordinances 'for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect.'"

In Hays v. Poplar Bluff, 263 Mo. l. c. 634, our Supreme Court said:

> "But the vice most important in this ordinance is its general scheme by which the city council places its parental hand upon the interests of the people of the city with the manifest intention of gathering to itself the unrefined and arbitrary power to determine who shall have the special privilegeof erecting buildings of combustible material in these areas, and who shall be denied, without being entitled to the courtesy of a reason. This cannot be done."

In Elkhart v. Murray, 165 Ind. 304, the Supreme Court of Indiana said:

> "If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own dependent upon the arbitrary will of the city authorities, it is invalid because it fails to furnish a uniform

> rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons."

In the case of St. Louis v. Russell, 116 Mo. 248-257, the Court held an ordinance invalid:

> "For the reason that by its provisions one citizen is permitted to erect a livery stable in a certain locality by obtaining the written consent of the owners of one-half the ground in the block, while another of like merit would not be permitted to do so for want of consent."

In Barthet v. New Orleans, 24 Fed. 63, in which an ordinance of New Orleans was held invalid which made it unlawful to maintain a slaughter house:

> "Except permission be granted by the council of the City of New Orleans."

In State v. Mahner, 43 La. Ann.496, in which an ordinance forbidding the keeping of more than two cows by any person within certain prescribed limits in the city without a permit from the city council was held void.

In Richmond v. Dudley, 129 Ind. 112, in which an ordinance forbidding the storing of inflammable or explosive oils within the limits of the city of Richmond without the permission of the common council was held void.

In State v. Dubarry, 44 La.Ann. 1117, in which an ordinance of the city of New Orleans was held void because it prohibited the setting up of any private market without permission of the city council.

In case of Newton v. Belger, 143 Mass., 598, an

ordinance permitting the Board of Alderman to exercise their discretion in granting or refusing permits for the erection of buildings within the fire limits was held invalid.

In case of State v. Tenant, 110 N. C. 609-12, an ordinance forbidding the erection of a building in the city of Ashville, without first having applied to the aldermen and obtained permission for that purpose, was held void.

All the above cases were decided upon principals, as stated in Elkhart v. Murray (Supra). They were held unconstitutional and void because they failed to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons.

Now, with reference to your proposed ordinance, our conclusion is that Sections II and IX would render the ordinance void because it is not within the legislative powers delegated to cities of the third class, by our statutes; because it would violate the fundamental principal inherent in our constitutional system, that when a municipal corporation seeks by ordinance to restrict for the public good, the rights of individuals otherwise incident to the ownership of property, it must do so by a rule applicable to all alike under the same circumstances and cannot make his enjoyment of his own depend upon the arbitrary will or caprice of the municipal legislature or their agent, the Health officer, which amounts to a delegation of the legislative power of the city to the Health officer.

The authorities, as we have tried to point out above,

clearly hold that an ordinance of this kind which requires the obtaining of a permit or ordinance as a prerequisite in the opening up and conducting a business, is void as a discrimination between individuals of a municipality with respect to the use of their property and the conduct of their business.

In case of Davison v. Lill (Supra.) the Court said:

> "An ordinance seeking to regulate citizens in the lawful conduct of their business must specify rules and conditions to be observed in such property or business so that all citizens alike may comply with them, and must not exercise or create or permit the opportunity for the exercise of arbitrary and uncontrolled discrimination between citizens so applying, otherwise such ordinance will be void and violative of Article IV, Clause 26 of Section 53 of the Constitution of Missouri."

We very much regret that you have been delayed in receiving this opinion earlier, but your request came at one of the very busiest seasons this office has.

Yours very truly,

Barnes
Assistant Attorney General.

APPROVED

Attorney General.

SURETY BONDS: Executed to Athletic Commission may or may not be cancelled at the mere pleasure of the Commission.

October 27, 1933.

10-28

FILED
65
55

Mr. R. F. Mundorff
Secretary
Athletic Commission of the
State of Missouri
Cassville, Missouri

Dear Mr. Mundorff:

This is to acknowledge your letter which reads as follows:

> "Will you please supply this office with a written opinion as to whether or not surety bonds executed prior to June 30, 1933, can be canceled at the pleasure of the commission?
>
> You will remember going over this matter with me some time ago. We would like to have a written opinion for this office, as we desire to write the bonds in a different company."

I.

Section 12998, R. S. Mo. 1929, provides as follows:

> "CREATING ATHLETIC COMMISSION.--That immediately upon this chapter becoming effective, the governor of the state of Missouri by and with the advice and consent of the senate, shall appoint two members, not more than one of whom shall belong to the same political party, who, together with the athletic

> director of the university of Missouri, shall constitute the athletic commission of the state of Missouri, and shall have such powers and duties as hereinafter set forth. The athletic director of the university of Missouri shall be ex officio chairman of said commission, in addition to his present duties. The other two members of the commission shall hold office at the pleasure of the governor. Every commissioner shall serve as such without salary."

Section 12999, R. S. Mo. 1929, among other things, provides:

> "That the athletic commission of the state of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the State of Missouri, and it shall have the power, and it shall be its <u>duty</u>: First, to make and publish rules and regulations governing in every particular the conduct of boxing, sparring and wrestling exhibitions, the time and place thereof, and the prices charged for admission thereto. Second, to accept application for and issue <u>licenses</u> to any etc. * * * * * Third, to collect fees for such license of ten dollars ($10.00) for every license issued etc. * * * * * * * * *"

II.

Thus it is the duty of the Athletic Commission, among other things, to make and publish rules and regulations governing boxing, sparring and wrestling exhibitions, and further, to collect a license fee of ten dollars. In pursuance to the above statute the Athletic Commission published rules and regulations governing boxing and wrestling exhibitions and referring to them, on page 6, the following is found:

> "The Commission will issue annual licenses as provided by law. Each application for a license shall be accompanied by a fee of $10. In addition, each application must be accompanied by a fee of $10 in

> payment of premium of $1000 bond required by the Commission. If the license is applied for after the beginning of the fiscal year, bond premium will be computed on quarterly basis. Each such license shall designate the usual place where such exhibitions are to be held."

And further, page 8,

> "No license shall be granted unless the licensee has executed a surety bond in the sum of not less than one thousand dollars ($1000), in which the surety is a bonding company authorized to do business in Missouri, the bond to be approved by the Commission, conditioned on the faithful compliance by the licensee with the provisions of this act, the rules and regulations of the Commission, and such other laws of the state as may be applicable to anything done by the licensee in pursuance of the license."

Referring to the rules and regulations, supra, it will be noted that (1) each licensee is required to give a surety bond which expires at the end of the fiscal year, (2) the premium of the bond is ten dollars or the proportionate part thereof, depending on time issued, (3) it must be a surety bond in which the surety is a bonding company authorized to do business in the State of Missouri, and (4) that it is conditioned on the faithful compliance by the licensee with the provisions of the statute etc.

As stated in Dibert v. D'Arcy, 248 Mo. 617, l. c. 660:

> "A surety is simply one who is bound for a debt of another."

So, to insure the faithful compliance by licensees with the provisions of the statutes and rules and regulations, the Athletic Commission requires a surety bond.

III.

If the surety bonds do not meet the requirements of the provisions of the rules and regulations, supra, then the present Commission would have the right and authority to require a bond that does comply therewith.

It is our opinion that a surety bond may be cancelled by the Commission if it does not meet the requirements of the rules and regulations relating thereto, or the Commission may require a new surety bond to be given that conforms thereto. However, the cancelling of a surety bond by the Commission, that meets the requirements of the rules and regulations in all respects, on the mere whim or at the pleasure of the Commission, exceeds the authority of the Commission.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

Automobiles:

1. Dealer resident of Missouri running cars from another state in Missouri to negotiate sales must use Missouri dealers licenses on them.

2. Dealer may not use dealers licenses for private purposes and pleasure.

11-23

November 14, 1933.

FILED
65

Mr. Robert L. Murphy
Prosecuting Attorney
Unionville, Missouri.

Dear Mr. Murphy:

We have your letter of September 15, 1933, in which is contained a request for an opinion as follows:

"We have a very troublesome problem here in my County in regard to the use of automobile dealers licenses of another state by a resident of this state who purports to be a representative of a motor company whose place of business is in another state.

The specific case that I would like to have the opinion of your department is this. A man living here in Unionville has a garage here and is a dealer in used cars. He has a place of business here in Unionville and he has purchased Missouri dealer's licenses. He claims that he represents a motor company whose place of business is in Chariton, Iowa. This man frequently brings cars from this place in Chariton, Iowa, to Unionville and vicinity to sell them. Most of them are used cars, and the law in Iowa is, as I understand it that when a licensed vehicle is sold the license goes with the car. So apparently both the license and the car belongs to the Iowa dealer. This man here in Unionville brings those used cars here to Unionville and runs them on the Iowa licenses, and his justification for doing so is that they serve the same purpose as a dealer's license, and in fact that they are dealer's tags because in Iowa dealer's licenses are used only on new cars. He justifies his use of the Iowa licenses on the grounds that he is a representative of the Iowa firm.

Is this proper where the man has a place of business in Missouri. I wish to call your attention to paragraph (a) of Section 7764 Revised Statutes of Missouri 1929 which states in part "All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the commissioner for all the motor vehicles owned or controlled by such manufacturer or dealer."

What is the opinion of your department as to the meaning of the phrase underlined above? It would seem to me that it would require this man to use Missouri dealer's tags on the cars that he brings down here while he is using them for demonstration purposes or otherwise.

This same individual has given us quite a lot of trouble by using his Missouri dealer's licenses for private purposes and for pleasure. He drives a car all the time and has never purchased individual license plates. When confronted with this fact he claims that he is always looking for prospects, and that as he does not keep any motor vehicle for any length of time that it would be a hardship on him as it would require that he be continually transferring license plates. Of course there is no merit in this claim and we are requiring him to buy individual license plates for his personal use. Does this meet with the approval of your department?

Will you please give me your opinion on this matter at your very earliest opportunity, as I have a case pending against this individual for operating a motor vehicle with improper license plates and would like to have your advice before proceeding with it.

Thanking you in advance, I am"

Section 7764 R. S. Mo., 1929, Art. 1, Ch. 41, provides in part as follows:

"Sec. 7764. Registration of manufacturers and dealers.- (a) All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the commissioner for distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain: etc. etc."

Section 7758 R. S. Mo., 1929, Art. 1, Ch. 41, provides in part as follows:

"Sec. 7758. Application of law.-This article shall be exclusively controlling on the registration, regulation, operation, ownership and sale of motor vehicles, their use on the public highways, etc."

Section 7759 R. S. Mo., 1929, Art. 1, Ch. 41, provides in part as follows:

> "Sec. 7759. Definitions.- **** 'Dealer.' Any person, firm, corporation, association, agent or sub-agent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers."

We can find no decision to fit this particular situation but, construing the above statutory sections together, we are clearly of the opinion that the man referred to in your letter being a dealer must use Missouri dealers licenses on all cars "owned or controlled" by him when he drives said cars in the furtherance of his sales promotions. The language of Section 7764 is perfectly plain and unambiguous. Nowhere in the article, entitled Regulations and License Fees, is there any provision allowing a resident dealer to use the licenses of another state on cars owned or controlled by him; and since by Section 7758 said article is made exclusively controlling in such matters of registration there is no room for any other construction. The dealer in this case is a resident of Missouri and must be bound by our statutes. Whatever connections he may have with any Iowa firm cannot affect his own status if as you have stated, he himself controls the cars for the purpose of selling them as a dealer in Missouri.

As to the further question of whether a dealer may use his dealers licenses on a car driven by him for private purposes or pleasure, although we can find no decision in point, we are of the opinion that he can not.

Section 7764 R. S. Mo., 1929, Art. 1, Ch. 41, provides in part as follows:

> "(b) Fees and plates for manufacturers and dealers: On the payment of a registration fee of $21.00 there shall be assigned to such manufacturer or dealer a certificate of registration in such form as the commissioner shall prescribe, and two sets of number plates bearing such number. As many duplicate sets of number plates as may be desired may be obtained upon the payment of a fee of $10.50 for each duplicate set.
>
> (c) Display of duplicate number plates: Such duplicate number plates may be displayed on any motor vehicle used in the business of the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer used for the private purposes of any such manufacturer, dealer or their employees, or on any motor vehicle or trailer hired or loaned to others."

From a reading of the above sub-sections in connection with sub-section (a) of Section 7764 quoted earlier in this opinion, it

is obvious that the legislative intent was that dealers licenses could only be displayed on automobiles used in business. Section 7764 applies to dealers only as dealers in business. A dealer in his private life is of course subject to the registration laws applicable to the average individual and must obtain his license according to Section 7761 R. S. Mo., 1929, which for the purposes of this opinion we need not set out here. To construe the law in any other way would have the effect of placing dealers in a special class for all purposes, public as well as private, and such was obviously not the legislative intent. The books abound with cases holding that where possible effect must be given to the legislative intent hence our view of the present situation.

Very truly yours,

Charles M. Howell, Jr.,
Assistant Attorney General.

Approved:

_____
Attorney General.

COUNTIES:
COUNTY BUDGET LAW:
PLEDGING OF WARRANTS:- Under Section 12184a, Laws of Missouri 1933, page 358, County Court may not issue warrants now or in the future pay back indebtedness and pool and pledge them under said Section; the Section only applies to warrants already issued and outstanding; such construction compelled by provisions of County Budget Act.

11-23

November 17, 1933.

FILED
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Judge C. E. Murfin,
Hartshorn, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am writing you in regard to Section 12184a, Laws of Missouri, 1933.

Does this Section give the County Court authority to issue warrants to pay back indebtedness and sell those warrants to some corporation or individual and start a sinking fund to take up the warrants in future years as money comes into the treasury for that purpose?"

Section 12184a, Laws of Missouri 1933, page 358, provides as follows:

"County warrants issued under the authority of Article 8, Chapter 85, R. S. Mo. 1929, issued to pay any legal indebtedness of a county may be pooled by the holders thereof and assigned to such county and be pledged by the county court to any corporation, commission or agency created or authorized by Congress or the State of Missouri to accept a pledge of such warrants and the county court is authorized to pledge the warrants of any county issued under this article in a manner to conform to the requirements, rules and/or regulations of any such corporation, commission or agency. Upon a pledge of any such warrants as by this act authorized, funds available or to be available shall be segregated and set apart for the redemption of such warrants and interest thereon from the terms of such pledge in the same manner as if said warrants had been sold, and the lien of such pledged warrants and interest thereon shall be enforced in the same manner as provided in this article for warrants sold. Funds derived from a pledge of any such warrants shall be deposited, accounted for and paid to parties so pooling them in the same manner as if such warrants had been sold or as may be provided by the requirements, rules and/or regulations of the corporation, commission or agency accepting a pledge of such warrants and advancing funds thereon."

The above section was passed by the Legislature in 1933 and contained an emergency clause which made it become effective as soon as approved by the Governor. It was approved by the Governor on May 9, 1933. At the same session of the Legislature there was passed what is known as the County Budget Law, found in Laws of Missouri 1933, pages 340-351. The County Budget Law did not go into effect until July 24, 1933. Both were passed at the same session of the Legislature and the County Budget Law, being of later enactment than the County Warrant Act, must be deemed to have modified or repealed the County Warrant Act to such an extent as they are irreconcilably in conflict.

In State ex rel. v. Crawford, 262 S. W. 341, 343, the court says:

> "The general language referred to cannot be construed to destroy specific contrary provisions in the later act, nor will the fact that the two acts are passed at the same session prevent the later from repealing and modifying the former if they are in irreconcilable conflict. When two acts in pari materia are passed at the same session, they are to be construed so that both can stand, if reasonable construction will permit. Nevertheless, if there is irreconcilable repugnancy, the later act prevails. (Citations omitted). Further, a special act is not to be held repealed by one of general nature, even of later enactment, in the absence of negative words, or unless an irreconcilable inconsistency is necessarily raised."

A review of these two acts will disclose that there is an irreconcilable inconsistency. We shall not attempt to quote the entire County Budget Act, but shall point out such provisions therein as seem to us to conflict with Section 12184a. Section 1 of the Act, among other things, provides:

> "* *The County Court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 2 of the Act provides as follows:

> "The court shall classify proposed expenditures in the following order:
>
> Class 1: The County Court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.
>
> Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such

expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1.

In estimating the amount required in class 2 the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair and replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county.

Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

Class 5: The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expenses of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.

Class 6: After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

Class 6 of Section 5 of the Act provides as follows:

"Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes

have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

Section 14, among other things, provides:

"Any cash surplus at the end of any fiscal year shall be carried forward and merged with the revenues of the succeeding year. Payment of any legal unpaid obligations of any prior year, however, shall be a first charge in the budget against the revenues of the budget year; provided that any deficit existing at the end of the year preceding that in which this act takes effect may be paid over a term of years, or in such other manner as the county court may determine."

Section 17 of the Act provides as follows:

"The county court may borrow money in anticipation of the collection of taxes for the current fiscal year. The amount of such loans shall at no time exceed seventy-five per cent of the estimated collectible revenues for the year yet uncollected, and shall be paid out of the revenues for the year in which made. THe county court shall determine the amount and terms of such loans."

Section 20, among other things, provides:

"The accounting officer shall be personally liable and liable on his bond for the amount of any obligation incurred by his erroneous certification as to the sufficiency of an appropriation or of a cash balance, or for any warrant drawn when there is not a sufficient amount unencumbered in the appropriation or a sufficient unencumbered cash balance in the fund to pay the same, or for the payment of any amount not legally owing by the county."

Under the County Budget Act it is apparent that the purpose of the Legislature was to put the county on a balanced cash basis. The Act in Section 2 provides how proposed expenditures should

be classified and their order of payment. The expenses of the county are to be paid according to the way they are classified and in no other way. The county court is given authority to borrow money up to seventy-five per cent of the estimated collectible revenues, and any warrant is forbidden to be drawn when there is not a sufficient amount unencumbered in the appropriation, or a sufficient unencumbered cash balance in the fund to pay it. Under Section 12184a, the warrants issued under Article 8, Chapter 85, to pay anylegal indebtedness of the county may be pooled by the holders thereof and assigned to the county and thereby pledged by the county to some agency authorized to accept the pledge, and the funds derived from the pledge are to be turned over to the persons who own the warrants and assigned them to the county. The section further provides; that upon any pledge funds available or to be available shall be segregated and set apart for the specific purpose of redeeming such warrants.

In answer to your inquiry these two acts, which more or less over-lap, must be reconciled and must be construed as to give effect to both, if possible. Section 12184a cannot be construed to give the county court the right to issue warrants when there are no unencumbered funds out of which to pay them. If the act be construed as giving the county court the right now and in the future to issue warrants when there is not a sufficient unencumbered amount in the appropriation, or cash balance in the fund to pay them, then it appears to us that this act is in direct conflict with the County Budget Law. The County Budget Law provides as to how the expenditures of the county shall be classified and how they shall be paid. In Section 2, class 6 above quoted, it provides that all the five classes above shall be taken care of before any expenditure is made under class 6, and that outstanding warrants shall be paid before any expenditure is authorized under class 6. In other words, under Section 2, outstanding warrants come between classes 5 and 6. If, under Section 12184a, funds to become available for the redemption of such warrants could be segregated and used only for that purpose, such policy would be in conflict with Section 2 of the Budget Act.

Section 12184a simply provides the method for the county to borrow money to take care of its outstanding warrants. Section 17 above provides that the county court may borrow money at no time to exceed seventy-five per cent of the estimated collectible revenues for the year yet uncollected. There again appears a conflict. Under Section 20 of the County Budget Law the drawing of a warrant when there is not sufficient cash balance in the fund to pay the same is prohibited. Such section is in conflict with Section 12184a as applied to warrants to be drawn now or in the future, because if there is a sufficient cash balance in the fund to pay the warrant then there would be no necessity of issuing warrants, pooling them and pledging them with any corporation to obtain funds with which to pay them. Viewing the two statutes as a whole we are convinced that Section 12184a cannot be construed as to give the county court authority now or in the future to issue warrants for past indebtedness in order that they may be pooled and pledged to some corporation authorized to accept such

pledge. In order to reconcile the two statutes we must adopt the conclusion that Section 12184a only applies to legal warrants which are outstanding at the time the Act became effective.

Legal warrants outstanding at the time the Act became effective were a claim against the county in the hands of individuals. The Act provides that they may be pooled, assigned to the county and pledged by the county to some corporation. This act of pledging on the part of the county does not increase the county indebtedness in any respect, but only changes the creditor of the county from the individuals who pooled them to the corporation which accepted the pledge. So far as the county is concerned, it is in the same relation to those outstanding warrants as if the individuals themselves had pooled the warrants and assigned them to some corporation and the corporation had presented them for payment so that interest would start. So far we deem there is no conflict between the two statutes as applied to already outstanding warrants. However, when those warrants are presented for payment we believe that they must be paid according to the provisions of the County Budget Law. Under Section 2 and Section 5 of the Act it is apparent that expenditures for the first five classes must be taken care of before outstanding warrants for prior years can be paid. Outstanding warrants for prior years must be paid before the expenditures authorized under class6, and we conclude that such outstanding warrants for prior years are to be paid under the County Budget Act after the expenditures of class 5 have been met, and before any expenditure is made under class 6.

It is therefore the opinion of this Department that in view of the existence of the County Budget Law and Section 12184a dealing with county finance and county warrants that they both must be construed together in such a way as to give effect to both of them if possible; that under Section 12184a the county court would not now or in the future have any authority to issue warrants to pay back indebtedness for the purpose of having the warrants pooled and pledged to a corporation; that Section 12184a must be construed to apply only to legal outstanding warrants already issued, and that they may be pooled under the authority of that Section notwithstanding the County Budget Law, but that when such warrants are presented for payment they shall not be paid until the first five classes, as set out in Sections 2 and 5, shall have been paid; that the outstanding warrants for prior years shall be paid after the five classes have been paid, but before any payment is made under class 6.

Very truly yours,

Frank V. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

IN RE: Maximum amount in commissions County Collectors can retain as compensation.

FILED
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April 12, 1933.

Hon. Dan M. Nee,
Prosecuting Attorney,
Greene County,
Springfield, Missouri.

Dear Sir:

Your letter requesting an opinion reads as follows:

"The proposition confronts us here in Greene County as to the amount our Collector is permitted to retain annually as salary and commissions.

Under Section 9935, Revised Statutes of Missouri, 1929, the maximum amount which he may retain out of the current collections, is $9,000.00. Then, Section 9969, Revised Statutes of Missouri, 1929, provides that he is entitled to commissions for the collection of delinquent taxes.

As I am informed now, the commissions which he is to receive from delinquent taxes, in addition to the regular collection of current taxes, will exceed considerably the sum of $9,000.00.

Now, the question is, is he entitled to retain a maximum of $9,000.00 from the commissions on delinquent taxes and the commissions on current taxes; or is he entitled to $9,000.00 as commission on current taxes, then in addition to this amount, is he entitled also to commissions on further collections of delinquent taxes, even though the total amount of both exceed the $9,000.00 fixed as the maximum under Section 9935?"

Section 9935 R.S. of Mo., 1929 corresponds to Section 12927 R.S. of Mo., 1919, and Section 9969 R.S. of Mo., 1929 corresponds to Section 12959 R.S. of Mo., 1919. These two sections, 9935 and 9969 in the revision of 1929, barring slight changes which are immaterial for the purpose of determining the question we are considering, are identically the same as Sections 12927 and 12959 R.S. of Mo., 1919.

Your letter presents the question whether or not Section 9935 R.S. of Mo., 1929 fixes the maximum compensation County Collectors may receive. The question you present involves a construction of

Sections 9935 and 9969 R.S. of Mo. of 1929; Section 9935 R.S. of Mo., 1929 provides, among other things, as follows:

> "The collector shall receive as full compensation for his services in collecting the revenue except back taxes, the following commissions and no more: ***"

Then follows fifteen subdivisions fixing the rates of commissions according to the amounts of revenue collected in the respective counties and the City of St. Louis. The pertinent parts of sub-sections XIV and XV provide as follows:

> "XIV. In all counties or cities wherein the total amount of all such taxes and licenses levied for any one year exceeds two million dollars, the collector of revenue shall receive, collect and retain as full compensation for his services for collecting all revenues and other dues which he is authorized to collect belonging to the state, school, county and city the following commissions, viz: ***
>
> All such commissions hereinbefore enumerated shall be deducted and retained by such collector out of the amounts collected for state, school, county and city, respectively, and upon settlement with such collector shall be credited to his account and charged to the respective revenue accounts. On all back taxes and all other delinquent taxes, he shall be allowed a commission of two per cent., which shall be added to the face of the tax bill and collected from the party paying such tax as a penalty in the same manner as other penalties are collected and enforced. The said collector shall pay all salaries and other expenses of his office and all other costs of collecting the respective revenues. ***
>
> The collector shall make settlement and annually on the first Monday of March, and at the expiration of his term of office, with the proper officer of the city, or with the county court of the county for all commissions retained; and all commissions hereinbefore allowed shall be computed for the year or part of the year next preceding the dates of such settlement. Said collector shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting the revenue, which shall be allowed to him as against the commissions retained by him; and out of the residue of such commissions in his hands after deducting the amount of such vouchers allowed he shall be allowed and authorized to retain, as far as the said residue of such commissions in his hands will permit, a compensation at the rate of ten thousand dollars per annum. Should such residue of commissions be less than sufficient to cover the above compensation, then the entire residue shall be allowed to him, and shall be in full payment for his services. ***

All fees, commissions or other compensations heretofore charged, received or allowed by or to any such collector, as compensation for his services, whether under or by virtue of state law or not, are hereby abolished; and such collector and all his deputies and employes are hereby forbidden, under penalty of forfeiture of office to collect, charge or receive, directly or indirectly, any fees or commissions in the nature of compensation, or other compensation other than those allowed and authorized by this section.

XV. For the purpose of enabling the state auditor to determine the compensation of the collector to be paid by this state, it is hereby made the duty of the clerk of the county court, immediately after such annual settlement made by the collector, to make out and forward a statement to the state auditor, under the seal of the court, showing the aggregate of all such taxes and licenses levied for the year for which such settlement was made, including therein local, special and school and all other taxes; provided, that no collector shall be allowed to retain over nine thousand dollars of commissions and fees in any one year except as provided in subdivision fourteen herein; and all fees and commissions coming into the hands of any collector from any source whatever in excess of nine thousand dollars except as provided in subdivision fourteen, shall be paid into the city, county and state treasuries in proportion to the amount received on taxes collected for each; ***"

Section 9969 R.S. of Mo., 1929, reads as follows:

"Fees shall be allowed for services rendered under the provisions of this article as follows: To the collector, except in *such cities, four per cent. on all sums collected; in such cities two per cent. on all sums collected--such per cent. to be taxed as costs and collected from the party redeeming. To the county clerk, for making the "back tax book" twenty-five cents per tract, to be taxed as costs and collected from the party redeeming such tract. To the circuit clerk, justice of the peace, sheriff and printer, such fees as are allowed by law for like services in civil cases, which shall be taxed as costs in the case; provided, that in no case shall the state, county or city be liable for any such costs, nor shall the county court or state auditor allow any claim for any costs incurred by the provisions of this article."

The legal history of these two sections shows Section 9969 R.S. of Mo., 1929 was first put on the statute books April 12, 1877, and was then, as now, applicable to back and delinquent taxes, and Section 11 of the Act read in part as follows:

> "Fees shall be allowed for services rendered under the provisions of this act, as follows: To the collector, except in the city of St. Louis, four per centum on all sums collected; in the city of St. Louis two per centum on all sums collected, such per centum to be taxed as costs, and collected from the party redeeming."

We find Section 9935 R.S. of Mo., 1929, was enacted May 9, 1879 (See Session Laws of Missouri, 1879, p. 92) as an amendment to an Act regulating the fees of collectors passed May 2, 1877 (See Session Laws of Mo., 1877, p. 253). The Act of 1879 contained two sections and the first section contained only thirteen subdivisions and the same proviso as occurs in subdivision XV of Section 9935 R.S. of Mo., 1929; and subdivision 13 of 1879 referred to subdivision XII thereof for the exception mentioned in subdivision XV of Section 9935, R.S. of Mo., 1929. Two new subdivisions have by amendments through the years been added to what is now Section 9935, Chapter 59, R.S. of Mo., 1929. This Act of 1877 was a general law applicable to each county in the state and the city of St. Louis and allowed the Collector the commission named therein. Subdivision 12 of the Act of 1879 appears now as subdivision XV of Section 9935 R.S. of Mo., 1929.

We see Section 9935 fixes in subdivision XIV a maximum compensation which collectors are allowed to receive in counties and cities wherein the total amount of all taxes and licenses levied in any one year exceed two million dollars, and subdivision XV of said section contains the following provision:

> "Provided that no collector shall be allowed to retain over nine thousand dollars of commissions and fees in any one year except as provided in subdivision fourteen herein."

And we find under the Back Tax and Delinquent Statute, Section 9969, which provides as follows:

> "Fees shall be allowed for services rendered under the provisions of this article as follows: To the collector except in such cities four per cent. on all sums collected; in such cities two per cent. on all sums collected--such per cent. to be taxed as costs and collected from the party redeeming."

Your letter states"the commissions the Greene County Collector will receive from the delinquent taxes plus commission from current taxes will exceed nine thousand dollars-is the collector entitled to receive any sum in excess of nine thousand dollars in Greene County?" Section 9935 fixing a maximum amount allowed collectors was passed in 1879, two years after the back tax and delinquent statute, now Section

9969, was enacted. This back tax section, 9969, was enacted in 1877 and is an earlier and general statute, while Section 9935 is a later and special statute dealing minutely with the collector's commissions and compensation; each statute deals with the same subject, the collector's compensation.

If the collector's commission on current taxes plus his commission on delinquent taxes for the year will exceed the maximum of nine thousand dollars allowed by Section 9935, R.S. of Mo., 1929, then if full force is given to Section 9969, allowing the collector to retain all of the four per cent commission on back taxes, there is a conflict between the results produced by the operation of the two sections, 9935 and 9969 in this: that under Section 9935 the collector is limited to nine thousand dollars compensation, and under Section 9969 he is entitled to have the four per cent on all delinquent taxes even though his total compensation exceeds the nine thousand dollars maximum Section 9935 permits him to retain.

The rule in this situation is in case of a conflict between a general and a special provision of a statute, the special one prevails.

McGrew v. Mo. Pac. Ry. Co., 230 Mo., 496
State ex rel Rosenblatt v. Lindell Hotel Co., 9 Mo. App. 450

Our Supreme Court has considered this question and construed these provisions of the statutes as to amount of compensation Collector can retain in case of

State ex rel Buchanan Co. v. Fulks, 296 Mo., l.c. p.626

in which it is said:

> "Where there is one statute dealing with a subject in a general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one. *** But it is admitted that this case is within the proviso of subdivision XV of Section 12927. It must be obvious that "to the extent of any necessary repugnancy between them, the special will prevail over the general statute". The canons of construction require that the two statutes relating to the same subject should be harmonized and read together as constituting one law; the special being viewed as an exception to the general statute; otherwise, the proviso of Subsection XV is meaningless. Our conclusion is that Fulks was not entitled to retain the four per cent commissions on delinquent and back taxes provided by Sec. 12959, R.S., 1919, but was required to account for all commissions

My opinion is therefore that assuming your county is not under township organization and the total amount of taxes and licenses levied for any one year does not exceed two million dollars, your County Collector can retain only nine thousand dollars as his full compensation and must account in his annual settlement for all commissions from both current taxes and back or delinquent taxes in excess of nine thousand dollars.

Yours very respectfully,

EDWARD C. CROW.

APPROVED:

Attorney General

ECC:AH

Wholesale permittee cannot sell to another wholesale permittee -- Permittee for consumption where sold cannot sell in original package to be consumed elsewhere than where sold.

April 15, 1933

FILED
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Hon. Dan M. Ree
Prosecuting Attorney
Springfield, Missouri

ATTENTION MR. CHAS. L. CHALENDER!

Dear Sir:

Your letter reads:

> "Confirming our telephone conversation this morning, I would like to ask for an opinion from your department concerning the new beer law. The Springfield Grocery Company, of this city, has a permit under 'B' of Section 13139-E, known as Distributors and Wholesalers License. This company is distributor for a Milwaukee brewer. They have a large number of counties in southwest Missouri, and desire to sell to other wholesalers who hold permits under paragraph 'B', the wholesalers, in turn, selling to retailers.
>
> I would like to know whether or not, under your interpretation, this can be done.
>
> I would also like to call your attention to the license permit in paragraph 'C', and to the construction of said license permit in Section 13139-U. Please advise whether the holder of a $10.00 permit for consumption on the premises, can also sell in the original package to be taken away.
>
> Also advise whether Mr. Ralph Crover, who runs a lunch stand in the basement of the Landers Building, and has a $10.00 permit, can sell and deliver beer to the offices in the building."

Wholesale permittee cannot sell 3.2 per cent beer to person or corporation having a wholesalers permit under the act approved March 15, 1933

Section 13139ee of House Bill No. 23 (known as Beer Bill) approved March 15, 1933 forbids sale by wholesale permittee to another wholesale permittee. A wholesale dealer can sell only to a grocer or other merchant permittee or to a permittee for sale for consumption on premises where sold.

Section 13139ee provides as follows:

> "A permit authorizing any distributor or wholesaler to sell non-intoxicating beer in this state shall be construed to authorize the sale thereof only to holders of permits authorizing the sale of non-intoxicating beer to consumers, not for resale, but shall not be construed to authorize the sale by any such distributor or wholesaler of non-intoxicating beer direct to consumers."

Permittee for sale for consumption on premises where sold cannot sell in an original package to be taken from permittee's premises and consumed elsewhere.

The undersigned have no personal knowledge of Mr. Crover's lunch stand and Mr. HornBostel is not in Jefferson City at this time. But I will say if the officers mentioned in the building are not a part of Mr. Crover's premises which he either rents or owns and controls and uses in connection with his business of conducting a lunch stand he cannot sell and deliver 3.2 per cent beer to occupants of offices in the Landers Building.

Very respectfully

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

Attorney General

ECC:SW

IN RE: THE USE OF BEER ON TRAINS WITH DINER ATTACHED.

May 19, 1933.

FILED
66
22

Mr. Dan M. Nee
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

Your letter of May 1 requesting an opinion from this office is in words and figures as follows:

> "Suppose a railroad company has a permit to sell beer on the premises; that is, on its trains. Will this permit allow the permittee to sell beer, not only in the dining car, but also in the observation and other cars on the same train on which the dining car is being operated?"

It is the opinion of this office, under the recent beer law, a railroad company having a permit to sell beer on the premises, having obtained said license for its train, may sell said beer not only in the dining car but also in the observation and other cars on the same train on which the dining car is being operated.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOS/AJ

TREASURER'S DRAFT: Not required to be surrendered to endorser.

May 20, 1933.

FILED
66

Honorable Richard R. Nacy,
State Treasurer,
Jefferson City, Missouri.

Dear Mr. Nacy:

This Department acknowledges receipt of your letter dated May 11, 1933, as follows:

> "On March 3, 1933, Treasurer draft was issued to Irwin Williams for $80.00.
>
> This draft was endorsed in the name of Irvin Williams, which has been proven to be a forgery; however, not until the draft had run its regular course, and returned to this office. The party cashing the draft refuses to make good on his endorsement unless the draft is turned over to him.
>
> Will you kindly advise if I am permitted to deliver the draft to him upon payment of the amount of it?"

We do not believe that the party cashing the above draft has a right to demand the surrender of the original draft to him before making it good. It is a well recognized rule that the best evidence obtainable is the original document which, in this case, would be the draft. However, Section 1660 R. S. Mo. 1929, provides as follows:

> "Copies of all papers and documents lawfully deposited in the office either of the treasurer or auditor of the state, when certified by such officer and authenticated by the seal of office, shall be received in evidence in the same manner and with the like effect as the originals."

It will be seen from the above Section of the Statute that a copy of the draft duly authenticated in court will have the

same effect as the original itself. We think, therefore, that you should make a certified and authenticated, or photostatic copy for the use of this endorser, and such instrument in his hands will serve all the purposes that the original itself will serve.

However, in as much as the question involved here is one of forgery, and it may be difficult to duplicate the handwriting upon a copy or photostatic copy, we believe it would be proper, if this matter should reach the courts, to take into court the original draft upon a subpoena or order of court for the purpose of being introduced into evidence. You, of course, would be permitted to withdraw the original instrument, after it had served its purpose for trial, and return it to the records and files of your office, where such original documents are required to be kept.

Very truly yours,

Assistant Attorney General.

APPROVED:

_____
Attorney General.

FWH:S

WORKMEN'S COMPENSATION COMMISSION:

ATTORNEYS AT LAW:

To represent a claimant before the commission one must be a member of the Bar.

May 24, 1933

FILED
66

Hon. Edgar C. Nelson, Chairman,
Workmen's Compensation Commission
Jefferson City, Missouri

My dear Mr. Nelson:

We are in receipt of your letter of May 18th which is as follows:

> "Will you please give our Commission your opinion regarding one who is not a member of the Bar practicing before the Commission as a representative of a claimant. As far as I know there is nothing to prevent this but we would be pleased to have your opinion."

The Workmen's Compensation Act, Chapter 28, R. S. Mo. 1929, confers among other things, statutory rights and privileges upon the commission for the hearing of disputes and the regulating of compensation of employees injured in the course of their employment.

Section 3338 R. S. Mo. 1929 provides:

> "The commission or any of its members shall hear in a summary proceeding the parties at issue and their representatives and witnesses and shall determine the dispute. All evidence introduced at any such he rings shall be reported by a competent stenographer appointed by the commission. The award, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue, shall be filed with the record of proceedings, and a copy of the award shall immediately be sent by registered United States mail to the parties in dispute and the employer's insurer."

Section 3349 R. S. Mo. 1929 reads as follows:

> "All proceedings before the commission or any commissioner shall be simple, informal and summary, and without regard to the technical rules of evidence, and no defect or irregularity therein shall invalidate the same. Except as herein otherwise provided, all such proceedings shall be according to such rules and regulations as may be adopted by the commission."

Section 3321 R. S. Mo. 1929, among other things provides the following:

> "* * *The commission may allow as lien on the compensation, reasonable attorney's fees for services in connection with proceedings for compensation if such services are found to be necessary and may order the amount thereof paid to the attorney in a lump sum or in installments. All attorney's fees for services in connection with this chapter shall be subject to regulation by the commission and shall be limited to such charges as are fair and reasonable and the commission shall have jurisdiction to hear and determine all disputes concerning the same."

No where in Chapter 28, R. S. Mo. 1929, do we find where a claimant may be represented before the commission by one not a member of the bar.

Section 3339 supra, would intimate that the claimant might be represented thus, as the statute says that the commission shall hear in a summary proceeding the parties at issue and <u>their representatives.</u> And Section 3349, supra, provides the proceedings shall be according to rules and regulations as may be adopted by the commission. However, we are constrained to say that one who is not a member of the bar may represent a claimant before the commission.

The question then would be whether or not one appearing before the compensation commission for a claimant would be practicing law.

Section 11692 R. S. Mo. 1929, defines practice of law and

law business as follows:

> "The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

Section 11693 R. S. Mo. 1929, provides a penalty for one to engage in the practice of law or do law business without being admitted to the bar.

We again call your attention to Section 11692, supra, wherein the practice of law is defined to be the appearance as an advocate in a representative capacity in connection with proceedings pending before any committee or commission constituted by law or having authority to settle controversies. The Workmen's Compensation Commission has authority to settle controversies and is a commission constituted by law, and any person, in our opinion, who in a representative capacity appears for a claimant before the commission would be deemed to be practicing law. It must therefore follow, that if the appearing before the commission is practicing law, then those practicing law must have a license or be admitted to practice before the bar.

We are substantiated further in our belief that a person appearing for a claimant before the commission should be an attorney at law in view of Section 3321, supra, relative to attorney's fees

and the establishing of a lien on the compensation of claimant for services thus rendered. And further, in that a claimant would have rights to be preserved, if he be aggrieved by the decision of the commission, through the procedure of appeal or review.

In the case of Woods v. American Coal & Ice Co. et al. 25 S. W. (2d) 144, the St. Louis Court of Appeals in writing its opinion held the following:

> "* * *Our courts have held that the findings and award of the commission have the force and effect of the verdict of a jury, and in the same way become the basis for a court judgment, etc., (citing cases)* * *Privitt v. Jewett (Mo. App.) 225 S. W. 139, provided that there is substantial and competent evidence to sustain such findings, (cases cited)* * *"

It is thus seen that substantial evidence is necessary even though the hearings are simple, informal and summary, and without regard to the technical rules of evidence.

We are therefore of the opinion, as above intimated, that no one except a member of the bar may practice before the commission as a representative of a claimant.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

IN RE: AWARD:--RIGHT OF MORTGAGEE TO AWARD MADE UNDER CONDEMNATION PROCEEDINGS.

June 1, 1933.

FILED
66

Hon. Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Attention: Mr. H. S. Johnson
Chief Clerk.

Dear Sir:

This department is in receipt of your letter of May 24 in which you request an opinion from this office as to the proper method of handling the following case:

> "On March 15th, last, your office issued check for $70.00 payable to C. C. Vickers, Novella Vickers and Wellman Arthur, in payment for right of way for land taken for Farm To Market Road South of Mt. View, in Howell County. A deed was duly executed and delivered to the Public at that time for the land taken. The check was made jointly. At that time the Vickers were the legal owners of the land. Arthur held a mortgage on the land deeded only. No agreement whatever I am advised was made between these parties concerning a division of the money. Nor did the deeds delivered, I am told make any provision concerning who was to receive the money. Arthur wants all the money and will not sign the check so that it may be cashed unless it is given to him. My clients, the Vickers claim the entire sum as legal owners of the land at the time the deeds were executed. They are in my opinion entitled the entire sum in the absence of some stipulation to the contrary."

Section 21 of Article II of Constitution of Missouri provides:

> "That private property shall not be taken

> or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

The majority view on the question of where mortgaged property is taken in eminent domain proceedings is that the mortgagee is entitled either to the whole award made for the condemned land or to a share thereof to the extent of its interest or damage. The courts are not unanimous on this proposition, however, many authorities holding that in the absence of a statute providing for compensation to the mortgagee, the mortgagor may recover the full amount of compensation without regard to the mortgagee; the latter having his remedy against the mortgagor.

The Missouri cases seem to follow the doctrine that the mortgagor is entitled to the payment of the award in the case of Thompson v. The Chicago, etc. Ry. Co., 110 Mo. l. c. 163; the court said:

> "The damages awarded to the owner stand instead of the land, and can be subjected to the payment of the incumbrance. Railroad v. Brown, 12 L. R. A. 84, and notes.
>
> "'The burden of proof is on the mortgagee to show to what extent he has a claim upon the funds; and that question is then litigated between the parties in interest, and not at the cost of the taker of the land.' 1 Jones on Mortgages (4 Ed.) sec. 681 a.
>
> "'The land-owner is entitled to full damages, and the question as to the distribution of the money between the mortgages is a question which does not concern the plaintiff.' Railroad v. Baker, 102 Mo. 553.'"

In the case of Chicago, etc. Ry. Co. v. Baker,

103 Mo. 1. c. 560, the court said:

> "The mortgagees are no doubt entitled to have the damages awarded by the jury applied to the payment of the mortgage debts, and they can still have that done. They might have demanded a separate assessment of damages as to the lands embraced in each deed of trust, but they made no such request, and they are not here making any complaint. The fact that the jury awarded the damages in one sum to defendant Baker is a matter of which the plaintiff has no right to complain. The mortgagees may waive their right to the money, if they see fit so to do, or they can still have their rights adjusted. The land-owner is entitled to full damages, and the question as to the distribution of the money between the mortgagees is a question which does not concern the plaintiff."

These two cases were cited with approval in the case of Cassville School District, v. McArtor, 286 S. W. 729.

While these cases might seem to bear out the contention that the award might safely be made to the mortgagor, the case of Morgan v. Willman, 1. S. W. (2d) 193, held that a mortgagee was, under the section of the Constitution cited supra, an "owner"; so that payment made to the mortgagor upon the authority of the railroad cases cited supra would not bind the mortgagee. The court said:

- mortgage interest as property.

> "After a careful and thoughtful analysis and study of the authorities bearing upon the question, we are constrained to the view, and so hold, that the interest of plaintiff in the land in controversy, by reason of being the owner and holder of the note secured by the deed of trust upon such land, is "property," and that plaintiff is the "owner" of property, within the meaning and intent of Chap. 21, art. 2, of the Constitution, and the applicable statutes of this state."

The court then went on and concluded:

"Under a statute requiring an award in condemnation proceedings to be paid to the persons entitled thereto respectively, or into court for their use, the mere payment of the amount of the award, without designating the owners, to the clerk of the court, who turns it over to the owner of the equity of redemption, who settles the judgment as to his interest only, does not bind the beneficiary in the mortgage, who was notified merely by publication, and claims under assignment of the mortgage, although the trustee and beneficiary named in the mortgage were made parties to the action."

Therefore, it is the opinion of this office that the proper method of handling the case which you now have before you is as follows:

(1) The money should not be paid to the Vickers as the legal owners of the property unless a release be first obtained from the mortgagee, or unless the parties can come to some agreement as to the award.

(2) In the event that a release can not be obtained or there can be no agreement reached, the money should be paid to the court and the parties required to interplead so that their respective interests may be legally adjudicated.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JWH/AJ

PAPER AND STATIONERY: Duties of Commissioners of Public Printing under Sec. 13806 R. S. of Mo. 1929 in view of Senate Bill 192.

6-22

June 15, 1933.

FILED
66
28

Hon. Richard R. Nacy
State Treasurer
Jefferson City, Missouri

My dear Mr. Nacy:

We acknowledge your oral request for an opinion of this office respecting the effect of Senate Bill No. 192, upon the powers and duties of the Commissioners of Public Printing respecting the letting of the contracts for paper and stationery as provided for in Sec. 13806 R. S. of Mo. 1929, and in accordance therewith render the following opinion.

The duties placed upon the Commissioners of Public Printing in respect to the furnishing of paper and stationery are set forth in Section 13806, the pertinent parts of which read as follows:

> "The commissioners of printing shall on or before the first day of July of each year give notice that sealed proposals will be received at the office of the secretary of state for the paper for the state printing, for stationery for both branches of the general assembly and for each and all of the state departments and bureaus for the term of one year from the first day of July. * * *

It is contemplated that the contract will be awarded on the basis of these proposals and the contract promptly let. This, in view of the fact that the statute provides that the contract shall run from July 1st. The notice should be given, the proposals received, and the contract awarded prior to the first day of July, otherwise, the Commissioners would be required to purchase on the open market the necessary paper and stationery needed between the first of July and the date the contract is executed, thus losing to the state the obvious benefits of the general contract.

Senate Bill No. 192, as passed by the 57th General Assembly and approved by the Governor on April 21, creates the office of State Purchasing Agent, describes his powers and duties in respect to the purchasing of supplies required by the various boards, bureaus, commissions, institutions and departments. The parts of the Act applicable to the present issue are as follows:

"Section 2. The purchasing agent shall purchase all supplies, except printing, for all departments of the state, except in this act otherwise provided. * * * * * *"

"Section 11. The term 'supplies" used in this act shall be deemed to mean supplies, materials, equipment, contractual services, and any and all articles or things, including the paper used for printing, but not the work of printing, used by any department of the state government. * * * * * * * * * * * * * * The term 'department' as used in the act shall be deemed to mean department, board, commission, bureau, institution, or any other agency of the state'"

As the foregoing Act carries no emergency clause, it does not become the law on the subject until July 24, 1933; from and after that date, the duties of the Commissioners of Public Printing in respect to the purchase of the paper and stationery as required by Sec. 13806 are transferred to the State Purchasing Agent. Until that time, however, the duty and obligation is upon the Commissioners of Public Printing to comply with the law, the State Purchasing Agent being entirely without authority to act until after July 24. In the case of State Board of Election Commissioners, et al, v. Coleman, et al, 29 S.W. (2d) 619, the Supreme Court of Kentucky stated at page 622 as follows:

> "'It would seem that it would require the citation of no adjudged cases to demonstrate that it would be incompetent for public officers to perform completed duties under a law that had no existence than prospective or potential. Until the time arrives for it to take effect as a controlling mandate of governmental policy, it necessarily could have no more force than if it had never been enacted. In other words, it requires no argument to show that a statute is not a governing law until it does take effect and necessarily nothing provided for in it may legally be done until it does so. Hence we read from the text in 36 Cyc. 1192, subd C: 'Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive officer has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void.'"

Section 13806 R.S. of Mo. 1929, being in full force and effect until July 24, 1933, the duty rests upon the Commissioners to comply with the provisions of the law. Not only are the duties of the Commissioners determined by the law effective at the time the law requires an act to be performed, but the rights for the contractor are also determined by the law at the time the contract is executed. The rule is laid down in 59 C.J., p. 187, a portion of Sec. 324 reading as follows:

> "The rights of the contractor are fixed by the contract and by the law in force at the time of its execution."

And the State is bound by such contracts, as stated in 59 C.J. page 170, Sec. 285, reading as follows:

"The state is bound by contracts executed in its behalf by its authorized officers or agents, although not to be performed until after the expiration of such officer's term; and a contract made by state officers under statutory authority binds the state notwithstanding the subsequent repeal of the statute authorizing it."

It is therefore the opinion of this office that the Commissioners of Public Printing may proceed to advertise for bids and award a contract covering paper and stationery in accordance with the provisions of Art. 1 of Chap. 115, R.S. of Mo. 1929, and that if such contract is awarded in accordance therewith prior to July 24, 1933, the same will be a valid and subsisting contract.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:AH

Beer Bill – Successor to Food and Drug Commissioner

June 30, 1933

7-3

FILED
66
31

Hon. Richard R. Macy
State Treasurer
Jefferson City, Missouri

Dear Sir:

This Department is herewith replying to your oral request for an opinion on the following question:

> "House Bill No. 23 provides for the Food and Drug Commissioner signing various kinds of permits issued under said bill. That office is no longer in existence or will not be on July 24th and I would like to know which officer if any will succeed to the duties of said office after it is discontinued."

The office of Food and Drug Commissioner was not created by the Constitution but by the Legislature and the Legislature can abolish same and transfer powers and duties to the Commissioner of Health as has been done by Senate Bill No. 16, a copy of which is attached hereto.

> State ex inf. Crow v. Evans
> 166 Mo. 347
> State ex rel Atty.Gen. v. Davis
> 44 Mo. 129
> State ex rel v. Coon
> 316 Mo. l.c. 541

In England officers are considered incorporeal hereditaments grantable by the crown and a subject of vested or private interests. Not so in the United States: They are not held by grant or contract nor has any person a private property or vested interest in them and

they are therefore liable to such modifications and changes as the law making powers may deem it advisable to enact.

In the present case the Health Commissioner will perform duties and exercise powers heretofore devolving on Food and Drug Commissioner.

Yours very truly,

EDWARD C. CROW.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

ECC:SW

INSURANCE:

Mutual casualty companies organized under Article 7, Chapter 37, is entitled to license to write surety insurance.

July 10, 1933.

7-29

FILED
66

Mr. C. E. Nelson,
Actuary Insurance Department,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 29, 1933, in which you inquire as follows:

"A mutual casualty company, organized and operating under Article 7, Chapter 37 of the Revised Statutes of Missouri 1929, has requested authority to write surety insurance.

We are requesting an opinion from your office as to, first, whether a mutual casualty company can write fidelity and surety insurance and, second, if it can write such insurance can any special deposit be required? In considering this question we refer you to Sections 5793, 5795 and 5796 of Article 6 and to Section 5844 of Article 7.

Companies writing fidelity and surety business usually operate under more strict requirements than companies handling other lines of casualty business. This is due to the very large amount of risk as compared with the premium and also to the fact that fidelity and surety insurance, even more so than other lines of insurance, is very closely associated with matters of public interest. The Department in the past has licensed several mutual casualty companies from other states to write either fidelity or surety insurance, or both, in this state, but such companies have had very considerable deposits with their home insurance department."

Section 5844 R. S. Mo. 1929, provides:

1. "Any company organized under the provisions of this article is empowered and authorized to make contracts of insurance or to reinsure or accept reinsurance on any portion thereof, to the extent specified in its articles for the kinds of insurance following:

2. Liability insurance * * * .

3. Disability insurance * * * .

4. Automobile Insurance * * *.

5. Steam Boiler insurance * * *.

6. Use and occupancy insurance * * *.

7. Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

A mutual casualty company, organized under Article 7, Chapter 37, of which the foregoing is a section, may engage in any of the kinds of insurance enumerated above. Under Provision 7 of the above section, such a company may engage in any kind of insurance, excepting that prohibited by statute or at common law, and excepting life insurance and fire insurance. Becoming a surety for another is a proper subject of insurance and is neither prohibited by statute nor at common law. Such insurance does not come within the exception of life insurance or fire insurance and, therefore, is not prohibited under subdivision 7. It is, therefore, our opinion that a mutual casualty company organized under Article 7, Chapter 37, may engage in writing surety insurance and that the Insurance Commissioner should issue the license upon the compliance of the company with Section 5845 R. S. Mo. 1929, which is as follows:

"No such company shall issue policies or transact any business of insurance unless it shall hold a license from the superintendent authorizing the transaction of such business, which license shall not be issued until and unless the company shall comply with the following conditions:

(a) It shall hold bona fide applications for insurupon which it shall issue simultaneously, or it shall have in force, at least twenty policies to at least twenty members for the same kind of insurance upon not less than two hundred separate risks, each within the maximum single risk described herein;

(b) The 'maximum single risk' shall not exceed twenty per cent of the admitted assets or three times the average risk or one per cent of the insurance in force, whichever is the greater, any reinsurance taking effect simultaneously with the policy being deducted in determining such maximum single risk;

(c) It shall have collected a premium upon each application, which premiums shall be held in cash or securities in which insurance companies are authorized to invest and shall be equal to not less than five

times the maximum single risk assumed, nor less than twenty-five thousand dollars;

(d) For the purpose of transacting employer's liability and workmen's compensation insurance the applications shall cover not less than one thousand five hundred employees, each such employe being considered a separate risk for determining the maximum single risk."

You inquire whether such company, on obtaining a license to write surety insurance, may be required to put up any special deposit, and refer us to Sections 5793, 5795 and 5796, of Article 6, Chapter 37, R. S. Mo. 1929.

Article 6 of Chapter 37 provides for the formation of insurance companies other than life insurance companies. Section 5793 provides that any number of persons, not less than 13, may associate and form a corporation to make insurance upon real and personal property, insuring against fire, windstorm, etc,; insurance upon the health of individuals and against personal injury, and to insure the fidelity of persons holding places of public and private trust and the safe-keeping of books, papers, etc.; insure cattle and livestock against theft, disease, death, etc., and to do any and all kinds of legitimate insurance business, excepting life insurance and dealing in annuities.

Section 5794 provides that companies engaged in the fire insurance business may also issue sprinkler leakage insurance, and provides that such companies may also insure against loss and destruction of money, securities and all kinds of insurance on automobiles.

Section 5795 provides that any company having a paid up capital of not less than $200,000.00 may insure the fidelity of persons holding places of public or private trust, and provides as follows:

"Provided, however, that no domestic corporation shall be licensed to do the business aforesaid until it has deposited $200,000.00 with the insurance superintendent of this state in trust for the protection of its policyholders, such deposit to consist of cash, treasury notes or bonds of the United States, * * *."

Article 6 of Chapter 37 is a general section for the incorporation of companies, as specified in the foregoing sections, other than life insurance. Article 7 deals with the formation of mutual insurance companies other than life and fire. There are no provisions in Article 7 of Chapter 37 which require a deposit to be made, as are found in Section 5795 which applies to companies organized under that Article.

We do not believe that companies organized under the provisions of Article 7 are bound by the provisions applicable to companies organized under Article 6. Article 7 contains special provisions applicable to mutual insurance companies other than life or fire. Article 7 is an exception to the general provisions found in Article 6.

In De Hart v. School District, 263 S. W. 242, the court, in construing various Articles of the Chapter, says:

> "It is an old and familiar rule for the construction of statutes that, where there is in the same statute a particular enactment, and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

In State v. Imhoff, 238 S. W. 122, 125, the court says:

> "We have said, not once, but a number of times, that where there are two acts and the provision of one has special application to a particular subject and the other is general in its terms, and if standing alone would include the same matter and thus conflict with the special matter, then the latter must be construed as excepted out of the provisions of the general act, and hence, not affected by the enactment of the latter."

In view of the foregoing, we do not believe that the sections contained in Article 6 can be read into Article 7 or made to apply to companies organized under Article 7. There are no provisions in Article 7 making similar requirements, as contained in Section 5795. We believe that a mutual casualty company, upon compliance with Section 5845 above, is entitled to have issued it a license to write surety insurance, and that it is not required to comply with the sections contained in Article 6 of the same Chapter.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

FWH:S
APPROVED:

Attorney General.

CONTRACT: Workmen's Compensation Commission, right to terminate Tabulating Machine Company contract at end of quarter.

July 14th, 1933 7/15

FILED
66
33

Mr. Edgar C. Nelson, Chairman,
Workmen's Compensation Commission
Jefferson City, Missouri.

Dear Sir:

We have your request of July 1st, 1933 for an opinion upon the following state of facts:

> "We are desirous of cancelling the enclosed contract, and before taking final action in regard to same we would like to have an opinion from your office. The second quarterly period of said contract ended yesterday and as we did not have sufficient time to get a written opinion from your office, we sent the enclosed telegram, which we feel, is sufficient to cancel the contract as of yesterday's date.
>
> The company's representative was in the office this morning and it seems to be his opinion that they should have at least ninety days' notice, so before we take any action which might result in a suit being filed against this department, we request that you advise us, first, as to whether or not the telegram which we sent yesterday would cancel the contract as of June 30th; add second, if the contract could not be cancelled as per the telegram, how much notice would we have to give?"

The telegram referred to is as follows:

> "You are hereby notified that we are today cancelling our contract number nine eight six eight for tabulating machine service said cancellation to be effective in accordance with said contract at the end of the present quarterly contract period."

The written contract submitted with your letter which was executed in 1926 is silent as to length of notice to terminate such contract. However, it does provide:

> "This agreement for the aforementioned equipment shall remain in force for One Year from the date that the machines are installed ready for your use, and Quarterly thereafter unless terminated by us in accordance with the stipulations of this contract, with the exception that the use of the Standard Tabulating and Vertical Sorting Machines may be terminated by you at the close of any calendar month."

After the lapse of the first year, to-wit, 1927 by the contract provisions above set out, the machines are left in your possession with the continuing offer of the company to rent them to you quarterly for a stipulated rental, and your acceptance and use of said machines during each new and succeeding quarter makes a binding contract. However, you have the right and authority before the end of any quarterly contract to cancel the above contract.

We understand from your letter and oral conversation that the above telegram dated June 30th, 1933 was sent to and received by the Tabulating Machine Company on that date which was the last day of that quarter. The telegram is sufficient notice of your intention not to accept the offer of the Tabulating Machine Company to rent you the machines enumerated in the contract for the new quarter containing the months of June, July, August and September, 1933.

While the contract provides for rental of the machines quarterly, the contract is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort. The above contract, in the opinion of this Office, is one for an indefinite duration, therefore terminable at will. 13 C. J. p. 604, Massachusetts Bonding and Insurance Company v. Simonds, Shields & Lonsdale Grain Company, 49 S. W. (2d) 645.

It is therefore the opinion of this Office that the above contract has been pfoperly terminated as of June 30th, 1933.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

Acting Attorney-General

FER/mh

STATE TREASURER: Right to make sales of real and personal property in view of State Purchasing Act.

8-22

FILED
66

August 21, 1933

Honorable Richard R. Macy
State Treasurer
Jefferson City, Missouri

Dear Mr. Macy:

This Department acknowledges receipt of your letter dated August 10, 1933, as follows:

> "Under the law to protect an account, the State Treasurer, in case of necessity, is permitted to buy in real estate where real estate notes have been taken as collateral to secure a deposit, the title being taken in the name of the State Treasurer, for the State. Likewise the State Treasurer is authorized to sell property acquired as above.
>
> Will you be kind enough to advise whether this practice must be discontinued, under what is known as the Purchasing Bill, the Purchasing Agent making the transactions; or will the State Treasurer continue to buy and sell land, as outlined above?"

Section 1, Laws 1931, page 356, provides:

> "The state treasurer shall have the duty to preserve and protect the state's lien and all rights that the state may have in any real estate which is security for notes and deeds of trust which are held by the state as collateral for state deposits and which have been taken over by the state as a result of the failure of such state depository."

Section 2 of the same act reads in part:

> "The state treasurer shall have the authority and power to bid upon such real estate at any public sale whether such sale is held for the payment of taxes or for the payment of any indebtedness upon such property. * * * * * If the state is the successful bidder, title shall be taken in the name of the state treasurer and he shall hold the title to said lands, control and manage the same until sold,* * * * * *. The state treasurer is hereby empowered on the sale of said land to convey same to the purchaser by proper deed**."

Section 11469 Laws 1931,page 378, after making provision for the depositing of certain bonds to secure and insure the repayment of state deposits in selected depositories, provides:

> "* * * In the event that such bank or banks or banking institution of deposit shall fail to pay such deposits, or any part thereof, on the check or checks of the state treasurer, then it shall be the duty of the state treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrants drawn by the state auditor upon the funds for which said bonds are security* * * * * ."

The office of state purchasing agent was created by an act found in Laws 1933, page 411. Section 2 of the act provides as follows:

> "The Purchasing Agent shall purchase all supplies except printing, binding and paper, as provided for in Chap. 115, R. S. 1929, for all departments of the State, except as in this Act otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Section 11 of the Act establishing the office of state purchasing agent, defining the word "supplies" as used in the Act, reads as follows:

> "The term 'supplies' used in this Act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this Act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this Act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the State."

Reading the State Purchasing Act in its entirety the conclusion can not be escaped that the central thought in the minds of the legislators was to put the purchasing of the supplies used by the various state institutions under the control and supervision of one head. Such supplies being the equipment and materials and articles customarily and ordinarily used in the conduct or management of any state institution. It is true that Section 2 of the Act authorizes the State purchasing agent to purchase all lands but the Act does not provide that the state purchasing agent may take title to lands in his name, so that we think the purchase of land as referred to in said Section 2 has reference to the negotiations for the outright purchase of any lands purchased for the use of the state or any of its institutions, and we think the Legislature did not intend to nor does the state purchasing act take away or repeal the right of the state treasurer to make sales of personal property or real estate as the same is provided for in the sections above set out.

We are of the opinion that the right of the state treasurer to make sales of real and personal property, where the

same stand as security for state deposits and to purchase and take title to same, was not impaired by the passage of the state purchasing agent act.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General,

GL:LC

STATE HIGHWAY DEPARTMENT: Salaries of all employees.

8-30

FILED
66

Au ust 29, 1933

Honorable Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Dear Mr. Nacy:

This Department acknowledges receipt of your letters of August 19, and August 25, 1933, relating to salaries of the employees of the State Highway Department. As the subject matter of both letters is the same, we are herewith answering the letters in one opinion. Your letters are quoted below:

> "Under the provisions of Section 2-A of House Bill No. 652 found at pages 113-114 of the Session Acts, 1933, the employees of the State Highway Commission are reduced in salary in various amounts depending upon the salary received during the year 1932.
>
> If an employee of the Highway Department is promoted to a position of higher rank and salary than the one held in 1932, is it legal under the above Section to pay said employee an increase in salary commensurate with the position now held?
>
> As an example, - if Richard Roe, who in 1932 was an Assistant Auditor at a salary of $200.00 per month, were promoted in June 1933 to Auditor at a salary of $400.00 per month, is it legal to pay said Richard Roe the salary previously received by the Auditor, towit $400.00 per month?

In other words, is it legal to pay the salary for the position held without regard to the name of the person holding it? "

"Under the provisions of Section 2a of House Bill No. 652, found at pages 113-114 of the Session Acts, 1933, the employees of the State Highway Commission are reduced in salary in various amounts depending upon the salary received during the year 1932.

If a present employee of the Highway Department has been employed since the adjournment of Legislature 1933, may the Highway Commission fix his salary at a greater amount than that received by his predecessor, or by an employee of the same rank and doing similar work in the year 1932?

As an example, if Richard Roe were Auditor of the Highway Department in 1932 at a salary of $400.00 per month and said Richard Roe is discharged and is replaced by John Doe June 1, 1933, would it be legal for the Commission to authorize and the Auditor to audit and the Treasurer to pay the said John Doe a salary greater than that received by Richard Roe? In other words, would it be legal to pay John Doe $450.00 per month when his predecessor, who did the same work and had the same rank in the year 1932 received $400.00 per month?

The point I wish particularly explained is whether an employee of the Highway Department who had no status with the Highway Department in 1932 is allowed to receive a larger salary for doing the same work than he could have received had he been employed by the Commission in the year 1932.

Since there are but a few days intervening between this and the regular payday for the Highway Commission employees I shall appreciate your usual prompt attention to this request."

We have heretofore rendered an opinion to the Honorable Louis V. Stigall embodying the questions as to the salaries of the legal department of the Highway Department, and are inclosing a copy of the opinion, but as your letter seems to affect all of the employees of the Highway Department and presents a different situation, we shall endeavor to make this opinion cover every situation.

In the opinion to Mr. Stigall we held unequivocally that the law as passed by the Legislature, page 114, of 1933, related to the positions held by the employees of 1932 and have no reference or relation to the individual or person holding the office at that time. In other words, the reduction was as to the position and not to the individual. Bearing this in mind then an employee in the Highway Department promoted to a different position and now receiving a greater salary, is entitled (under Section 2a, page 114 of the Session Acts of 1933) to receive the salary paid to the holder of said position in 1932, after the proper percentage of reduction is made, the same being according to the range of the salary in Section 2a. It is therefore legal "to pay the salary for the position held without regard to the name of the person holding it" after the proper percentage of reduction has been applied to the amount the position was paying in 1932.

Referring to the second paragraph of your letter of August 25, "If an employee has been added to the Highway Department since adjournment of the Legislature, may the Highway Commission fix his salary at a greater amount than that received by his predecessor?" It is the opinion of this Department that the Highway Commission can not increase the salary of any employee or the salary of the position held by any employee if the position was in existence prior to the time the present law became effective. In other words, the salary of any employee can not be increased by the Commission if the Commission had already fixed the salary prior to the passage of the law, and irrespective of the person holding the position he is subject to the reduction, the amount being according to the range in salaries as set forth in Section 2a. The Commission can only fix, at the present time, the salary of an employee who is taking a position, said position being newly created or one which did not exist prior to the effective date of Section 2a.

As to the last statement in your letter, "The point I wish particularly explained is whether an employee in the Highway Department who had no status with the Highway Department in 1932 is allowed to receive a larger salary for doing the same

work than he could have received had he been employed by the Commission in 1932." We believe that we have answered this above, but will repeat that the reduction and amount of the salary of a position (not the person) of every position in the Highway Department which existed in 1932, is now fixed and that no employee irrespective of whom he might be, can receive a greater salary than the holder of the same position was receiving in 1932, and that "John Doe" can not receive $450.00 per month if his predecessor who held the same position in 1932 received $400.00 per month, and further than that the said "John Doe" if he receives the salary of his predecessor, namely, $400.00, he must accept the percentage of reduction as set out in the range of salaries in Section 2a.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

Inclosure

ARSON--Burning of unoccupied dwelling house by owner, is criminal offense.

August 30th, 1933

9/2

FILED
66

41

Hon. Dan M. Nee,
Prosecuting Attorney,
Greene County,
Springfield, Missouri.

Dear Sir:

We received your request of August 16th, 1933 for an opinion as to whether or not any criminal offense has been committed under the following statement of facts:

> "Defendant was the owner of a dwelling house which was covered by insurance. This property was burned and completely destroyed. Defendant was arrested and charged with arson. Previous to his arrest defendant had made no claim for damages as a result of said fire. The state has evidence to prove that he set fire to and burned said dwelling by pouring gasoline on the premises and igniting same. There were no persons in the house at the time of the fire."

In the beginning, we find no adjudicated cases directly in point. We assume from the above facts that the insured has made no effort at any time to file a proof of loss, or to take any steps indicating an intention on his part to collect the insurance on the building destroyed by fire, and thereby avoiding prosecution under Section 4040, R. S. of Mo. 1929, making it a criminal offense to burn a building with intent to defraud an insurance company.

It also appears that the provision of Section 4039 is not violated by the above statement of facts because this Section covers the burning of the house which is the property of another, as was charged in the recent case of State v. Falco, 51 S. W. (2d) 1030.

Section 4036 provides,

> "Every person who shall wilfully set fire to or burn any dwelling house * * * whether the property of himself or of another shall be adjudged guilty of arson * * *."

Prior to the amendment of this law in 1929, it was necessary that a human being be in some part of the house before it came within the statutory term of "dwelling house", and this view is sustained by the Supreme Court in State v. Rudman, 37 S. W. (2d) 409 and State v. Witham 281 S. W. 32.

It now appears that this requirement of the 1919 statute, under which the Rudman and Witham cases were tried, has been changed by omitting therefrom the phrase,

"in which there shall be at the time some human being."

Under Section 3282, R. S. of Mo. 1919, and prior to its amendment in 1929, it was necessary to prove that the house burned was a "dwelling house", and in addition thereto it was necessary to prove that at the time of the burning of the dwelling house, that it contained some human being. It was necessary to prove that the "dwelling house" came within the definition of Section 3283 R. S. of Mo. 1919 and in addition thereto at the time of the fire must have contained some human being within the mandatory language of Section 3282 R. S. of Mo. 1919.

After the amendment of Section 3282 R. S. of Mo. 1919, (now 4036 R. S. of Mo. 1929) it was only necessary to prove that the building burned was a "dwelling house". As to what constitutes a "dwelling house", we find it specifically described in Section 4037, R. S. of Mo. 1929 in the following language:

> "Every house, * * * <u>which shall have been</u> usually occupied by persons lodged therein, shall be deemed a dwelling house <u>of any person having charge thereof</u> or so lodging therein; * * *"

We call your attention to the wording of this Section which is in the past tense. It does not require that the house <u>be</u> occupied, and it is not necessary to allege or prove that the house <u>is</u> occupied by some human being at the time of the fire; all that is necessary under this statute is to show that it is the type of house which has been occupied by human beings and "<u>which shall have been usually occupied by persons lodging therein</u>."

It is therefore the opinion of this office that the facts contained in your letter constitute a crime under Sections 4036 and 4037 R. S. of Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

FER/mh
APPROVED:

ROY McKITTRICK
Attorney-General

TAXATION - ASSESSMENTS - SEPARATION OF POWERS OF COUNTY ASSESSOR AND CITY ASSESSOR WITHIN SUCH COUNTY.

September 30, 1933.

10-2

FILED

66

Mr. Martin L. Neaf, Assessor,
St. Louis County,
Clayton, Missouri.

Dear Sir:

You have made an oral request of the Attorney General for an opinion as to the division of powers between a county assessor and a city assessor for a city of the third class within such county, in regard to the assessment of real estate within such city for county and state purposes, particularly as to whether or not such city assessor has any control over the assessments of such property for county and state purposes.

Revised Statutes Missouri 1929, Section 9752 provides in part as follows:

> "Every (county) assessor shall take an oath * * * that he will assess all the property in the county in which he assesses at what he believes to be its actual cash value."

Sections 9742, 9778, 9792, 9800 and 10003 all use substantially similar language in defining the duties of county assessors and in none of such sections is there any reference to the right of a city assessor of a city within a county to have any voice in the assessment for state and county purposes, and in none of such sections is any exception made for cities within such counties.

The only section of the statutes which might lead to a contrary conclusion is Revised Statutes Missouri 1929, Section 6779, which is contained in Chapter 38 relating to municipal corporations, Article 4 relating to cities of the third class. Section 6779 provides as follows:

> "Sec. 6779. Assessors, duties - levy of taxes. In assessing property, both real and personal, in cities of the third class, the city assessor shall, jointly with the county assessor, assess all property in such city, and such assessment, as made by the city assessor and county assessor jointly, and after the same has been passed upon by the board of equalization, as hereinafter provided for, shall be taken as the basis from which the city council shall make the levy for city purposes; and for the purpose of giving cities of the third class representation on the county board of equalization, when said board is sitting for the

purpose of equalizing the assessment on such city property, the mayor and city assessor shall sit with the county board of equalization when the said board is passing upon the assessment of such city property, and shall each have a vote in said board, and they shall be paid for such service the same amount per day and out of the same fund as other members of such board of equalization. The assessment of city property as made by the city and county assessor shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's book shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the city council."

The use of the phrases "for city purposes" and that "the city assessor's book * * *"shall be "returned to the city council" clearly indicate that the joint assessment provided for by Section 6779 is only the assessment of city property for city purposes, and has no bearing on the assessment of the county assessor for county and state purposes.

The above conclusion is strengthened by the statutory methods provided for assessing the property within other classes of cities for city purposes, such statutes being Sections 6180 for cities of the first class, 6589 for cities of the second class, 6994 for cities of the fourth class, and 7109 for towns and villages. Without going into the details of these statutes their general scheme shows a clear intent of the Legislature to provide for assistance by county assessors to the smaller cities for their assessments for city purposes beginning with the towns and villages, which municipalities must use the county assessment unchanged for their city assessments, progressing through cities of the fourth class which must adopt the procedure for towns and villages where they have no city assessor but where they have city assessors being governed as cities of the third class are governed, by having the County Assessor assist the City Assessor in the assessment for city purposes, progressing further through cities of the second class where the assessments are made by boards including both the city and the county assessors, and ending with cities of the first class where the city assessor makes the assessment for city purposes unaided.

Thus, it is our opinion that Section 6779 providing for joint assessments in cities of the third class relates only to assessments for city purposes and that the city assessor within such city has no voice of any kind in the assessment by the county assessor of property within such city for county and state purposes.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

J. Roy McKittrick

Attorney General

...ON: Institution of suits not stayed by Senate Bill 80.

October 27, 1933

FILED
66
55

10-28

Neuhoff & Millar
Rialto Building
320 N. Fourth St.
St.Louis, Missouri

Gentlemen:

We acknowledge receipt of your letter of recent date wherein you request an opinion of this office as to whether or not Senate Bill 80, found at page 423, Laws of Missouri 1933, stays the bringing of suit for taxes for personal property until after December 31, 1933. For convenience we herewith quote that act;

> "In payment of the taxes assessed against any person whose name appears upon the personal delinquent list of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for the year 1932, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; Provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1933; if paid after June 30, 1933, and not later than August 31st, 1933, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31st, 1933, and not later than October 31, 1933, such remission shall be 50 Per cent of such penalties, interest and costs; if paid after October 31, 1933, and not later than Dec. 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs; Provided further, that after Dec. 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

The Supreme Court of Missouri in the case of State ex rel. McKittrick vs. Bair, reported at 63 S. W. (2d) p. 64, determined the subject of your inquiry after noting the similarity of Senate Bill 80 and the Act of 1877 remitting penalties upon delinquent taxes. The Court made this statement respecting Senate Bill 80, l.c. 67:

> "So we think that under a proper construction of the statute assailed in the instant case the filing of suits for delinquent taxes and penalties is not prevented, but that penalties are remitted, in the manner provided in No.80."

While we agree that the bringing of suits upon these delinquent taxes was not in accord with the operation of Senate Bill 80, on the other hand it is our opinion that the Collector is within his statutory right in doing so and suggest that your clients' remedy is to pay the tax plus 50% of the interest penalties and costs which have accrued, as under Senate Bill 80 if payment is made prior to the 31st of October your client is entitled to the 50% remission.

Respectfully submitted,

HARRY G. WALTHER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

JURIES: Board of Jury Commissioners in counties of 200,000 to 400,000 inhabitants receive no compensation, and have no power to appoint clerks or assistants.

September 11, 1933.

9/12

FILED
67

Hon. Julius R. Nolte,
Judge, Division No. 1,

and

Judges of the Circuit Court
of St. Louis County,
Clayton, Missouri

Gentlemen:

This is to acknowledge your letter which reads as follows:

> "We direct your attention to act of the General Assembly of Missouri, approved May 1st, 1933, appearing at Laws of Missouri, 1933, page 277.
>
> This act is made applicable to all counties in the State, now containing or which may hereafter contain, according to the last preceding National Census, not less than 200,000 nor more than 400,000 inhabitants.
>
> The purpose of the act is the creation of Jury Commission Boards in counties of the class named. St. Louis County falls under the operation of the act. Section 2 of the act provides that the circuit judges and the judges of courts having jurisdiction in felony cases shall constitute a Board of Jury Commissioners. It further provides that the circuit clerk shall be ex-officio clerk of said Board. Section 3 requires the Board to cause to be made a complete list as near as may be, alphabetically arranged, of all the qualified jurors in the county and their residence; and that in compiling said list said Board of Jury Commissioners and their clerks and assistants may have access to the books of the County Assessor and to any registration

of voters required by law to be made. By section 16 of the act the same is made mandatory.

It is estimated that we now have in St. Louis County between 50,000 and 60,000 persons eligible for jury service and this number is being rapidly increased. It is therefore obvious, that to compile a list, alphabetically arranged, and to duplicate the list on cards to be retained in a wheel or box and to revise the whole, striking out the names of those who have died, moved from the county or become disqualified, and noting changes of residence, annually, as required by sections 14 and 15 of the act, will of necessity involve a stupendous task.

While it is clear that by the provisions of section 2, the Board is afforded the aid of the circuit clerk in discharging the clerical part of the work, yet additional assistance is not afforded except inferentially by the provisions of section 3, and if such additional assistance is authorized by said section, the act nowhere provides for the compensation of such assistants.

The act took effect today and the circuit judges of St. Louis County, after organizing themselves into a Jury Commission Board in obedience to the mandate, find themselves now confronted by this problem: Does the act, by delegating the powers of the Board and requiring the exercise of these powers by an imperative mandate, carry with it the implied authority to procure additional assistants and fix their compensation, so as to be a legal charge upon the general funds of the county, or on the other hand is the right to compensation for the discharge of official duty purely a creature of the Statute and where the statute gives no compensation, none exists?

In this predicament we are submitting the above for your consideration and respectfully request your advice in the matter."

As stated in your letter, an act was approved May 1st, 1933, Laws of Missouri, 1933, page 277 et seq., providing for and designating the manner of selecting petit jurors in counties containing, or hereafter containing, 200,000 inhabitants and less than 400,000 inhabitants according to the last preceding National census. St. Louis County is within the provisions of this act.

In your letter you called attention to how jurors are selected which entails a great deal of clerical work (Sections 3 and 4), thus we will not lengthen this opinion by quoting those provisions that sustain this premise. The act does not provide for clerical help, except Section 2, page 278, which provides in part:

> "The circuit clerk of said counties shall be ex-officio clerk of said board of jury commissioners, and his duty shall be to assist the board in the performance of the clerical part of their work, and such clerk shall perform such other duties and services as may be required of him by the board of any member thereof, with respect to the things to be done by the board of jury commissioners, as provided by law."

Section 3, page 278, has this provision:

> "* * *; and in compiling said list said board of jury commissioners, and their clerks and assistants, may have access to the books of the county assessor and to any registration of voters required by law to be made."

Nowhere in the act is it provided that the board of jury commissioners may appoint clerks or assistants and if it may by inference be said that such power vests in the board, then there is no provision as to their compensation.

If the board has power to appoint clerks and assistants then there is no limitation as to number or compensation. In this connection, we invite your attention to Section 8795, Laws of Missouri, 1933, page 281, which provides, among other things, for the number of employees and fixes their compensation for services to be rendered to the jury commissioners in counties having 400,000 and less than 800,000 inhabitants. If the Legislature intended to provide clerks and assistants for the board of jury commissioners in counties of 200,000 to 400,000 inhabitants, it could and would have done so as it did by Section 8795, supra.

In King v. Riverland Levee Dist., 279 S. W. 195, l. c. 196, the St. Louis Court of Appeals in its opinion said the following:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creating of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 Loc. cit. 27, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra."

It is our opinion that the act (Laws of Missouri, 1933, page 277) places an additional duty upon the judges of the circuit court without adding compensation therefor, and that the discharge of this mandatory act being a matter of statute and no compensation provided for, none exists. And further, the act by not providing for clerks and assistants, except circuit clerk, such may not be employed by the board so that their compensation will be a legal charge upon the funds of the county.

We have been very busy with matters before the Supreme Court and for that reason the answer to your inquiry was delayed.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

CITIES OF THE FOURTH CLASS - Legal publication - what newspaper may be selected for publication under R. S. Mo. 1929, Sec. 7074 when no newspaper published in city.

12-2

November Twenty-Ninth,
1933.

FILED
67

Honorable Sarpy J. Noonan,
City Attorney, City of University City, Missouri,
St. Louis County, Missouri.

Dear Sir:

Request for an opinion has been received from you under date of October 18, 1933, such request being in the following terms:

"The City of University City is confronted with this situation: There is no legal newspaper within the city; however, there are two legal newspapers in Clayton, St.Louis County, being the city adjoining and under the provisions of Section 7074, R. S. Mo. 1929 we are required to do our legal advertising in "the next nearest newspaper published in the county in which said city is situated." We would appreciate it very much if you would give us your ruling interpreting this Statute.

"Are we required literally to do our legal advertising in that newspaper in Clayton whose office is actually nearest University City in metes and bounds, or under this section of the Statute are we required to select a legal newspaper in the next nearest city? It would strike me that this is the more reasonable construction inasmuch as to construe it otherwise we would indeed be in a dilemma, were Clayton to have two newspapers, each an equal distance from University City.

"I have made a very thorough search for some Missouri authority covering this point, but up to the present time have been unable to find anything in point. I shall be very grateful to you if at your earliest opportunity you will let me have a ruling on this point.

"I would further like to get your thought as to whether or not Section 13775 of the 1931 Acts in any way conflicts with and therefore repeals Section 7074 of the 1929 Statutes."

Revised Statutes of Missouri, 1929, Section 7074, applicable to cities of the fourth class is as follows:

"Whenever, by the terms of this article, it is provided that an advertisement shall be published in a newspaper published in the city, and there shall, in fact, be no newspaper

published in the city, then said advertisement shall be published in the next nearest newspaper published in the county in which said city is situated."

If the phrase in Section 7074 "next nearest newspaper" is to have any effect at all, it would clearly prohibit publication in a newspaper in some remote part of the county where there were other newspapers published at much nearer points. If, however, such phrase is to be construed literally it might, as you have pointed out, involve a serious difficulty if there were two newspapers published at points equidistant from the city in question, and the problem would arise as to whether or not the word "nearest" means nearest geometrically, i.e. as the crow flies, or whether it would mean nearest by the most direct road or street or other most available avenue of access. If the geometric test were adopted it would not be practical where, for example, the nearest newspaper might be separated from the city in question by a river not spanned by any bridge within several miles. The difficulty with the other standard being adopted literally would be the difficulty of measurement, and also the fact that it would not be in complete harmony with the statutory phrase if such phrase must be construed literally. For these reasons it would seem that a strictly literal construction of the statute might result in confusion and absurdity.

No authority has been found in this state dealing with this problem. However, in Shaw v. Cade, 54 Tex. 307, a similar problem was presented, involving an act of the legislature of April 7, 1874, providing that on the grant of a change of venue the cause shall be removed to some adjoining county, the courthouse of which is nearest the courthouse of the county in which the suit is pending, and the court said that the phrase "nearest courthouse" in the meaning of the statute was not necessarily the one nearest by geometrical measurement, but may be the one most convenient of access and nearest by the usually traveled route, 54 Tex. 311.

Another analogous situation is presented by insurance policies providing that where a loss occurs the insured must procure a certificate under the hand and seal of the magistrate or notary public "nearest" to the place of the fire. In the case of American Central Insurance Co. v. Rothchild, 82 Ill. 166, the court said that the word "nearest" should not be construed literally but only required the procurement of the certificate from a justice or notary public residing in the same locality, 82 Ill. 167. Likewise, in the case of Osewalt v. Hartford Fire Insurance Co., 175 Pa. 427, 34 Atl. 735, involving the same sort of a policy of insurance, the court held that a certificate was sufficient to comply with the policy where the notary executing such certificate lived within a third of a mile of the premises destroyed by the fire, although there was another notary living a few rods nearer, where the insured had no knowledge of the business of such other person, and the latter maintained his office in another locality, and was commissioned and residing in such other

locality. Likewise, in the case of Peltrovitch v. Phoenix Ins. Co., 143 N.Y. 73, 37 N.E. 639, in quoting from the case of McNally v. Phoenix Ins. Co., 137 N.Y. 389, 33 N.E. 475, the court said: "I think that the phrase 'living nearest the place of fire' should not be confined entirely to the food and sleep of the notary, and should take account of the place where he lives officially, and to which by some public sign he invites those who do business with him." The strongest case on the subject is German American Insurance Co. v. Etherton, 25 Neb. 505, 41 N.W. 406, wherein the court held that "the word "nearest" in such an insurance policy should not be construed as employed in such a strict sense as to render necessary a careful and correct measurement of distance, it appearing that an honest effort was made to comply with the policy."

The last case cited and discussed would seem equally applicable to the situation in question here. Of course, if there are two newspapers at distances almost equal from the city in question the safest course would be publication in both of such newspapers, but as this would involve a considerable expense it would seem that the statute would be sufficiently complied with if in the case of two newspapers at an almost identical distance from University City, the City of University City should elect to publish in one or the other of them.

Revised Statutes of Missouri, 1929, Section 13775, as amended by Laws of 1931, page 303 does not in our opinion conflict with or alter the effect of Section 7074, because Section 13775 requires publication in "some" newspaper and not in any newspaper published at any particular geographic location, except that it must be in the confines of the county, and Section 7074 being a special statute, as opposed to 13775 as a general statute, and there not being any conflict in their terms, no reasons are seen why Section 13775 should have any effect on the provisions of 7074 as to where the newspaper must be published in the county to qualify.

It is our opinion that where a city to which Revised Statutes of Missouri, 1929, Section 7074 applies, has no newspaper published therein and where there is a close question as to whether one or another newspaper is the "next nearest newspaper published in the county in which said city is situated" that the city in question should have a right to select one or the other of such newspapers for the publications to which Section 7074 applies.

Very truly yours,

EDWARD H. MILLER,

Assistant Attorney General.

APPROVED:

_____

Attorney General.

EHM/MG.

IN RE:County Court--What may be accepted as collateral to secure county funds.

April 8th,1933

FILED
69

Hon. John B. Owen,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:-

I acknowledge your request for an opinion dated April 5th, reading as follows:

> " Where a County depository does not give bond, but in lieu thereof deposits bonds as collateral security, would the bonds issued by an incorporated City School District in such county, be such security as authorized by law?
>
> Could such school district in selecting its depository, accept as collateral security or pledge, its own bonds? "

In reply to your first question,I beg to advise that it is the opinion of this office that the bonds of an incorporated City School District would not be proper collateral for your county deposits. Section 12187 Revised Statutes of Missouri 1929, particularly provides for the bond to be supplied by the depository, or the security that may be placed as collateral in lieu of the bond. The part of the statute applicable reads as follows:

> "SECTION 12187. BOND OF DEPOSITORY--* * * provided, that the court may accept in lieu of real estate as security, bonds of the United States or of the State of Missouri, which said bonds shall be deposited as the court may direct; * * *."

The statute is plain and unambiguous, naming the bonds which are acceptable as collateral. No other bonds would comply with the statute.

In reply to the question contained in the second paragraph, of your letter of April 5th, I beg to advise that the same rule governs the depositing of school district funds. Section 9762 is the authority for this procedure. This section reads as follows:

"SECTION 9362. DEPOSITORIES OF SCHOOL MONEYS.--
The board of education of City School Districts in this state shall select depositories for the funds of such school districts in the same manner as is provided by law for the selection of county depositories; * * *."

Accordingly, United States bonds and State of Missouri bonds are the only collateral that could legally be approved and accepted by the school districts or school board to secure its funds in the approved depository.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW/mh

TOWNSHIP COLLECTOR'S BOND --- Section 12279, R. S. 1929.

April 24, 1933.

FILED
69

Hon. John B. Owen
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

Your recent letter directed to the Attorney-General requesting an opinion has been handed the undersigned for attention. Your letter states the following:

"You will no doubt remember a recent conversation between yourself, Mr. Floyd Sperry and Mrs. Harve Gray a few days ago regarding the making of a bond as Township Collector by Mr. Harvey Harelson, recently elected collector of Clinton Township. According to the Statutes governing such matters in counties for Township Organization, such as ours, the Collector is required to make a bond in double the amount of total collections made by him during the entire year. In this township such a bond would be in the amount of one-hundred sixty thousand dollars. A surety bond in that amount would cost Mr. Harelson $800.00 and his commissions and income from the office would not exceed $1100.00. It is practically impossible for him to procure signers for personal bond in this amount and the office is not worth paying $800.00 of $1100.00 income for surety bond.

Mr. Sperry and Mr. Harelson have requested that I write you in accordance with Mr. Sperry's conversation with you regarding the matter and ask if your office can devise a method or can write an opinion which would permit County Courts to require a bond double the amount of total amounts collected made by the Collector each month for under the law the Township Collector is absolutely required to settle with the County and Township Board and turn over his previous collections each month and such a bond as proposed would absolutely protect the township and all public funds.

It has been suggested that it might be impossible in this township to make such a bond under any circumstances due to the banking conditions which generally exists. In that event would it be possible for the County Court to permit the duly elected Collector to make collections under such a bond as he might be able to make regardless of the amount of the bond and make daily payments of his collections to the Treasurer? If so probably no bound would be required, probably not to exceed $5000.00.

Unless such a method of this can be worked out it is extremely doubtful if this county can legally collect revenue of this kind. Please let me hear from you regarding this situation which is very acute here."

Section 12267, R. S. Mo. 1929, provides the time for holding election for the selection of township officers, as being on the last Tuesday in March, biennially.

Section 12279, R. S. Mo. 1929, among other things provides,

"The township collector shall, before he receives the tax books, give bond and security to the state, to the satisfaction of the county court, in a sum at least double the amount of all the revenue to be collected by him for any one year, including school taxes; such bond shall be executed in duplicate; one part thereof shall be deposited and recorded in the office of the clerk of the county court, and the other part shall be transmitted by the clerk to the state auditor * * * *"

It is to be noted that while the statute fixes the amount of the bond and makes the amount thereof a mandatory condition precedent, the bond is to be made to the satisfaction of the county court.

Construing this section, it is the opinion of this department that the township collector of Clinton Township would be required to give a bond in the amount as in such section provided, and we are of the further opinion that the provision in said statute "to the satisfaction of the county court" refers to the sufficiency of the security offered, that is, that the county court

must require a satisfactory bond in the sum fixed by statute, which is a matter left to its discretion.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:
ROY McKITTRICK
Attorney-General.

CCA:EG

Taxation of Corporations: Business and manufacturing corporations taxed--9764 R. S. Mo. 1929.

May 4, 1933

FILED
69

Honorable John S. Owen
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This is to acknowledge your inquiry of April 26th, 1933 which reads as follows:

> "Our County Court is concerned about the following proposition:
>
> Is a mining corporation whose office and place of business is in Kansas City, liable to assessment in Henry County on steam shovel and other mining equipment located in Henry County? Or is it liable in Jackson County for assessment thereon.
>
> Your early opinion will be appreciated."

Section 9764 R. S. Mo. 1929, reads as follows:

> "All personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the 1st day of June of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning personal property on the 1st day of June in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county where situated,

in the same manner as other personal property is required by law to be returned. This section shall not apply to railroad or banking corporations."

It is our opinion from the above statutory provision that personal property as mentioned in your letter would be assessed for purpose of taxation in your county according to the provision of said section above set out.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED
Roy McKittrick
Attorney General.

JLH:HM

INSURANCE DEPARTMENT: Bond of Superintendent may be signed by either or both natural persons or surety companies.

FILED
69

May 29, 1933

Honorable R. E. O'Malley
4144 Warwick
Kansas City, Missouri

Dear Mr. O'Malley:

With reference to your inquiry as to whether the bond required to be given by you as provided in Section 5672 Revised Statutes Missouri 1929, should be signed by natural persons or what is known as surety companies or both.

The above section requires you to give bond to the State of Missouri in the sum of $100,000.00, with five or more good and sufficient sureties, the bond is to approved by the Attorney General and State Auditor and is to be conditioned for the faithful discharge of your duties as Superintendent of the Insurance Department of the State of Missouri.

Article I of Chapter 15 Revised Statutes Missouri 1929, with reference to official bonds provides in Section 2851 thereof that any company with the required capitalization and authority to transact business in this state as surety on bonds or engaged in insuring the fidelity of persons holding places of public trust, may upon making the required showing as to solvency become and be accepted as surety on official bonds, it being specifically set out in Section 2851 that it is the true intent and meaning of Sections 2851 to 2853 to enable corporations created for that purpose to become a surety on any bond in the same manner that natural persons may so do. Then follows a

number of sections with reference to the enforcement of bonds in case of misfeasance or malfeasance on the part of the principal.

In Article I of Chapter 15, supra, the word surety is used in referring both to surety companies and to natural persons in the same manner. This reference also occurs in Barton v. Surety Company, 192 Missouri Appeal, 561. Since the intention is evidenced by Section 2851 to permit surety companies to become a surety on bonds in the same manner as natural persons do, we are of the opinion that the sureties required on your bond by Section 5672 refers to and may be either or both natural persons or surety companies qualified under the law to act as sureties.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____

Attorney General.

GL:LC

INSURANCE DEPARTMENT: ✓ What constitutes insurance contract and doing insurance business. Steuben Health Clinic.

7-10

FILED
69
32

July 8, 1933

Honorable R. Emmet O'Malley
Superintendent of Insurance
Jefferson City, Missouri

Dear Mr. O'Malley:

This Department acknowledges receipt of letter dated June 29, 1933, from your Department, signed by James K. Coolidge, counsel, the letter is as follows:

> "Enclosed is a circular and contract issued by the Steuben Health Clinic, Kansas City, Missouri, which contracts are being offered to the public.
>
> This Clinic is not licensed by the Insurance Department to conduct an insurance business and we would appreciate your opinion as to whether or not this contract constitutes an insurance contract. If it does we will, of course, make demand that it cease its operations."

In the first paragraph of the contract it is stated that by the agreement the applicant becomes a member of the Steuben Health Clinic, and for the considerations thereinafter set out such member is entitled to all rights, services and benefits stipulated in the contract.

The second, third and fourth paragraphs of the contract are as follows:

"The Steuben Health Clinic agrees to furnish the holder of this contract, his wife, and all his dependent children under sixteen years of age, Medical and Surgical service for one year from date hereon upon the following terms:

The beneficiaries of this contract shall receive Surgical and Medical treatment, through the offices of the Steuben Health Clinic, for all sickness and accidents requiring hospital service; including meals, semi-private room, general nurse, medicines, surgical dressings, Surgeon's operating service, laboratory and X-Ray examination, and whatever is required, according to the best PRACTICE Of MEDICINE and SURGERY, to restore the beneficiary to the best health possible.

The beneficiaries under this contract are entitled to examinations and consultations and advisory service at any time and as often as necessary".

The sixth, seventh and eighth paragraphs of the contract are as follows:

"Hospital service will be given the member or dependents in recognized reputable hospitals in good standing.

The Surgeons, Physicians, and Specialists on the Staff of the Steuben Health Clinic are professional men of wide experience and recognized ability.

The above services are given complete for a consideration of only Ten Dollars initial membership fee and Two Dollars monthly dues, payable in advance on the

first day of each month, for a period of one year. This contract shall remain in full force after the first year upon the payment of Two Dollars per month dues, payable in advance on the first day of each month".

The contract states that for individual members without families the monthly dues will be One Dollar. Beneficiaries under the contract are not entitled to services for any cases that are not admitted to a general hospital and likewise not entitled to services in certain other specified cases. The Steuben Health Clinic claims the benefits to Workmen's Compensation paid to a member for medical and surgical service in all accident cases. The contract may be terminated by either party thereto by giving a thirty days' notice in writing to the other party, at his last known address.

The question to be determined therefore is whether or not the Steuben Health Clinic by the issuance and delivery of the aforesaid contract, and the engagements and committments therein provided for on its part, is engaged in the insurance business within the meaning of the insurance laws of the State of Missouri. In reaching a conclusion in the premises it is of course obvious that the determination of the question whether the contract is one of insurance or whether a corporation or association is making contracts of insurance, depends, not upon the name by which the association is called but upon the nature of the business it transacts and the contract it issues.

State v. Alley, 96 Miss. 720, 51 So.467.

Cooley's Briefs on Insurance, Vol. I, page 8.

For a consideration of Ten Dollars as an initial membership fee and Two Dollars monthly dues payable in advance the Steuben Health Clinic agrees to furnish medical, surgical and hospital service to its members, and to pay the cost of same. The contract seems to proceed upon the theory that the Steuben Health Clinic does not within and of itself have a staff of physicians and surgeons, but that such physicians and surgeons as are necessary are procured from outside sources. It also appears that the hospital service furnished by the Steuben Health Clinic will be furnished not in hospitals of the Steuben Health Clinic but in other recognized reputable hospitals in good standing.

We understand the contract to entitle a member to all examinations and consultations and advisory service as may be necessary for such member and whatever attention is needed by surgeons, physicians and specialists will be furnished and likewise such hospital services as are necessary, regardless of the length of time or the cost of such services so long as such member is in good standing, and when the member is not afflicted with any of the ailments, diseases or sickness excepted by the terms of the contract.

The case of Physicians' Defense Company v. Cooper, 199 F. 576, involved the question of whether or not the plaintiff company was transacting insurance business within the meaning of the statutes of California in the issuance of the policy involved in that case. The contract provided that if the holder thereof be sued for damages for civil malpractice the Defense Company would employ a local attorney in whose selection the holder of the contract had a voice, who together with the company's attorney would defend the case without expense to the holder of the contract up to the extent of a fixed amount of expense. The contract specifically provided that the company did not agree to pay the holder of the contract any expense and it is specifically provided that the company did not agree to pay any judgment that might be rendered against the holder. The Defense Company simply agreed to hold the holder of the contract harmless in case of suit to the extent of Five Thousand Dollars in the matter of expense. The court at page 578 of the opinion sets out many definitions of insurance, as follows:

> "(1) The statutory definition of insurance does not differ greatly from that usually given by lexicographers, text-writers and judges, and yet it is practically as comprehensive as any. Webster defines it as:
>
> "The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guarantee the other against loss by certain specified risks". Webst.Dict. "Insurance".
>
> The Standard Dictionary defines it as:
>
> "An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or

several parties to another party, in certain contingencies, upon specified terms".

And the Century Dictionary:

"In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes".

As to the text-writers, May defines insurance as:

"A contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss".

Such, says the author, is the definition of the term in its most general terms, and, speaking further, he says:

"It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended, or protection required, it holds out its fostering hand and promises indemnity". May on Insurance Sections 1, 2.

Phillips defines it as:

"A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks". 1 Phil.Ins. Section 1.

Smith, in his work on Commercial Law, defines it as:

"A contract by which a person, in consideration of a gross sum, or a periodical payment, undertakes to pay a larger sum on the happening of a particular event". Smith, Com. Laws, 299.

This collation of definitions is taken, with some rearrangement, from People v. Rose, 174 Ill. 310, 314, 51 N. E. 246, 247, (44 L. R. A. 124).

"An insurance contract", says the court, in Shakman v. Credit-System Co., 92 Wis. 366, 66 N.W.528, 32 L. R. A. 383, 53 Am. St.Rep.920, "is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a spedified peril".

Again the court, in Commonwealth v. Equitable Beneficial Ass'n. 137 Pa. 412, 419, 18 Atl. 1112, 1113, says of insurance that:

"It is a merely business adventure, in which one, for a stipulated consideration or premium per cent., engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to the loss of life. To grant indemnity or security against loss for a consideration is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance".

We will refer to but one more definition of the term, which is that given by 22 Cyc. p. 1384, as follows:

"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them".

The principal ingredients of such a contract are the consideration, the risk and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified. Insurance, under the statute, is a contract to indemnify "against loss, damage or liability". We think the addition of the word "liability" to the usual definition of the term does not operate to enlarge its significance. The kinds of insurance which have grown up and are denominated insurance under the usual definition have become very numerous. 22 Cyc. 1386."

The court at page 581 of the opinion further says:

"It is faulty logic to say that this is not a loss, damage, or liability of the contract holder, premising that he does not incur it, and concluding that it is the liability of the Defense Company. The loss, damage, or liability follows the suit for malpractice; and, were it not for the contract of the Defense Company, the holder must bear it. Whose loss, damage or liability would it then be? That of the person sued, of course. It is this very burden which the Defense Company agrees to bear in case the

> contingency of the holder being sued happens, and this is insuring the holder against the risk dependent upon the contingency. Looking on the other side, if this be a contract for personal services, why limit the amount of the services to be rendered in dollars and cents? Attorneys do not take contracts for defending parties sued in that way. How peculiar it would be for an attorney to say:"I will engage in your defense $5,000worth". It would follow that when the fund was exhausted the attorney would quit, whether the case was brought to a close or not. The very uncertainty of the amount to be paid by the Defense Company to meet the exigency contracted against is persuasive that the contract is not one of hiring, but one rather of indemnity. And such is our conclusion. See Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N.W. 396. The reasoning of the court in this case is both cogent and persuasive".

The same contract was before the Supreme Court of Minnesota in Physicians' Defense Company v. O'Brien, 111 N. W. 396. At page 397 of the opinion the court said:

> "The contract is very carefully and skillfully framed for the purpose of conveying the idea that it is an agreement for the performance of services and not for the indemnification of the physician against loss; but, unless we admit that language was invented to enable us to conceal our thoughts, this is a contract of insurance. Calling it "prophylactic and preventive" suggests its connection with the medical profession, but does not change its essential character. The books are full of definitions of insurance, and the contract has been variously described and characterized.

> Underlying all the definitions, except in life insurance, is the idea of indemnity".
>
> And further, on page 398:
>
> "A physician is subject to the ever-present peril of an action for malpractice. The defense of such an action, regardless of its merits, requires the expenditure of time and money. If the defense is successful, there is nevertheless a financial loss; if unsuccessful, the amount of the judgment is added to this initial loss. The judgment in favor of a defendant always leaves him a loser, because but a part of the actual expenses of the litigation are taxable as costs against the plaintiff. If judgment in a malpractice case is rendered against the physician, it is so much in excess of what he has incurred in the defense of the suit. In every case the defendant suffers a financial loss. Under this contract the company does not agree to pay the judgment, but it does agree to defend the action at its own expense, and thus in substance indemnify the physician against the risk or peril of being called upon to defend such an action. The consideration is paid annually. If no action is brought during the life of the contract, the company gains the amount of this compensation, which it received for subjecting itself to the risk of being called upon to defend an action at its own expense".

The object and purpose of the contract under consideration obviously is to indemnify, protect and save harmless the member from the heavy expenses entailed in the services and operations by physicians and surgeons and the cost of treatment and attention in hospitals. We can see no difference in

principle in the contract before us and one where a company agrees to repay to the contract holder the amount and sums of money he had expended of his own funds by reason of such services having been administered to him. By collecting a small initial fee and monthly premium from a great many persons, under the law of averages the Steuben Health Clinic might be enabled to take care of and pay the expenses of such services to its members when necessity therefor may arise and thus the individual member is indemnified against the burden of the expense of paying the whole bill for such ministrations to himself.

In the case of John Renschler v. State ex rel Hogan, L. R. A. 1915 D, 501, an individual engaged in the undertaking business agreed, in consideration of what was termed a note and certain interest payments to be made thereon, to furnish burial service to the holders of such notes. The court at page 502 of the opinion said:

> "In February, 1914, the court of appeals of Franklin county, on the foregoing agreed facts, entered its decree of ouster against the respondent, and error was thereupon prosecuted by respondent to this court. **Held**, the so-called mutual note is clearly insurance. By all the tests to which the contract may be subjected, it unerringly leads one to the conclusion that the intention of the parties was on the one hand to receive and on the other to provide a fund to pay the burial expenses of the insured.
>
> The contract being naked insurance and nothing else, it is subject to regulation by the insurance department. State ex rel. Coleman v. Wichita Mut.Burial Asso. 73 Kan.181, 84 Pac.757; Pikes v.State, 87 Miss. 251; 39 So. 783; State v. Willett,171 Ind. 296, 23 L. R. A. (N.S.) 197, 86 N. E. 68; Guenther, Ins.Sec.191; 1 May,Ins. 4th ed. Sec.27; Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319".

We think it is just as true in this case that by the payments provided for in the contract that the members are establishing a fund out of which payment may be made for the services they are entitled to under this contract.

We have not overlooked the cases of Vredenburgh v. Physicians' Defense Company, 125 Ill. App. 509, and State v. Laylin, 76 N. E. 567, but we think the cases heretofore quoted from are based on sounder reasoning and logic.

We are of the opinion that by the issuance, sale and delivery in the State of Missouri of the contract attached to your letter the Steuben Health Clinic would be engaged in the insurance business in the State of Missouri, and that the contract constitutes an insurance contract.

We return you your inclosures herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

Acting Attorney General.

GL:LC

Inclosures

DRAINS AND LEVEES: Duty of Drainage Districts to maintain and erect destroyed bridges.

July 18,1933 1-26

FILED 69

Honorable Morris E. Osborn
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Morris:

Your letter of July 12th, addressed to General McKittrick wherein you ask for several opinions regarding questions of liability of the drainage districts in replacing bridges, has been handed to me for answer. Your letter is quoted as follows:

> "The County Court has asked that I get your opinion on the following:
>
> After the Drainage Laws of 1913 were passed there was organized in this county a Drainage District. After the construction was completed, three bridges were built across the ditch in this county. For some reason, which I am unable to explain, the County Court has maintained these bridges up to about two years ago. At that time the company widened the ditch and raised the banks, which necessitated building approaches from each bank down to the bridge, which was left at a much lower altitude than the banks.
>
> At that time the Court brought the matter to my attention, and I gave the court my opinion that the maintenance of the bridges was and had always been the job of the company. Since that time the bridges have not been repaired, and only lately were washed out by an over-flow of the ditch.
>
> Whose job is it, according to the law, to repair and maintain these bridges?
>
> Does the fact that Shelby county has maintained these bridges in the past estop the

the county from now maintaining mandamus against the company to repair and maintain the bridges.

I believe the Court talked with Mr. McKittrick sometime ago and he told them to have me to write him for this opinion.

I might add that the 1929 law had not as yet been enacted when Shelby county got my opinion as to whose job it was to maintain the bridges. Also, at the time the ditch was being widened and the banks raised the Commissioners of the Company were served with a notice that the County expected them to repair and maintain the bridges. You will note that the 1929 Law gave to Counties the right to take over Drainage bridges only after they were constructed according to the specifications of the County Court and County Engineer."

This department agrees with you in having given your opinion to the County Court that the maintenance of the bridges was and always has been the duty of the Drainage District. Since you state that the Drainage District was formed under the laws of 1913, there has been an unbroken line of decisions holding that it was the duty of the drainage district to maintain and build the bridges. The first case deciding this point being State ex rel v. Medicine Creek Drainage District, 284 Mo. l. c. 649, wherein the court said:

"***In each of the three cases above cited, it will be noted that it was held that the cost of building bridges over public highways in or out of drainage districts, was imposed upon the county in which the bridge was located. In the first case (State ex rel.v.Chariton Drainage District,252 Mo. 345) this court construed Section 5513, supra, to impose the cost of building bridges upon the county, not because of any plain and pointed statement in the statute to that effect (for the statute contains no such statement), but because of the proviso

in that section to the effect that "if such bridge shall belong to any corporation, or be needed over a public highway", then the bridge shall be built by or at the expense of such corporation. A county is a public corporation, of course (14 C.J. 74), and upon that idea the decision in the Chariton Drainage District case is plainly based. That decision was handed down July 10,1913. The opinion affirmed the judgment of the lower court. It is argued that when the General Assembly of 1913 met it was a matter of common knowledge that under the drainage laws as they then stood, the cost of building bridges made necessary by the cutting of drainage ditches, was imposed upon the counties, because counties were corporations within the meaning of that word as used in the drainage laws. Thereupon the General Assembly of 1913 undertook a revision of the drainage laws. In so doing it adopted as Section 30 of the Act of 1913 all that part of Section 5513, supra, beginning with the words, "All bridges contemplated by this section," thence to and including the words "twenty days actual notice of the time and place of letting such work." A few slight changes in verbiage are made, but none which affects the question here involved. The Legislature then added the following clause, which did not appear in the statutes of 1909, to-wit:

"Within ten days after a dredge boat or any other excavating machine shall have completed a ditch across any public highway, a bridge shall be constructed and maintained over such drainage ditch where the same crosses such highway; Provided, however, the word corporation as used in this section shall not apply to counties."

Whether or not the General Assembly took cognizance of the decision of the Macon County Circuit Court in the Chariton Drainage District case,

252 Mo. 345, may admit of speculation, but that the addition to the drainage laws of the words last above quoted sweeps away the foundation upon which the decision of the Chariton Drainage Drainage District case was based, so far as the question here involved is concerned, is too plain for controversy. This amendment affects the decisions above cited in the Little River cases (269 Mo. 444 and 271 Mo. 429) in the same way, and to the same extent. Hence it becomes necessary to determine in the light of this amendment, upon whom now rests the burden of bridge building under the Act of 1913. At common law, that burden would rest upon the individual whose acts made the building of the bridge necessary. (Rex. v. Lindsey, 14 East, (Eng) 317; Rex v. Kerrison 3 M. & Sa. (Eng) 526; Penn. Railroad Co. v. Irwin, 85 Pa. St. 336; Richardson Co. v. Drainage Dist., 92 Neb. 776). Numerous authorities to the same effect are collated in an exhaustive note upon the case last cited, in 31 Am. & Eng. Ann. Cases (1914A), page 550.

As construed in the Chariton Drainage District case, supra, and in subsequent decisions, Article 1 of Chapter 41 (Drainage Statutes, R.S. Mo. 1909) the law imposed what this court felt to be a hardship upon the counties, but one which we could not avoid. Thus in the Chariton case, Faris, J., speaking for this court, said:

"While it is regrettable that a studied effort seems to have been made to render this drainage statute vague and ambiguous upon the point of where the burden of bridge building lies and while the view we have heretofore taken and are now again forced to take, is fraught with hardships in this and in other single instances, we can only repeat that the remedy lies with the Legislature and not with us. We construe the law; we do not make it." (269 Mo.l.c.463)

The vexatious vagueness of which the learned jurist there spoke is still as annoyingly per-

sistent in the Act of 1913 as before. It seems that it would not have been a difficult matter to incorporate into this act a line saying in plain terms either that the county or the drainage district must build and pay for bridges, but that has not been done. We must construe the act as we find it.

Seeking the legislative meaning, then as in duty bound, as Job sought the grave, "diligently and with tears," we come to considerations which may be summed up thus: The drainage law as found in the Statutes of 1909 permitted a construction which placed the duty of building bridges over drainage ditches upon the counties. The trial courts so construed it--and correctly so construed it, as we held in the Chariton case, supra. This was held to be a hardship, as was said by Faris, J., in the paragraph which we have quoted. This paragraph though written subsequent to the Act of 1913, no doubt voiced a sentiment which had prevailed under the old law. The construction which caused this hardship was based, as we have said, upon an interpretation of the word corporation, as used in the drainage statute, as a word which included counties. The Legislature revised the law and in substance and almost literally reenacted the section which had been so construed. But in doing so, the Legislature said very clearly, that "the word corporation as used in this section shall not apply to counties." By this rule of construction we are bound, and if counties are not corporations within the meaning of that section, then there is no authority in the Act of 1913 for imposing the burden of the building of bridges upon counties. But Section 30 of the Act of 1913 provides that the bridges must be built. In the absence of a statutory declaration otherwise, the obligation to perform the duty would rest upon the drainage district under the common law, as we have said."

This opinion by the court has been followed and we find it further approved in 40 S. W. (2nd) p. 1086.

The next question which confronts us; What effect would the change in the statute of Section 4406 R. S. 1919, as made by the Legislature in 1929, which we find in Section 10773 R. S. 1929?

Omitting the parts which are not pertinent to the question we find the old Section 4406 reading as follows:

> "* * *A bridge shall be constructed and maintained under such drainage districts where the same ccosses such highways; Provided, however, the word corporation as used in this section shall not apply to counties." * * *

The same was then changed in Section 10773 to read as follows:

> "A bridge adjudged sufficient by the county court of said county or counties shall be constructed over such drainage ditch where the same crosses such highway, and after such bridge has been constructed it shall become a part of the road over which it is constructed and shall be maintained by the authority authorized by law to maintain the road of which it becomes a part. If said bridge has been constructed by the drainage district and has become a part of said road and is then destroyed the authorities having control of the road are authorized, if they desire, to reconstruct such bridge: Provided, however, the word corporation as used in this Section shall not apply to the state or any political subdivision thereof."

From reading Section 10773, at first glance it might be construed that the drainage districts are relieved of further responsibility of maintaining and repairing bridges across drainage districts, and such would be the case in the opinion of this Department in the absence of the statement in your

letter; "Since that time the bridges have not been repaired, and only lately were washed out by an over-flow of the ditch."

The situation now is that you have no bridges and that they have been destroyed across the ditches, therefore we must apply that portion of the statute beginning with; "If said bridge has been constructed by the drainage district and has become a part of said road and is then destroyed the authorities having control of the road are authorized, if they desire, to reconstruct such bridge."

We must therefore construe this portion of the statute to mean that the county has the power and could reconstruct the bridges if it so desired, but there is nothing mandatory on the county court to reconstruct the bridges, in other words, if the county court does not desire to reconstruct the bridges then the decisions quoted above would still compel the drainage district to replace the bridges.

The change in the statute merely gave the county court the right to assist and aid drainage districts if the county court so desired.

The next question; "does the fact that Shelby County has maintained these bridges in the past estop the county from now maintaining mandamus against the company to repair and maintain the bridges?"

Under the doctrine of estoppel we fail utterly to understand how the drainage district could avail itself of that defense. To constitute an estoppel by conduct there must have been, first, a false representation or concealment of material facts; second, the representation must have been made with the knowledge of facts; third, the party to whom it was made must have been ignorant of the truth of the matter; fourth, it must have been made with the intention that the other party should act on it; fifth, the other party must have been induced to act on it. Under the facts set forth in your letter the drainage district has in nowise been injured or prejudiced by the county court maintaining the bridges which under the law the district itself should have maintained.

In view of the foregoing authorities it is the opinion of this Department that the county court has the power, if it so desires, to replace the bridges, but in the event the county

court does not so desire it can compel the district to replace the bridges destroyed.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:MM

INSURANCE: When insurance company liable for premium tax - Mutual Benefit Health and Accident Association of Omaha, Nebraska.

9-23.

September 12, 1933

FILED
69

Honorable R. E. O'Malley
Superintendent of the Insurance Department
Jefferson City, Missouri

Dear Mr. O'Malley:

My letter dated May 22, 1933, your predecessor in office Joseph B. Thompson, Esquire, submitted to this office the following inquiry:

> "A controversy has arisen between the Mutual Benefit Health & Accident Association of Omaha, Nebraska and this Department as to whether that Association is liable for a premium tax on its business transacted in Missouri under section 5779 or section 5979, R.S.Mo.1929.
>
> I enclose herewith statement and brief prepared by Mr. Fred Dexley of Kansas City on behalf of the Association contending against the tax; an opinion by Mr. Weatherby holding that said Association is taxable under Section 5979, supra; also Mr. Dexley's reply to Mr. Weatherby's opinion.
>
> Up until 1932 this Association has been licensed in Missouri as an assessment company. In 1932 shortly before their license was renewed the question arose as to the character and form of policy they were selling in Missouri and after considerable discussion, more as a matter of compromise than anything else, it was agreed that they should be licensed as a stipulated premium company thereafter and that they should pay a premium tax of 1% under said section 5779.

> This year, however, the association through Mr. Boxley protested against the payment of any tax whatever and thus the question is before us again.
>
> It will very likely result in a suit unless your office is of the opinion that Mr. Weatherby is wrong in his conclusion. It is almost certain that they will refuse to pay any tax and will drive the Department to an action for its recovery. This being true I feel that the matter should be submitted to you for your opinion. Will you therefore kindly give us your opinion on the subject involved."

From time to time various briefs have been submitted for the consideration of this office and we now give you our final conclusions thereon. In determining a question such as is now presented the Supreme Court of this state speaking of an assessment company having a license, laid down the following rule:

> "Its measure of authority for legitimate business in Missouri is our statute. The test of the character of the policy it issues is the statute, and not the license it may have obtained."

Ordelheide V. Modern Brotherhood of America, 268 Mo. 339.

So that the character of license issued to the Mutual Benefit Health and Accident Association is immaterial so far as this state is concerned, except as that fact may be useful in determining whether or not the contract issued by the company is an assessment contract. On that point in Westerman v. Supreme Lodge K. of P. 196 Mo. 670, 707, the Supreme Court said:

> "We take it that in assigning reasons upon which to rest the conclusions reached in this case the practical construction of the statutes applicable to the insurance laws of this State, given by the department of state government, which has the direct supervision of the Insurance Department

> of the State, as well as the manner of all insurance companies and other associations in conducting the business of insurance in which they are engaged in this State, should not be ignored."

In Lee v. Missouri State Life Insurance Company, 303 Mo. 492, 501, Division No. 2 of the Supreme Court, in a suit involving an assessment insurance contract, said:

> "It is not material that the word 'assessment' was not used in the certificate. It means nothing more as applied to the facts here under consideration than an apportioning of amounts required to be paid."

The Supreme Court of this state in Westerman v. Supreme Lodge K. of P. supra, at page 716 of the opinion, and quoting from 104 Fed.718, approved the following language:

> "While the premium at first reserved is a definite sum, yet by further provisions the executive committee of the company can require the holders of such policies to pay a greater or less sum than that stipulated to be paid on the face of the policies, if the condition of the defendant company at any time renders such action necessary . . . When all the provisions of the contract are considered, it seems to retain all the essential features of assessment insurance."

The same principle is announced in Hanford v. Massachusetts Benefit Association, 122 Mo. 50.

Section 5745 of Article III of Chapter 37, Revised Statutes of Missouri 1929 covering insurance on the assessment plan, provides as follows:

> "Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized corporations which shall be subject to the provisions and requirements of this article."

Section 5754 provides in part:

> "*** Provided, always, that nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth and provided."

The Supreme Court of this state in Masonic Aid Association v. Waddill, 138 Mo. 628, 638, construed the above sections and held insurance companies doing business upon the assessment plan not liable for the insurance premium tax provided for in the general insurance law, the court said,

> "So that when in 1895, the legislature determined to impose a license or occupation tax on insurance companies as evidenced by the passage of the act 'approved March 20,1895,' they could, without infringing upon this constitutional requirement, have imposed such tax upon both or either of these classes. That they intended to impose it upon the premium life and casualty insurance companies only, and not upon the life and casualty insurance companies doing business upon the assessment plan, is plainly evident from the act which left

> article 3 intact, and section 5869 of that article containing the exemption aforesaid unrepealed, while specifically repealing other sections of the general insurance law, and by its terms imposing the tax upon 'premiums' only and not upon 'assessments'."

Young v. Life Insurance Company, 277 Mo. 694, involved the question of the liability of an assessment company for premium tax in this state. The court at page 699 of the opinion said:

> "No such tax was demandable, under the statutes and decisions of this state, by any company doing business on the assessment plan."

In Hartford Life Insurance Company v. Hincoe, 253 U. S. 129, 65 L. Ed. 549, the Supreme Court of the United States speaking of the decisions of the Supreme Court of this state, at page 135 of the opinion said:

> "***The court decided that the tax was not applicable to companies doing business on the assessment plan *******."

Section 5979 Revised Statutes Missouri 1929 as amended by Missouri Laws 1931, at page 242, reads as follows:

> "Every insurance company or association, not organized under the laws of this state, shall, as hereinafter provided, annually pay tax upon the premiums received, whether in cash or in notes, in this state or on account of business done in this state, for insurance of life, property or interest in this state at a rate of two per cent. per annum in lieu of all other taxes, except as in this article otherwise provided, which amount of taxes shall be assessed and collected as hereinafter provided: Provided, that 'Fire and casualty' insurance companies or associations shall be credited with canceled or

> return premiums, actually paid during the year in this state, and with premiums on reinsurance with companies, authorized and licensed to transact business in Missouri, which reinsurance shall be reported by the company reinsuring such business; but no credit shall be allowed any such insurance company or association for reinsurance in companies not licensed to transact business in Missouri."

The above section is found under the general provisions regulating the business of insurance companies in this state.

Section 5779 provides that all foreign insurance companies doing business in this state on the stipulated premium plan shall pay a tax on gross premiums at the rate of one per centum per annum.

While the Mutual Benefit Health and Accident Association was organized as an assessment company under the laws of the State of Nebraska, yet, from the foregoing statutes and decisions, and since this state has the right to make any regulations or restrictions it desires as to the conduct of business by foreign insurance companies in this state, we think the real question at issue in this matter is whether or not the company is or has been doing business in this state on the assessment insurance plan. That question is to be determined by a construction of the form of contract issued by the company to its policy-holders and to the form of such contract we next give our attention.

Section 5750 R. S. 1929, provides:

> "Any company organized under the authority of another state or government to issue certificates or policies of life or casualty or life and casualty insurance on the assessment plan * * * * * shall deposit with the Superintendent of the Insurance Department * * * * * a copy of its policy of certificate and application which must show that the liabilities of the members are not limited to fixed or artificial premiums."

The copies of policies of the association in question on deposit with the Superintendent of the Insurance Department of this state require the first payment to be made in advance and thereafter quarterly or annual premiums are payable in advance. The Westerman case above quoted from shows that the fact that fixed premiums are required does not, in and of itself, make the contract an old line policy. We quote further from Lee v. Missouri State Life Insurance Company, supra, at page 500,

> "The question necessary to be solved in this proceeding is the character of the contract. If upon its face it clearly indicates that the payments, by the insured necessary to continue the life of the policy were to be gathered in whole or in part from the assessments upon the holders of certificates of a like class, then the certificate or policy may be classified as upon the assessment plan (Williams v. Ins.Co. 189 Mo. l. c. 81; Andrups v. Accdt.Assn. 283 Mo. l. c. 449); if, however, it provides for the payment of fixed premiums at stated intervals without condition, then it is to be classified as a level-premium or old-line policy."

The sample form of policy on deposit in the office of the Superintendent of the Insurance Department contain the following provision:

> "Should the premium provided for herein be insufficient to meet the requirements of the association, it may call for the difference as required."

Undoubtedly the requirements of the association are for such funds as will discharge the liabilities of the association to its members. It is true the policy does not contain any provision as to details in the collection of such requirements but the policy-holder upon acceptance of the policy containing the foregoing provision agrees to its terms and we see no reason why the provision could not be enforced by the association upon making timely and equitable calls against the holders of such contracts. If we are correct in that conclusion, then there can be no doubt

that the payment of benefits under such policies of the association are in a manner or degree dependent upon the collection of a sum of money in addition to the premiums, the amounts of the latter being fixed by the policy.

We have quoted from Section 5750 requiring this association to deposit with the Superintendent of the Insurance Department a copy of its policy or certificate. It has done so. The policies of the association on deposit with the Superintendent of the Insurance Department of this state contain the above quoted provision, and we assume the association has only issued contracts to its policy-holders in this state in the form of the policies on deposit with the Superintendent, therefore, as required by Section 5745 payment of the benefit under the policies issued in this state is dependent upon the collection of an assessment from the persons holding similar contracts. Under the holding in Lee v. Insurance Company, supra, this is true even though the quoted provision of the form of policy issued by the association does not contain the word "assessment".

We have not overlooked the case of State ex rel v. Revelle, 260 Mo. 112, which was an action in mandamus to compel the State Superintendent of Insurance to issue a license to the relator to write life insurance in this state upon the assessment plan. The controversy arose over the form of the policy desired to be issued by the company. The position of the Superintendent was that the form of policy desired to be issued by the company was deceptive on its face and the main contention centered around the stipulation in the policy set out at page 115 of the opinion. It is similar to the clause in the policy under consideration and is as follows:

> "Should the premium be insufficient to meet the requirements of this policy, the company reserves the right, in compliance with the law of its incorporation, to call for the difference necessary to meet the requirements and to fix the time for the payment thereof."

In the latter case, however, on the front page of the policy and above the signatures of the officers of the company, is a requirement for fixed and unchangeable premium payments. The provision of the policy last quoted was to be found on the back of the policy. Passing on the matter the court at page 118 of the opinion said:

> "The law does not contemplate that obligations to pay several premiums, some of them fixed and others contingent, may be scattered promiscuously and disconnectedly over all parts of a policy, so that, perchance, the purchaser may overlook some of them and thereby obligate himself to pay more than he intends to pay.
>
> In order that a policyholder may not be deceived, if there is (as in these proposed policies) a definite premium named on the front page, the very paragraph or proviso which designates such stated premium should, in plain words, refer to the fact that under other provisions of the policy additional premiums may be called for and collected. When this is not done the policy fails to show that the premiums are not limited as required by section 6955, supra.
>
> Instead of being so framed as to promote honesty and open fair dealing between the insured and the insurer, all the proposed policies attached to relator's petition are so framed as to deceive the insured."

The court seems to have based its ruling on the arrangement of the respective provisions in the policy. The sample policies of the Mutual Benefit Health and Accident Association containing the provision above quoted from same, sets out the provision with reference to fixed payments and immediately follows with the provision hereinabove set out and both are carried above the signatures of the officers of the association. By this, we do not mean that the Superintendent would not be entirely warranted in requiring the policies of the association to be reformed so that there could be no argument as to whether assessments could be levied under similar contracts in addition to the payment of fixed premiums. We quote again from Lee v. Insurance Company, page 501,

> "It is true, that for a fixed period, five years, the quarterly payments required of the insured were to be

> made at regular intervals and in certain uniform amounts. This requirement, however, was not unconditional, but subject to certain provisions indorsed on and which became a part of the contract. One of these provisions was to include certain quarterly dues on each thousand dollars of insurance and pro rata amounts necessary for mortuary purposes. By this we understand that payments thus required to be made by the insured are to constitute pro rata amounts necessary to meet the death benefits on matured obligations of the Association."

The provision in the policy there under consideration stating that,

> "Pro rata amounts necessary for mortuary purposes,"

was the basis of the holding that the policy required payments other than the fixed premiums and therefore was an assessment contract. We fail to see wherein the provision of the policy of the association in question is not at least as strong as the provision in the policy construed in the Lee case. In that regard, we think the decision of the Kansas City Court of Appeals in Wollums v. Mutual Benefit Health and Accident Association, 38 S. W. (2nd) 259, is in conflict with the opinion in the Lee case.

It is the opinion of this Department that the Mutual Benefit Health and Accident Association of Omaha, Nebraska, is not liable for premium tax on premiums collected by it under policies issued containing the provision hereinbefore set out.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

NEPOTISM: Official is not related to wife's sister's husband within the prohibited degree; duty of Prosecuting Attorney to remove officials of his county who violate said constitutional provision.

FILED 69

October 9, 1933.

10-14

Mr. John B. Owen,
Prosecuting Attorney,
Clinton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "If an official should appoint the husband of his wife's sister, would this be a violation of the anti-nepotism law. Shall appreciate your opinion.
>
> I wrote you some ten days ago for an opinion as to whether Section 13139x8, 1933 Session Acts, was punishable as a misdemeanor. Have not heard from you. Please let me have your opinion on this point also.
>
> Will you also advise what the duties are of the Prosecuting Attorney in enforcing anti-nepotism violation in schools?"

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing provision of the Constitution persons related within the fourth degree, either by consanguinity or affinity, cannot be appointed to office. We are of the opinion, however, that if an official should appoint the husband of his wife's sister, that such act would not be in violation of the Constitution, because he is not related to such husband within the fourth degree by affinity, as prohibited by the Constitution. In 2 C. J. 378, it is said:

> "Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor

does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, 11th Ed. Vol. 1, page 301, the author has the following to say about affinity:

"The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

In answer to your first inquiry it is our opinion that the official is not related to the husband of the wife's sister within the prohibited degree.

Your next inquiry whether or not the violation of Section 13139x8, Laws of 1933, is punishable as a misdemeanor. There is no such Section and we assume, therefore, that you are referring to Section 13139z8, which is a part of the Beer Act, found on page 266, Laws of Missouri 1933. Said Section provides as follows:

"It shall be unlawful for any holder of a permit authorizing the sale of non-intoxicating beer for consumption in or upon the premises described in such permit, to have or maintain in any room on said premises, wherein such non-intoxicating beer is sold and/or served to customers, any bar, mirror, or other fixtures having the appearance of a saloon such as existed, and was conducted in this state prior to, the effective date of the Eighteenth Amendment to the Constitution of the United States of America, or to have and maintain any blinds or screens, or any other thing, in any such room, that will obscure the interior of such room from public view. It shall also be unlawful for any holder of such permit to keep or secrete, or to allow any other person to keep or secrete, in or upon the premises described in such permit, any intoxicating liquor including beer having an alcoholic content in excess of 3.2 per cent by weight."

The above Section does not provide that the violation of said Section shall be a crime, either a misdemeanor or a felony. There is no general Section in this Law, as is found in many Laws, making the violation of all of its provisions a misdemeanor. The violation of some sections are made crimes. Section 13139y provides:

"Any person convicted of the violation of any provision of this article, the violation of which is by this

article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law * * * *."

That Section does not make the violation of every provision of this Act a crime. It simply provides that where the Act has made the violation of certain sections a misdemeanor and does not fix a punishment, that the offender shall be punished as otherwise provided by law. The Legislature has not seen fit to make the violation of Section 13139z8 a crime, and as there is no general section in the Act making such violation a crime, we are of the opinion that a violation of such section would not be a misdemeanor. Of course, if the holder of a permit should keep upon his premises intoxicating liquor he could be prosecuted under the Prohibition Law with which you are entirely familiar.

You next inquire as to the duties of the Prosecuting Attorney in enforcing the anti-nepotism provision of the Constitution.

Section 11316, R. S. Mo. 1929, provides as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county * * *."

Under the foregoing Section it is the duty of the Prosecuting Attorney to bring Quo Warranto proceedings against any official who has violated Section 13 of Article XIV of the Constitution. The state is interested in seeing that people do not usurp public offices. The fact that the Attorney General may also bring such proceedings does not take away from the Prosecuting Attorney the right to bring same or the duty imposed upon him by statute to bring such actions.

It is therefore the opinion of this Department that under the statute it is the duty of the Prosecuting Attorney to bring a Quo Warranto proceeding to oust any official of his county who has violated Section 13 of Article XIV of the Constitution.

Very truly yours,

Frank W. Hayes
Assistant Attorney General.

FWH:S
APPROVED:

Attorney General.

BEER: Criminal prosecution not appropriate for unlawfulness in declaring it to be a misdemeanor by the act.

October 20th, 1933

10-23

FILED
69

Hon. John B. Owen
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

Your letter of September 21st requesting an opinion of this office was as follows:

> "Supplementing my conversation with your office over the phone this morning will your kindly advise me what penalty if any follows Section 13139z8 CERTAIN FIXTURES UNLAWFUL - Laws Missouri 1933 page 266. I assume this section is a misdemeanor for the violation thereof but am in doubt. Sec. 13139y of above provides penalty for the article but not the particular section in issue. Would a criminal proceedings lie. Am troubled with the curtain proposition on windows of place of business selling beer under state premit. This matter is urgent and your opinion at once will be appreciated as I advised over phone."

Section 13139z8 of the Laws 1933, p. 266 provides as follows:

> "It shall be unlawful for any holder of a permit authorizing the sale of non-intoxicating beer for consumption in or upon the premises described in such permit, to have or maintain in any room on said premises, wherein such non-intoxicating beer is sold and / or served to customers, any bar, mirror, or other fixtures having the appearance of a saloon such as existed, and was conducted in this state prior to, the effective date of the Eighteenth Amendment to the Constitution of the United

> States of America, or to have and maintain any blinds or screens, or any other thing, in any such room, that will obscure the interior of such room from public view. It shall also be unlawful for any holder of such permit to keep or secrete, or to allow any other person to keep or secrete, in or upon the premises described in such permit, any intoxicating liquor including beer having an alcoholic content in excess of 3.2 per cent by weight."

Section 13139y of the Laws of 1933, p. 264 provides as follows:

> "Any person convicted of the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law, and if any person so convicted shall be the holder of any permit issued by the Food and Drug Commissioner under authority of this article, such permit shall from and after date of such conviction, be void, and the holder thereof shall not thereafter, for a period of one year after date of such conviction, be entitled to any permit for any purpose authorized in this article."

Thus we see that the Legislature declared it to be unlawful for one holding a permit to sell beer for consumption on the premises to have or maintain in the sales room certain fixtures which were always used and maintained in the old fashioned saloon of pre-Volstead days. No place in the same section is a penalty provided for one committing the unlawful act, nor is there a statement in said section that one violating its provisions is guilty of crime or misdemeanor in unequivocal terms. If in violating the provisions of said section one be guilty of crime or misdemeanor, it is because the word 'unlawful', as used in said statute, means that the remedy intended by the Legislature for the doing of the unlaw-

ful act, was intended to be a criminal remedy. There can be no doubt but that the public are afforded a legal right under the above section to expect those permitted to sell beer for consumption on the premises, to sell only as permitted by law, and one who violates the mandates of the law commits an unlawful act under the simple wording of the statute.

If the Legislature intended to punish those who commit the unlawful act for a crime or misdemeanor, it can only be done by virtue of the provisions of Section 13139y, as above set out, for in the whole act, that section is the only provision that would indicate the remedy that the Legislature intended. Other sections of the beer law declared certain defined and prohibited acts punishable as a misdemeanor, but not to include permittees who unlawfully maintain a sales room for consumption of non-intoxicating beer on the premises. Section 13139y provides that 'the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this act provided, shall upon conviction thereof be punished as otherwise provided by law'. That phrase simply means that the misdemeanors set out in the beer law and providing no punishment (and not a single described misdemeanor in the whole act declares a penalty), shall carry the common law penalty, under the provisions of Sections 645, 646, and 648, R. S. Mo. 1929.

Section 645 R. S. Mo. 1929 provides as follows:

> "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such

> common law, or with such statutes or acts of parliament, but all such acts of the general assembly, or laws, shall be liberally construed so as to effectuate the true intent and meaning thereof."

Section 646 of the R. S. Mo. 1929 provides as follows:

> "Punishment by virtue of the common law shall in nowise be other than by fine or imprisonment, or both, and such fine shall not exceed one hundred dollars, and the term of such imprisonment shall not exceed two months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this state."

Section 648 of the R. S. Mo. 1929 provides as follows:

> "No person's body shall be imprisoned or restrained unless by authority of law."

Thus we see that under the beer law where certain unlawful acts are declared misdemeanors, the penalty provided can only be the common law penalty, as above set out and limited. Section 13139y further provides for a revocation of the permit in cases where there is a conviction under the provisions of the section. Said section, by its own limitations, does not apply to your problem because by its terms it applies only where unlawful acts in the beer law are declared to be a misdemeanor and the unlawful act of which you complain is not declared to be a misdemeanor in the act.

Thus, you have a question of one operating a sales room for the consumption of beer on the premises in an unlawful manner without the Legislature providing any remedy. The doing of such unlawful act, we think, was not a crime at common law, so you cannot expect the courts to enforce a criminal remedy as in a common law crime when the Legislature itself does not even as much as declare such unlawfulness to be a misdemeanor. Misdemeanors were punishable at common law but not unlawfulness.

The act itself, although defining non-intoxicating beer and many other

words and phrases, does not define the word 'unlawful' as used in its context. The Missouri statutes, while defining over seven hundred words and phrases, does not even pretend to define the word 'unlawful'.

R. S. Mo. 1929 provides that:

> "Words and phrases shall be taken in their plain or ordinary sense, but technical words and phrases having an appropriate meaning in law shall be understood according to their technical import".

The word 'unlawful' as used in this statute, has no other meaning in law than its ordinary meaning. I find that Noah Webster defines the word 'unlawful' thus:

> "Not lawful; contrary to law."

It would be going too far for this office to say that the word 'unlawful' means 'criminal', as here used by the Legislature, for it would have been a simple matter for the Legislature to have defined it as meaning 'criminal', if they intended it to have that meaning. We take its meaning as Webster defined it, above set out.

Even if one who unlawfully operates a sales room for consumption of non-intoxicating beer on the premises, by keeping and maintaining fixtures prohibited by law, be guilty of a misdemeanor at common law, they would be guilty only of an unlawful act which is not necessarily a crime after the passage of this beer law, and our Supreme Court said, State vs. Crane, 202 Mo. 54 l.c. 81, 100 S.W. 422

> "It is a familiar rule of construction that a statute is impliedly repealed by a subsequent one revising the whole subject matter of the first, and in case of a statute revising the common law, the implication is equally as strong.*** So here, as in State v. Church, supra, we are of the opinion that when the Legislature took this subject of the trial of insane persons in hand, it must be held that the statutory provisions on that subject are controlling, and that whatever the rule might have been at common law and in other states, our statute must govern*********".

#6 - Hon. John B. Owen October 20th, 1933

In the beer law, you have a revision by a subsequent act of the Legislature of the whole beer law in Missouri, as said law relates to non-intoxicating beer. The whole law is repealed, not only by implication but by the express provisions of the new law. The statutory provisions of the new law, as they exist, must control.

It is the opinion of this office that criminal proceedings will not lie against one who unlawfully operates a sales room for consumption of non-intoxicating beer on the premises by keeping and maintaining fixtures prohibited by law, as the statutory provisions of the present beer law do not declare any punishment for such an unlawful act.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney-General

WOS:FE

Allied Mutual Insurance Company
Approval of Declaration.

FILED
69
55

October 27, 1933.

10-27

Hon. R.E. O'Malley,
Superintendent of Insurance,
State of Missouri,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of the Declaration and Articles of Incorporation of the Allied Mutual Insurance Company, and have examined same, and it is our opinion that said Declaration and Articles are in accordance with the provisions of Art. VII, Chap. 37, R.S. Mo. 1929, and are not inconsistent with the Constitution and laws of this State and the United States.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

VV

In re: Cross examination of witness about prior conviction even though appeal from said conviction was pending.

January 10, 1933

FILED
70

Mr. George B. Padget
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

Your letter of January 6th, 1933 has been referred to me and, which in part, is as follows:

> "At this time, having inherited the case of State of Mo. vs Harold E. Taylor, charged with perjury, on change of venue from this county and now to be tried in DeKalb Co., their court convening coming January 16th.
>
> "One of my first cases in this court in 1911 when I was prosecuting attorney here before, was to convict this same man for cutting harness, and now, strange to say, one of my first cases, is to prosecute him on this above charge.
>
> "I am informed that he was convicted on an insufficient funds check in Caldwell County, about June 1931; that he started to appeal it, but am not informed as to whether he ever perfected his appeal, and if not your records may show, and if he has not, will it be possible to have it, the appeal, dismissed there, in time, so it will stand affirmed, so that I may use the record of such conviction by way of impeachment, in case he takes the stand, in this perjury case. Will you look it up and enlighten me so soon as possible, making such suggestions about it as may further the interests of the State in this prosecution pending against him in DeKalb County?"

The records of the Supreme Court show that the appeal from Caldwell County has been perfected and continued until the April term of court, together with an order extending the time of filing a Bill of Exceptions.

In State vs Shelton, 284 S.W. 433, 314 Mo. 333, the question of whether a witness could be asked, on cross-examination, about a conviction even though an appeal was pending was passed upon by the Supreme Court. I suggest you read this case in the Missouri Reports. You will notice that Blair, Walker, Atwood, White and Graves concurred in holding that the question was proper.

Yours very truly,

FRANKLIN E. REAGAN,
Asst. Attorney General

Approved:

ROY McKITTRICK
Attorney General

FER/mh

Bonding Company qualified in Missouri can sign county official's bond --
If County under township organization, County Treasurer must give bond mx as Treasurer also bond for school district money, and for money received as exofficio collector - Treasurer failing to give bond and not inducted into office predecessor holds over until Treasurer either is inducted into office or gives bond and qualifies or does all three -- Giving bond is a directory and not mandatory provision and has nothing to do with election and qualifying of Treasurer,
If Treasurer gives bond after being inducted into office and before ouster proceedings filed, Treasurer cannot be ousted for failure to give bond.

April 14, 1933

FILED
70

Hon. Geo. B. Padget
Prosecuting Attorney
Gallatin, Missouri

Dear Sir:

Your letter reads as follows:

> "An unusual condition has developed here regarding the giving bond of Robert Pogue, our Treasurer elect. Heretofore it has been the custom for the bank with whom the money was deposited, to go on the bond, but now owing to their not desiring to increase their liabilities, the bank has indicated that they are not willing to make his bond, though he is in all respects a very worthy gentleman. I notice that sec. 12133 Revised Stat. 1929 provides that his bond shall not be less than twenty thousand dollars, to be fixed by the court, and that the sureties are referred to as 'resident land owners'. Now the first question is, will a bond bought from a bonding or surety company fill the requirements of the law?
>
> Our county court informs me that the present sum fixed as bond amounts to the sum of Two Hundred Thousand Dollars, and to buy a bond in such sum would cost so much that it seems he cannot well afford to buy the bond, even if such bond would be a legal bond. The court further informs me that the greatest sum of money likely to be in his hands at any one time is Sixty Thousand Dollars. I also see by sec. 9266 R.S. 1929 'He shall give a separate bond with sufficient securety in double the probable amount of school moneys that shall come into his hands', and sec. 9886 R.S. 1929 provides that 'he shall give bond and securety as such exofficio collector ****** in a sum at least equal to the amount of all revenue to be by him collected for any one year'. Now here are three separate and distinct bonds that it seems are required by statutes above set out, and if there is any provision for other, or additional bonds, to be given in such case, I have over-looked it.

> Now that our county-court may know just how many bonds, he must give, and the least amount the bonds should be for, and whether a bonding, or surety companies bond will answer, Will you kindly advise me fully as soon as possible. I suppose in case he gives no bond the present incumbent will hold over; is that correct?"

Section 2851 R. S. of Mo. of 1929 provides as follows:

> "Any company having a paid-up capital of not less than two hundred thousand dollars, organized and incorporated ***** for the purpose of transacting the business of becoming surety on the bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust,******* may, on production of evidence of solvency satisfactory to the court, judge, clerk, head of department or other officer, person or persons authorized to approve the same, become and be accepted as surety on the bond, recognizance or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the state, and if such surety company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional surety may be exacted, but other surety may, in the discretion of the official authorized to approve such bond or obligation, be required: ******* it being the true intent and meaning of sections 2851 to 2853 to enable corporations created for that purpose to become surety on any bond, recognizance or other writing in the nature of a bond, in the same manner that natural persons may, subject to all the rights and liabilities of such persons."

I am not aware of any act repealing this statute nor court decision holding Surety Company cannot become surety on County Treasurer's bond, subject of course to right of county court to require additional surety in discretion of the court as provided in Sec. 2851. It is true Sec. 12133 R. S. Mo. 1929 provides as follows:

> "The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Section 12133 was enacted first in 1855 l.c.p.520, Par. 6.

Section 2851 was passed and put on the Statute Books in 1885, see Mo. Session Laws 1885, p. 41. Both Statutes deal with the same subject - giving of bond by county Treasurer. The act of 1885 now Section 2851, is an additional method of furnishing bond by the county Treasurer and is a later act and modifies Sec. 12133 to the extent that Treasurer can furnish legally qualified Surety Company as bondsmen and if Surety Company furnishes, satisfactory evidence it can furnish the requisite security required by law, the county court should accept same, but as above stated in addition county court may require under Section 12133 additional security.

In county under township organization county Treasurer should in my opinion furnish a county Treasurer's Bond under Sec. 12133 R. S. Mo. 1929 and a school money bond under Section 9266 R. S. Mo. 1929 and also give bond as exofficio County Collector in the amount of all revenue to be collected by him in any one year. I know of no additional bonds the county Treasurer is required to give under the Missouri decision as I read same there is no vacancy in the office in your county. A county Treasurer was duly elected in legal time and manner. He merely has not given bond. Our court held as follows in State ex rel Attorney General v. Churchill 41 Mo. p. 41, that the statute requiring giving of a bond in ten days after Treasurer's election was merely directory and in the course of the opinion said l.c. p.p. 43:

> "The matter of time was not essential to the validity of the bond nor a condition precedent to the party's title to the office. Time not being of the essence of the thing required to be done here it was not material."

And in 46 C. J. p.p. 962-963 par. 95 it is stated:

> "In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy; and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient."

This doctrine is quoted approvingly in Cantley, Com'r v. Village of Mt. Moriah, 49 S.W.2nd, in which case l.c.277 the Kansas City Court of Appeals said:

> "Some statutes provide that the failure to give bond shall work a vacancy or a forfeiture of the office, but it is usually held that, under these statutes, the officer continutes to be a de jure officer until a vacancy or forfeiture is declared. See State ex rel. v. Ely, 43 Ala. 568; State ex rel. v. Callow, 78 Mont. 308, 254 P.187; People ex rel. v. Benfield, 80 Mich. 265, 45 N. W. 135; People ex rel. Brooks v. Watts, 73 Hun, 404, 26 N. Y. S. 280. In the case last cited the court quoted

approvingly (page 282 of 26 N. Y. S., 73 Hun,404) from Dill. Mun. Corp. (4th Ed.) as follows:

'Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, ipso facto, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.'"

The elected County Treasurer is a de jure officer until a forfeiture of his office or vacancy is declared. But as the elected County Treasurer has not been inducted into office the old Treasurer will hold over until a successor is both elected and qualified. In this case the Statute Sec. 12130, expressly provides the county Treasurer shall hold "For a term of four years and until his successor is elected and qualified unless sooner removed from office". A successor was elected to the present incumbent but he has not qualified nor been inducted into office.

But if the statute above quoted did not provide for the Treasurer holding until successor is elected and qualified he would so hold under Sec. 5 of Article 14 of Missouri Constitution which provides, "In the absence of any contrary provision, all officers now or hereafter elected or appointed shall hold office during their official term, and until their successor shall be duly elected or appointed and qualified."

State ex inf. Crow Atty. Gen. v. Smith 152 Mo.l.c.517.

Very Respectfully,

Edward C. Crow.
Assistant Attorney General.

APPROVED:

Attorney General.

ECC:SW

Act relating to transportation of persons and property by motor vehicle; penalty for violation thereof.

July 13, 1933 7-26

FILED
70
34

Hon. Geo. B. Padget
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

This department is in receipt of your letter of June 19th in which you request an opinion as to the following state of facts:

> "A party here, who advises me that he has obtained his permit to operate a Truck, or Trucks, came to me today complaining that other parties, and especially one whose name he mentioned, was operating a truck of 1½ Ton capacity, with no other permit than simply his license-tags.
>
> He says that in addition to other hauling in and out of Gallatin, Mo, this party hauls to St.Joseph and to Kansas City, in his Truck, stock from farms around here, and then while in the city he loads up, some-times with feed or flour or both and some-times he loads up with groceries, which feed, flour and groceries he brings to Gallatin, Mo. in his Truck, and delivers the same to merchants of Gallatin." * *
>
> Will you kindly fully enlighten me on this complicated law, and suggest to me just how I should proceed in case legal complaint of such kind is made by some one." * **

Section 5268 Laws of Mo. 1931, p. 307, provides in part as follows:

> "It is hereby declared unlawful for any motor carrierto operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation." " "

Section 5271 Laws of Mo. 1931, p. 310 provides in part as follows:

> "It is hereby declared unlawful for any contract hauler except as provided in section 5265 of this act to operate or furnish transportation for persons or property, or both, for hire over the highways of this state, without first have (having) obtained from the commission a contract hauler's permit." " "

Section 5275 Laws of Mo. 1931, p. 314, provides as follows:

> "Penalties-misdemeanor.---Every owner, officer, agent, or employee of any motor carrier, contract hauler, and every other person, who violates or fails to comply with or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, and who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

Section 5264 Laws of Missouri 1931, p. 304, provides in part as follows:

> "(b) The term 'motor carrier' * * operating any motor vehicle * * upon any public highway for the transportation of persons or property or both * * *for hire as a common carrier.***
>
> (c) The term 'contract hauler' * * means any person***engaged, as his principal business in the transportation for compensation* * *of persons and/or property for a particular person* * * to or from a particular place * * under special* * *agreement* * *and not operating as a common carrier* * **"

Therefore, it is the opinion of this department, that whether a person be operating a motor vehicle as a 'motor carrier' within the meaning of the law as above set out, or whether a person be operating a motor vehicle as a 'contract hauler' within the meaning of the law as above set out, that unless that person obtains a permit from the Public Service Commission as provided in the Laws of Missouri, 1931, p. 304 et seq, that person is guilty of a misdemeanor and punishable by a fine not exceeding $1000.00, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

However, Section 5280 Laws of Mo. 1931, p. 316, provides in part as follows:

> "* * *Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

The construction that the Public Service Commission has placed upon the above provision is that the maximum weight carrying capacity of the truck and not the manufacturers rating capacity is the test as to whether or not a truck is of one and a half ton capacity or less and so within the provisions of Section 5280 Laws of Mo. 1931.

From the facts as stated in your letter it would seem that if the maximum weight carrying capacity of the truck is one and a half ton then and in that event the provisions of the act relating to the transportation of persons by motor vehicle on public highways of the State of Missouri as found in Laws of Mo. 1931, p. 304, are not applicable.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

_____(Acting)
Attorney General.

JWH:MM

TAXATION: Real estate in the custody of guardian for an insane war veteran may be taxed for state and local purposes.

7-21

FILED
70
33

July 14, 1933

Honorable Geo. B. Padgett
Prosecuting Attorney
Gallatin, Missouri

Dear Mr. Padget:

This office acknowledges receipt of your letter dated June 27, 1933, as follows:

"At Pattonsburg, Mo., in this county lives a man named Albert Blankinship. He has a brother, an ex-service man, now insane in a government hospital, and he also has a mother in the Hospital No. 2. at St. Joseph Mo.

The ex service brother has an income from the U. S. Government, and this Albert Blankinship is his guardian, handling his money as it comes in, loaning it, on real-estate. I rather believe, though not fully informed, that his mother in No. 2. also probably has some kind of income from the U. S. Government; Any way Albert Blankinship, is handling money for the mother and brother both. He takes particular pains to close out every one he gets a chance to, where there is an opportunity to buy it in at a bargain, and he now has taken over several properties in the town of Pattonsburg, renting them, and these estates are fast growing, and at the same time this guardian, Albert Blankinship contends that he is not required to pay any taxes of any kind on either the money on hand, nor on

> "A curator does not stand in the same relation to the estate of which he has charge as does an administrator. In case of an intestate's estate the title to the personal property, vests in the administrator for the purposes of administration and he can sue and defend as such in his own name because of that title. But in the case of an infant's estate the title is in the infant alone and not in the curator. In such case the curator has only the custody, care and management of his ward's estate. (Section 5297 R. S. 1889; Duncan v. Crook, 49 Mo. 116) It is the duty of the curator to represent his ward in all legal proceedings, to prosecute and defend for him, and is entitled to so represent him in any suit without being especially appointed as guardian ad litem unless in a particular statutory proceeding a different requirement should be made. (Section 5298 R. S. 1889.) But in all cases the ward is the party and the curator is the representative; the act either in suing or defending is the act of the ward by his curator".

The identical question submitted by you was passed on in the case of State v. Wright, 140 So. 584, by the Supreme Court of Alabama. The applicable provisions of the federal law are set out in the opinion, from which we quote the following:

> "The guardian rests his contention that the lands are not subject to taxation on the provisions of sections 454 and 618, 38 USCA. The first provides that: "The compensation insurance, and maintenance and support allowance payable under Parts II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is

any of the real properties he takes over in the names of his said wards.

If he should go on long enough at the rate he is going it may be possible for him to own every property situate in the city of Pattonsburg, leaving no person to pay any taxes to properties in Pattonsburg.

He has not been paying any city taxes, nor any state, county or township tax. So that he is enjoying all the enjoyment of every convenience the city, county and the State afford him, receiving a percentage for looking after it, with the possibility of inheriting a portion of it, but in no way does he expend any thing out of his brothers or mothers money, nor the profits derived from it to pay their proportionate part of city, township, county or State expense in return for the privileges he enjoys. It occurs to me that ought not to be the law, and I am therefore writing for your opinion as to whether this money, and the properties he buys with it and rents out for profits, is legally immune from taxation. If you do not fully understand this matter I will be glad to answer questions about it."

While you do not state in your letter we assume the title to the real estate purchased by the guardian was taken in the name of the ward. As it is not necessary to discuss the question of the right of the guardian of an insane person to use moneys in his hands for the purpose of investment in and purchase of real estate for the purposes of this case, we assume the legal right of the guardian to make the investments he did make.

It is important in this case to determine the relation existing between the guardian or the curator and his ward so far as the title to property is concerned. We find a very clear statement of the general principle in Judson v. Walker, 155 Mo. 155. The court at page 179 of the opinion stated:

made under Parts II, III, or IV; and shall be exempt from all taxation," etc. (Italics supplied) USCA, title 38, Sec.454, page 217.

The other section provides: "No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate, shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation". (Italics supplied) USCA, title 38, page 276, Sec. 618.

(2) It is a well-settled rule of statutory interpretation, that provisions for exemption from taxation must be construed strictissimi juris, and claims of exemption not clearly within the import of the language of the statute must be rejected.(citing cases).

(3) When this rule of interpretation is applied to the quoted sections of the statute, it is clear that the exemption applies only to "compensation, insurance and maintenance and support allowance", "adjustment certificates", and "sums payable" under the act of Congress, and does not extend to privately owned property purchased with money arising from such sources, and which was at the time of its purchase within the jurisdiction of the state and subject to its powers of taxation. (citing cases) ".

The case of State ex rel Smith v. Board of Commissioners, 294 P. 915, involved the right to assess property belonging to minor children of a deceased soldier, the property being purchased with compensation paid by the United States Government. At

page 921 of the opinion the court says:

> "The general theory of the law with reference to funds and property intended for minors is that both title and possession are in the ward while under the charge and control of the guardian.
>
> "While the relation between guardian and ward is that of trustee and cestui que trust, the trust is not of such character as to give the guardian the legal title to the ward's estate, but the title remains in the ward, and the possession of the guardian is the possession of the ward". 28 C.J. 1128.
>
> "The legal title, however, is in the ward rather than in the guardian; so that upon the death of the guardian the funds of the ward do not pass to his executor, and on change of guardians no transfer of title takes place. His possession is deemed the possession of the ward." 12 R.C.L. 1123.
>
> We conclude that the intervention of a guardian does not leave the pension funds still in the hands of the government so that they are still "payable" or "due" the ward as expressed by 38 USCA Section 454 so as to exempt them from assignment, execution, and taxes, but, when paid to the guardian, the title and possession have both passed from the government, and they are no longer "payable", and consequently not entitled to any exemption from taxes under section 454."

Along the same line of reasoning is Duzan v. Cantley, 55 S. W. (2nd) 711, a decision of the Kansas City Court of Appeals, where at

page 712 of the opinion it is said:

> "It is argued that the money shall not be subject to the claims of creditors, and since there can be no assignment or garnishment or other proceeding against the beneficiary, therefore the relationship of debtor and creditor cannot exist, especially where the bank takes the fund with knowledge of the source thereof.
>
> This contention is on the theory that the purpose and intent of the legislation in behalf of veterans is to protect the money from all claims, except the United States Government, not only until it comes into the hands of the beneficiary, but also until the latter has himself spent it. We think this is not the correct construction or interpretation to be placed thereon. In our view, funds thus arising are not thus protected after they have once come into the hands of the beneficiary. They have then become his absolute property, and having once come into his hands are no longer an object of solicitude or care on the part of the Government. The latter is careful to protect the fund until the beneficiary receives it, but no further. This seems to be clear from the use and subsequent reiteration of the word 'payable". So long as a fund is 'payable' to a person it has not yet reached his hands, b but when it has, it can no longer be said to be payable to him. This is borne out by the plain intent of section 54, p. 81, of the above-mentioned USCA, where, in protecting money due pensioners, attachment, levy, or seizure of such funds is

> prohibited, it speaks of money 'due or to become due' to any pensioner, 'whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner'. It is not exempt after it is paid to the pensioner".

See also Martin v. Guilford County, 138 S. E. 847.

Tax exemptions are construed strongly against those claiming such exemptions. We do not believe it was the intention of the Congress to exempt from taxation the property in which the money paid to war veterans was invested particularly where such property was subject to taxation at the time of the investment. The exemption from taxation mentioned in the act of Congress probably referred only to exemptions from inheritance, transfer or estate tax, because it is generally held that such funds are exempt from such taxes.

See Estate of Harris 229 N. W. 781.

Cross v. State of Washington, 278 P. 414.

Tax Commission v. Rife, 162 N. E. 390.

In RE: Wanzell's Estate, 295 Pa. 419.

We therefore are of the opinion that taxes may be properly levied, assessed and collected against the property described in your letter.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

SHERIFF: Fees of Sheriff of Macon Co. in extradition proceedings.

September 13, 1933. 9/14

FILED
70

Your Excellency
Governor Guy B. Park,
Executive Office,
Jefferson City, Mo.

Attention: Hon. Woodson Cockrill,
Executive Secretary.

Dear Governor:

This department acknowledges receipt of your request, handed to General McKittrick, for an opinion in regard to the fees of Hon. B.R. Williams, Sheriff of Macon County, Missouri in conveying one Clarence Dowell from Leavenworth, Kansas to Macon, Missouri.

We are not undertaking to pass upon the legality of the fees as contained in the attached messenger's return, as under Sec. 3588, R.S. Mo. 1929 the expenses of the messenger are ascertained by the Governor, and shall, upon his authorization, be paid out of the State Treasury (the statute will be quoted later in full). Therefore, the burden of determining whether or not the fees of a messenger are fair and legal devolves entirely upon the Governor. We note, however, in the items of fees of the messenger, that being a sheriff, it is obvious he has undertaken to claim fees in his official capacity rather than as a messenger. The Governor has the power to appoint and to make his agent any one he so desires, and because it is the usual practice to appoint the sheriff as agent and messenger, does not give the sheriff the right to charge his statutory official fees.

Under Sec. 3587, R.S. Mo. 1929, the same being as follows:

> "Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

it will be noted that the phrase "to some messenger" is the sole person under the command of the Governor to receive the fugitive and convey him to the sheriff of the county in which the offense was committed. The statute is silent as to any guard or to any additional assistant that the messenger might take upon himself to include.

Under Sec. 3588, mentioned above, if the messenger should demand or should be in need of a guard or any other unusual expense which he anticipates he might incur in conveying the prisoner, the matter should first be taken up with the Governor and he should have the Governor's approval or sanction, or he should be able to convince the Governor that the item in question was essential.

As to the other items in the messenger's return, we note nothing unusual and the same appears to be legitimate expense. However, as stated above, the allowance of all the items is wholly within the discretion of the Governor.

This department has heretofore rendered an opinion to Hon. Walter G. Stillwell, Prosecuting Attorney, Hannibal, Missouri, one question of which related to the fees of a messenger, and the same is being incorporated and made a part of this opinion. The said opinion follows:

> '"Paragraph 4 of your letter is as follows: 'In extradition proceedings if the sheriff is appointed messenger of the State of Missouri, is he entitled to any compensation other than actual and necessary expenses in returning the prisoner to his county?'"

Under Sec. 3588, R.S. Mo. 1929, expenses of the messenger are always within the discretion of the Governor of the State, said section being as follows:

> 'The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state.'

This section does not make it mandatory on the sheriff to be the messenger. The Governor could appoint any other person he desired; therefore, the various fees which the sheriff in his official capacity might claim are not applicable. In the case of

State ex rel v. Allen, 180 Mo. 27, the Court said:

> "Under the statute quoted (Sec. 2744 R.S. Mo. 1899) the duty of determining the question of the compensation and expenses of such messenger is vested solely in the Governor and he is the head of a coordinate branch of the government, and all his acts as such are in that capacity; hence, he cannot be interfered with in the discharge of his duties by the courts."

In making out the expenses incurred by the sheriff as messenger, it is the opinion of this department that he should include the number of miles traveled, claiming said mileage, the expenses of the prisoner, his own expenses, the number of miles by rail, and any other legitimate expenses and fees which the conscience of the sheriff or messenger might prompt him to include. In the last analysis, it will not matter what the sheriff or messenger wishes to charge, but it will be wholly within the discretion of the Governor as to what amount he shall receive.'"

It is the opinion of this department that the matter of fees of messengers is wholly within the discretion of the Governor and this department, under statutes and the decision above quoted, could not usurp or infringe on that power by fixing the fees; therefore, we are only making advisory suggestions.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

EXTRADITION: SUFFICIENCY OF AN INFORMATION.

10-25

October 18, 1933

FILED
70
52

Governor Guy B. Park
Executive Office
Jefferson City, Missouri

Dear Governor Park:

Your request for an opinion dated September 28th was in words and figures as follows:

> "Please advise me in extradition matters, whether or not an information sworn to by a Prosecuting Attorney is sufficient to support the demand for the fugitive."

The United States Constitution provides at Clause 2, Section2, Article IV as follows:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

28 U.S.C.A. Sec. 662 provides as follows:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or

> Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

Your question briefly can be stated thus: where a Prosecuting Attorney makes an affidavit upon his information and belief that treason, felony, or other crime has been committed by a named defendant, is the said information complying with the Federal Code above set out, which requires "an affidavit made before a magistrate * * * charging the person demanded with having committed treason, felony, or other crime * * * "?

In the case of Ex Parte Hart (Maryland 1894) 63 F. 249, I find that the court held an information of a Prosecuting Attorney not sufficient to support an extradition under the federal code, for the reason that the information did not rise to the dignity of an indictment and the court said:

> "We do not consider this a compliance with the Act of Congress, which we think requires the copy of an indictment found by a Grand Jury, and not the copy of an information filed by the attorney for the State. * * * To authorize the removal of a citizen of Maryland to the State of Washington for trial on a charge of crime, something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true, should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit, and fraudulent in fact." (Underscoring ours)

Again in Ex Parte Morgan (D.C. Arkansas 1883) 20 F. 298, l.c. 307 the court held that the affidavit in that case was not sufficient because it was founded on belief or information and the court said:

> "The Act of Congress provides for a method that is summary in its effect and it must therefor be strictly complied with. * * * In the affidavit in this case the affiant says 'that he has reason to believe and does believe from information received, that one Frank Morgan did commit the crime of willful murder'. This is a charge upon suspicion, and the constitution of the United States and the laws of congress are not satisfied with such a charge. The affiant Patton swears to his belief. Suspicion does not warrant the arrest of a party that may be sent from a state where he may be found to another, and it may be a distant state. All legal intendments in a case of this kind are to avail the prisoner." (Underscoring ours)

In the case of Ex Parte Nash, 44 F.(2d) 403, (Arkansas 1930) the District Federal Court held that an information of a Prosecuting Attorney is sufficient if it charges the crime under the law of the demanding state, and said:

> "Under the decisions of the Supreme Court of the United States in construing and applying the Interstate Extradition Act of Congress, the state law must be taken into account for the purpose of effecting the object of the constitutional provision." (Underscoring ours)

The State and Federal Courts are bound by the construction of the Constitution and Federal Extradition Laws as adopted by the United States Supreme Court. The decisions of the courts of different states vary on the question presented in this brief. It is to be noted that the decisions of the Federal District Courts as above set out also vary on the question presented in this brief, for in the Hart and Morgan cases an information was held not sufficient while in the Nash case it was held sufficient to support the extradition in as much as it was sufficient to charge the crime properly in the demanding state. In the case of In Re Strauss (1905) 197 U.S. 324, 25 S.Ct. 535, the United States Supreme Court said:

> "Under the constitution each state was left with full control of its criminal procedure. No one could

> have anticipated what changes any state could make therein, and doubtless the word 'charged' was used in its broad signification, to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. * * * It may be true as counsel urge, that persons are sometimes wrongfully extradited; * * * that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods by false pretenses. But it is also true that a prosecuting officer may either wantonly or ignorantly file an information charging a like offense. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify extradition? Such possibilities as these can not be guarded against". (Underscoring ours)

Again in Pierce v. Creecy, 210 U.S. 387, 28 S.Ct. 714, our Supreme Court said:

> "But the Constitution does not require as an indispensable prerequisite to interstate extradition that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime." (Underscoring ours)

Thus we see that the United States Supreme Court upholds the logic and holding in the Nash decision above set out. The Pierce case holds that the United States Constitution requires nothing more than the affidavit sworn before a magistrate charge a crime, and the Strauss case went far enough while considering both the United States Constitution and Federal Act above set out to ask the question, "But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify extradition"?

It follows as the opinion of this office that an information of a Prosecuting Attorney when properly charging a crime under the laws of the demanding state, it is sufficient to support an extradition of a fugitive from an asylum state under the provisions of the Federal Constitution and Code. The sense of such a ruling is apparent. Under the Federal Constitution the states have been left with full control of their criminal procedure. Take Wisconsin for an example. In Wisconsin in criminal cases the only prodedure known under its constitution and laws is a trial upon the information of the Prosecuting Attorney. Fugitives from Wisconsin are necessarily arrested on extradition papers supported by informa-

tion, and it is not reasonable to believe that our United States Supreme Court will tell the people of Wisconsin that they must change their fundamental law and their criminal procedure before they can have the right to a return of fugitives for trial for crimes committed in Wisconsin.

We recognize that a copy of an affidavit of a prosecuting witness made before a magistrate when Missouri is the demanding state is to be preferred from the Prosecuting Attorney to a copy of his information charging the crime, for the former method has never been questioned by any state in the union as not a compliance with the Federal Constitution and Code. We are aware that the Supreme Court of several states have held the opposite to the holding of this opinion, and refused to dignify an information in matters of extradition. We think as a matter of policy your office should as a general rule continue to require the affidavit of the prosecuting witness rather than the information of the Missouri Prosecuting Attorney, as no doubt by the present policy Missouri messengers are avoiding unnecessary delay and expense in asylum states while messengers from other states are taking time to debate the legality of an information. Your present policy is expedient.

Respectfully submitted,

WM. ORR SAWYERS.
Assistant Attorney General.

APPROVED:
Roy McKittrick
Attorney General

WOS:SW

Beer - Constitutionality of S.B. 51

12-5

December 5, 1933.

FILED
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62

Governor Guy B. Park
Jefferson City, Missouri

Dear Governor Park:

I have received your communication requesting an opinion as to the constitutionality of Senate Bill No. 51.

The Supreme Court of the United States in the case of State of Rhode Island vs. Palmer, 40 Sup. Ct. Rep. 486 said:

> "The first section of the Amendment (18th) - the one embodying the prohibition - is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act, whether by congress, by state legislature, or by a territorial assembly, which authorizes or sanctions what the sections prohibits."

In view of the foregoing ruling, if the bill is signed and becomes a law prior to the repeal of the 18th amendment, it would santion that which the 18th amendment prohibits, and therefore would be invalid.

If the bill is signed after the repeal of the 18th amendment becomes effective, it would be a valid law. The syllabus in the case of State ex rel vs. Becker, 45 S. W. (2d) 533, is as follows:

> "Bill redistricting state into congressional districts that was vetoed by Governor was not a 'legislative act' * * * because it lacked the concurrance of the Governor, who was part of the law making power of the state."

The passing of Senate Bill No. 51 by the Senate and the House of Representatives did not give it any legal effect, and it cannot become a "legislative act" until signed by the Governor, and if signed subsequent to the repeal of the 18th amendment, it would not be in violation of any provision of the Constitution of Missouri or of the United States.

Yours respectfully,

Roy McKittrick
Attorney General

EXTRADITION: A person paroled from one state and parole thereafter revoked, is a fugitive from justice within the purview of the extradition laws.

12-7

December 6, 1933.

FILED
70
62

Hon. Guy B. Park,
Governor of Missouri,
State Capitol,
Jefferson City, Mo.

Attention: Mr. Woodson Cockrell

Dear Sir:

This department is in receipt of your request for an opinion on the following state of facts:

> "A was paroled from the state penitentiary of Illinois to a resident of the State of Missouri. While in the State of Missouri, the State of Illinois revoked this parole. Is A a fugitive from justice within the purview of the extradition laws?"

I.

A person who has been paroled by one state and whose parole is thereafter revoked is a fugitive from justice within the purview of the extradition laws.

The general rule of law with reference to this question is well stated in the case of Ex Parte Weinhause, 216 S.W. 548, l.c. 549:

> "The Constitution of the United States (Clause 2, Sec. 2, of article 4) provides that every person charged with a felony or other crime 'who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled' be delivered, etc. The Federal statute (Section 5278 R.S. (U.S. Comp. St. Sec. 10126) provides for the delivery of 'any person as a fugitive from justice'. It will be noticed that in the Constitution the expression is any person 'who shall flee from justice', while in the statute it is 'any person as a fugitive from justice'. But

> the meaning is the same. Either to flee or be a fugitive would ordinarily mean that the accused had run away to avoid prosecution. But it seems not to have been interpreted that way. So that, though one had no thought of an escape or of avoiding a prosecution, if he be found in a state other than the one in which he committed the offense charged, he may be extradited under either the wording of the statute or the Constitution. Roberts v. Reilly, 116 U.S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; In the the Matter of Voorhees, 32 N.J. Law, 141."

In the case of State ex rel. Gaines, Agent, v. Westhues, Judge, et al (Supreme Court of Mo.), 2 S.W. (2d) 612, l.c. 613, the Court held that the motive in leaving the demanding state had no bearing on the question of whether or not a person was a fugitive from justice. The Court said:

> "Petitioner's motive in leaving demanding state, if he did so, had no bearing on question whether he was fugitive from justice. That petitioner was fugitive from justice was shown prima facie by rendition warrant, and he had burden of proving that he was not in demanding state at time of commission of alleged crime."

This holding of the Supreme Court of Missouri is amplified in the case of People ex rel. Leach v. Baldwin, 174 N.E. 51, in which the Court said:

> "What constitutes one a fugitive from justice has also been frequently considered. In Appleyard v. Massachusetts, 203 U.S. 222, 27 S. Ct. 122, 123, 51 L. Ed. 161, 7 Ann. Cas. 1073, and in Biddinger v. Commissioners of Police, 245 U.S. 128, 38 S. Ct. 41, 62 L. Ed. 193, it was held that 'a person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime, leaves the state--no matter for what purpose or with what motive, nor under what belief--becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state, must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic

> by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state' ***"

The case of Albright v. Clinger (Supreme Court of Mo. 1921), 234 S.W. 57, while dealing with the question of one who violated his parole while in the State of Ohio and then fled to the State of Missouri, nevertheless, presents propositions of law which are applicable to the facts here under consideration. The Court said:

> "One who is shown to have committed a crime in one state, and when sought for to be subjected to criminal process, is found in another state, is, under the rulings of the Supreme Court of the United States, a fugitive from justice. Ex parte Reggel, 114 U.S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Roberts v. Reilly, 116 U.S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544. This showing constituted a prima facie proof of the fact that he was a fugitive. In re Cook, 49 Fed. 833; Hyatt v. N.Y., 188 U.S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; Marbles v. Creecy, 215 U.S. 63, 30 Sup. Ct. 32, 54 L. Ed. 92.
>
> * * * * * * * * * * * * * * *
>
> The last two contentions under consideration are evidently made on the assumption that the relator's extradition is sought for violating a parole. <u>While this may be regarded as a moving or immediate cause of his extradition, it is not the offense for which the State of Ohio demands his return.</u> State v. Gertz, 21 Hawaii, 526. The repeated statement of the offense--i.e., the nonsupport of minors--the indictment and sentence, and the averments contained in the formal application of the Governor of Ohio for the requisition, leaves no doubt as to the grounds upon which relator's return is sought.
>
> * * * * * * * * * * * * * * *
>
> <u>The right of the state of Ohio to the relator's return was therefore based upon the unsatisfied judgment of conviction against him which entailed imprisonment.</u> Upon a showing of these facts without more, the issuance of the requisition would have been authorized, and the incident that he was at large physically, instead of being in durance when he forfeited his right to clemency, was a matter with which the Governor of this state need not concern himself."

In the case of Ex Parte Williams (Criminal Court of Appeals of Oklahoma), 136 P. 597, we have a case exactly in point with the

proposition now here before us. In that case Williams was convicted for the crime of grand larceny in the State of Indiana and was sentenced to imprisonment in the penitentiary of Indiana. Before the expiration of the sentence, Williams was paroled and removed from the State of Indiana to the State of Oklahoma. Later, Williams was declared a delinquent and his parole was revoked. The Governor of Indiana presented requisition papers for the said Williams to the Governor of Oklahoma, which were honored by the Governor. The case came before the Criminal Court of Appeals of Oklahoma by petition for writ of habeas corpus. In denying the petition, the Court said:

> "When this matter was presented to the Governor of Oklahoma, he properly referred it to the Attorney General for legal advice. The Attorney General advised the Governor that, to be a fugitive from justice under the act of Congress, it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed did so for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against the laws, leaves such state, and when he is sought to be subjected to its criminal process to answer for his offense, he is found within the territory of another state. In support of this proposition, the Attorney General cited the following authorities: Ex parte Dickson, 4 Ind. T. 481, 69 S.W. 943; Op. Gov. Fairfield (Me.) 24 Am. Jur. 226; State v. Richter, 37 Minn. 436, 35 N.W. 9; In re Voorhees, 32 N.J. Law, 141; People v. Pinkerton, 17 Hun (N.Y.) 199; Johnson v. Ammons (Ohio) 7 Am. Law Rec. 662; Hibler v. State, 43 Tex. 197; Roberts v. Reilly, 116 U.S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; In re Bruce (C.C.) 132 Fed. 390; In Re Block (D.C.) 87 Fed. 981; in re White, 55 Fed. 54, 5 C.C.A.29; Ex parte Brown (D.C.) 28 Fed. 653.
>
> We are of the opinion that the advice of the Attorney General to the Governor states the law correctly. In further support of this proposition, we desire to cite the case of Drinkall v. Spiegell, 68 Conn. 441, 36 Atl. 830, 36 L.R.A. 486. In that case the Supreme Court of Connecticut held that a prisoner who violates a parole, and goes into another state, is a fugitive from justice within the provisions of the United States Constitution and laws, and that such person is subject to extradition.
>
> There is but one question in this case, and that is the legality of the revocation of the parole

> of petitioner; but this is a question for the courts of Indiana, for they alone have the right to construe their Constitution and laws."

In view of the foregoing, it is the opinion of this department that a person convicted of a crime in one state and paroled to a person in the State of Missouri and whose parole is later revoked, is a fugitive from justice within the meaning of the extradition laws.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

OPINION TO STEPHEN B. HUNTER, Director of Penal Institutions regarding authority for payment of premiums on bonds of state officials.

February 1, 1933.

FILED
71

Hon. Stephen B. Hunter,
Director of Penal Institutions,
Jefferson City, Missouri.

Dear Sir:

I have made an examination of the statutes and also the Appropriation Bill as reported in the 1931 Session Acts and I find no authority in either place for payment by the state of premiums on bonds given by state officials to the state.

Very truly yours,

ECC:AH

E. C. CROW,
Assistant Attorney General

APPROVED:

ROY MCKITTRICK,
Attorney General

PAROLES: Right of commissioners of the Department of Penal Institutions to approve parole and grant legal discharge.

FILED
71

February 6, 1933

Honorable John Thornberry
Superintendent Algoa Farms
Jefferson City, Missouri

Dear Mr. Thornberry:

We acknowledge receipt of your letter dated February 4, 1933, in which you state and inquire as follows:

> "I am anxious for your written opinion as to the legality of the approval of the commissioners relating to paroles from this institution as set forth in Section 8478, Revised Statutes of Missouri 1929. The clause I have reference to begins with the 11th. line in the section as appeared in the statutes "..... and with the approval of the commissioners (or governor) they shall grant paroles".

Section 8316 Revised Statutes Missouri, 1929, establishes what is known as the "Department of Penal Institutions" which department shall be under the control and management of a commission composed of five members, to be known as "Commissioners of the Department of Penal Institutions".

Section 8467 Revised Statutes, 1929, states that the Intermediate Reformatory for young men shall be under the management of the department of penal institutions.

Section 8470 provides that the commissioners of the department of penal institutions shall have control of the intermediate reformatory for young men, and shall make necessary rules among other things for the release of inmates therein.

Section 8478 provides that parole hearings may be given to all such inmates by a body consisting of the commissioner of paroles of the department of penal institutions, the superintendent of the intermediate reformatory and the attorney

general of Missouri or one of his assistants whom the attorney general may designate. Such board may grant paroles with the approval of the commissioners (or governor), the commissioners referred to are the commissioners of the department of penal institutions.

Section 8 Article 5 of the Constitution of Missouri, provides that the governor shall have power to grant reprieves, commutations and pardons after conviction for all offenses except treason and cases of impeachment. There is no question that the power of pardon rests exclusively with the executive department of the state.
State v. Schloss 25 Mo. 291.

The distinction between the meanings of the words pardon, commutation and reprieve is stated in State ex rel Bottomly v. District Court, 237 Pac. 525. The court at page 527 and 528 of the opinion saying:

> "Furthermore, the terms "pardon", "commutation," and "respite" each had a well-understood meaning at the time our Constitution was adopted, and no one of them was intended to comprehend the suspension of the execution of a judgment as that phrase is employed in sections 12078-12086. A "pardon" is an act of grace, proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed (United States v.Wilson,7 Pet.150, 8 L. Ed. 640); It is a remission of guilt (State v.Lewis, 111 La.693, 35 So. 816), a forgiveness of the offense (Cook v. Middlesex County, 26 N.J.Law 326; Ex parte Powell, 73 Ala.517, 49 Am. Rep.71). "Commutation" is a remission of a part of the punishment; a substitution of a less penalty for the one originally imposed (Lee v.Murphy,22 Grat. (Va.) 789, 12 Am. Rep.563; Rich v.Chamberlain,107 Mich.381, 65 N.W.235). A "reprieve" or "respite" is the withholding of a sentence for an interval of time (4 Blackstone's Commentaries, 394), a postponement of execution (Carnal v.People,1 Parker,Cr.R.(N.Y)272), a temporary suspension of execution (Butler v.State, 97 Ind.373)."

The distinction between a pardon and a parole is stated in Board of Prison Commissioners v. DeMoss 163 S. W. 183. The court of appeals of Kentucky, at page 187 of the opinion holding:

> "It is manifest that the Constitution confers upon the Governor alone the power to grant a pardon; but a parole is not a pardon, and there is no provision of the Constitution declaring the Legislature incompetent to confer upon the board of prison commissioners authority to grant paroles to prisoners convicted under the Indeterminate Sentence Law, whose punishment is fixed by the law and sentence of the court. There is, therefore, nothing in its provisions conferring upon the board the power to parole convicts of that class that violates section 77 of the Constitution."

To the same effect is People v. Hale, 222 Pacific,148, 152 (and cases cited).

It seems not to have been questioned in this state that the circuit courts have the right to parole offenders and no reason is apparent why the legislature could not provide for the special parole board as it does in Section 8478, and further provide for its approval by the commissioners for the department of penal institutions.

We are therefore of the opinion that the special parole board provided for in Section 8478 has legal authority to grant paroles (not pardons)when such paroles are made on conditions and when same is approved by the commissioners of the department of penal institutions or the governor.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____

Attorney General.

GL:LC

OPINION to Director of Penal Institutions holding appropriations for state penal board are not available after the two calendar years expires for which the appropriations are made.

February 9, 1933.

FILED

71

Hon. S. B. Hunter
Director
Penal Institutions
Jefferson City, Mo.

Dear Sir:

Acknowledging receipt of your letter of February 7, 1933, I beg to say you asked the following question:

> "I want to know if under your letter of February 1st, 1933, you intended to convey the information that there is no authority for the Penal Board to pay premiums on these bonds, notwithstanding the fact that this item was carried in the appropriation bill."

You will observe in your letter which I have quoted you did not state that you referred to the appropriation bill of the last and not the present General Assembly, but I assume you refer to the appropriation made by the last General Assembly and on that assumption I beg to say that in my opinion there is no authority for the penal board at this time to pay premiums on bonds from the penitentiary funds.

You will observe by glancing at the Session Acts of Missouri 1931, that the appropriations have been made for the penal board and penitentiary only for 1931 and 1932. These years are past and appropriations made in 1931 are no longer effective.

The constitution provides Section 20, Article 4, as follows:

> "The General Assembly shall meet in regular session once only in every two years; and such meeting shall be on the first Wednesday after the first day of January next after the elections of the members thereof."

Section 19, Article 10 of the constitution provides:

> "No monies shall ever be paid out of the treasury of this state or any of the funds under its management except in pursuance of an appropriation by law; ********"

The Supreme Cout of Missouri in the case of state ex rel Missouri State Board, et al vs. Holiday, State Auditor, 64 Mo. P. 526, said:

> "From a consideration of these two sections, it seems quite obvious that no appropriations of money find recognition in the constitution except "regular appropriations", and that such cannot be made except at regular legislative sessions occuring biannually. This view of the matter receives abundant confirmation in the prohibitions of Section 19 of Article X, that "no monies shall ever be paid out of the treasury of this state or any of the funds under its management except in pursuance of an appropriation by law; *******"

Continuing referring to above mentioned constitutional provisions the court said:

> "These provisions of the organic law are self-executive and consequently need no legislation in their aid.**** Whether, then, we consider the plain language of the fundamental law or, resorting to a very familiar rule of construction, reflect on "the old law, the mischief and the remedy," it seems plain, beyond question, that the auditor did but obey the constitutional mandate when refusing to issue his warrant. And if any doubt should still linger in the mind on this subject, that doubt will be quickly dissolved in favor of the position we have assumed by examination of the debates in the convention which framed the constitution. When speaking of Section 19, supra, Mr. Letcher observed; "in regard to the section I desire to say that if I understand the object of it, it is to keep the matter of appropriations close up together. An appropriation made at one time, made we will say today, by law, and no warrant for instance, issued for that appropriation until two years hence, we find that the state finances would be in such a condition that unless we put some limit upon this thing, it will be almost impossible to know how the treasury does stand."

And commenting on the same section, Mr. Mudd said:

> "Now the object of the committee was to restore to the general revenue the balances of the appropriations not applied at the end of every two years, so that each session of the General Assembly should make appropriation for the term during which they were elected, and not leave those appropriations open to be drawn upon at any time, which have been made by preceding general assemblies. It was to close up the books at least once every two years, and then if any appropriation be made, let it be made by the assembly then in session."

The constitutional provisions above referred to with the opinion of the Supreme Court thereon and comments by members of the constitutional convention which framed the instrument show that the reason behind these provisions was to close up the books at least once every two years.

In the case of State ex rel vs. Gordon 236 Mo. 142, the Supreme Court held,"

> "An act creating a game protection fund from licenses, penalties and forfeitures, and requiring all salaries of the game commissioner and his deputies and all expenses of the department to be paid out of said fund, does not constitue a continuing appropriation and the moneys in said fund or continually added thereto are not available to pay the said salaries and expenses unless appropriated biennially as required by Section 43 of Article 4 and Section 19 of Article 10 of the constitution."

The court in this case held, first, that an appropiation by the 1931 General Assembly for the state penal board could not be used to pay expenses beyond the years 1931 and 1932, although such salaries and expenses might come from earnings of the penitentiary; second, that an appropriation for a state department supported by having expenses thereof paid from fees or services rendered is not a continuing appropriation but must be made every two years.

I think I have answered your questions.

Any additional information I can give and which you desire will be promptly furnished. I think it is now unnecessary

Hon. S. B. Hunter #4

to discuss herein any recommendations made by the state tax commission as to payment of premiums on bonds herein mentioned, nor necessary to discuss the suggestion that Section "D" of appropriation for state prison board for years 1931 and 1932, Session Laws, Mo. P. 51, and the language occuring therein, " and other general expense", would authorize payment of premiums at this time by the state on bonds of members of penal board given to the state, because in my opinion nothing but an appropriation by the present General Assembly now in session will authorize payment by the state through the penitentiary fund or otherwise, of premiums on bonds executed by members of the penal board to the State of Missouri.

Very respectfully,

EDWARD C. CROW

APPROVED:

ROY McKITTRICK
Attorney General.

ECC:EG

PENAL INSTITUTION: WHAT DAYS ARE HOLIDAYS FOR CONVICTS.
CONVICTS:

February 11,1933

FILED
11

Honorable Stephen B. Hunter,
Department of Penal Institutions,
Jefferson City, Missouri.

Dear Sir:

Your letter of February 10th, 1933, to the Attorney General has been assigned to the writer for answer. Your inquiry being as follows:

> "Re. Chapter 127-Title Holidays Sections 14222 to 14226 inclusive Book #2 Revised Statutes Missouri 1929.
>
> We would appreciate an opinion from you as to the above mentioned chapter and sections regarding holidays which are to be observed in the labor of convicts here."

We are attaching hereto a copy of an opinion rendered February 26th, 1929, to the Honorable Leslie Rudolph, Warden, Missouri State Penitentiary, by the Honorable Stratton Shartel, Attorney General, which we believe covers your inquiry. Subject however, to the following changes:

1. Section 12517 R. S. Mo. 1919, referred to in the enclosed copy of opinion, is present Section 8443 R. S. Mo. 1929.

2. Section 5848 R. S. Mo. 1919, as amended laws of Missouri 1921, page 400, referred to in opinion is present Section 14222 R. S. Missouri 1929.

3. Section 5851 R. S. Mo. 1919, referred to in copy of opinion is present Section 14225 R. S. Missouri 1929.

4. We wish to add Section 14223 R. S. Mo. 1929 (5849 R. S. Mo. 1919) to the opinion, same being "Columbus Day", a public holiday, October 12th.

The Court in Byrne Real Estate Company v. Welsh, et al, 258 S.W. 743, used the following language in construing sections 14223 and 14225 R. S. Missouri 1929.

> "Section 5851 R. S. 1919, referring to Lincoln Day occurring on February 12th, is similar to section 5849. It will be noted that in section 5849, referring to Columbus Day, it is not stated in so many words that, should Columbus Day fall upon Sunday, the Monday next following shall be considered such holiday, as is provided in section 5848 in reference to the holidays mentioned in that section. However, section 5849 does provide that Columbus Day "shall be recognized, classed and treated as other legal holidays under ths laws of this state."
>
> Plaintiff cites 29 C.J. p 762, which provides as follows;
>
> "Where a holiday designated by statute falls on Sunday, the following Monday is not a holiday in the absence of express statutory provision to that effect."
>
> We have no complaint to make of the rule stated in 29 C.J., but we think that by construing sections 5848 and 5849 together it is provided by our statutes that when Columbus Day falls upon Sunday the Monday next following shall be considered that holiday. It will be noted, as stated before, that section 5849 states that "Columbus Day,'***shall be recognized, classed and treated as other legal holidays under the laws of this state." This section of the Statutes was passed in 1909 (see Laws of 1909, p. 549), long after the original enactment of section 5848 covering general holidays. Section 5848 was first enacted in a somewhat different form in 1877 (Laws of 1877, p. 37,) and appears in an

amended form in the revision of 1879 (section 551, R. S. 1879), and has been carried in the various revisions since then, and amended from time to time. See section 737, R. S. 1889, Laws of 1895, p. 47; section 461 R. S. 1899; Laws of 1909, p. 126; section 6701 R. S. 1909; section 5848, R. S. 1919. It is apparent that, when section 5849 refers to other legal holidays, it refers to the general holidays theretofore existing and mentioned in section 5848, and says that Columbus Day shall be recognized, classed, and treated as the holidays mentioned in said last-mentioned section. This is broad language and, if we give it full meaning, we must construe it as providing that, if Columbus day falls on Sunday, the following Monday shall be considered the holiday precisely as those holidays mentioned in Section 5848. Apparently the only distinction sought to be made in the law between section 5848 on the one hand and sections 5849 and 5851 on the other is that holidays provided in the latter two sections "shall not be construed to effect commercial paper, the making or execution of agreements or instruments in writing or interfere with judicial proceedings." See sections 871, 983, R.S. 1919. It is therefore our conclusion that the Monday of October 13,1919, was Columbus Day, and a holiday under the laws of Missouri, etc."

We believe that the enclosed copy of opinion and the additions made thereto answer your inquiry.

Very truly yours,

James L. HornBostel
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

JLH:MM
Enc. C.C. Opinion
February 26,1929

PENAL INSTTTUTIONS: Selection of depository, right to preferences in failed banks.

March 9, 1933

FILED
71

Honorable Stephen B. Hunter
Director Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Hunter:

We acknowledge receipt of your letter dated March 2, 1933, in which you state in part and inquire as follows:

"The statutes provide that money deposited in a bank by the Penal Board shall be done so by lettings in each odd year, the advertisement being so that the letting will take place on July 1st of the odd-numbered years. There is a further provision that if bids are received for monies offered for deposit and the depositors agree to bond, a bond shall be given securing these deposits.

In the year 1931 the money was offered, as I understand, as provided by the statutes and no bids received. Therefore, the money on deposit in the bank from July 1, 1931 until today is deposited without being secured as provided by the statutes. There is also a penalty in one section providing for the Board not carrying out the sections preceding those providing for the penalty."

And further:

"The Board is in a quandary what shall be done when the banks fail to bid for money or secure the funds deposited with them. These monies cannot be deposited in the State Treasury and withdrawn except by an appropriation, so that is impracticable.

The members of the Board each give a bond, and we do not want to be liable on the bond if anything should happen to any of the funds deposited in the bank, and if we cannot make a deposit in a legal way, we want to be advised what we shall do."

The relation between a bank and its depositor is that of debtor and creditor.

Utley v. Hill, 155 Mo. 232.

Section 3152 Revised Statutes 1929, provides that whenever any person is insolvent and is indebted to the State of Missouri the debt due the state shall be first satisfied out of the insolvent's property. The above statute, standing alone, gives the state priority for money deposited in an insolvent bank.

In RE: Holland Banking Co., 313 Mo. 307, 317,

except as to debts due the United States and to servants for wages and to those due for certain expenses incurred in sickness and burial. Section 15 of Article 10 of the Constitution of Missouri, as well as Article 2 of Chapter 72 Revised Statutes Missouri, 1929, requires all state money to be deposited by the State Treasurer to the credit of the state for the benefit of the funds to which they respectively belong in such bank or banks as may be selected by the Treasurer, with the approval of the Governor and Attorney General, upon such bank giving satisfactory security for the deposit and the money so deposited to be disbursed or paid out by the Treasurer for the purposes of the State, according to law and upon warrants drawn by the State Auditor. The deposit remains to the credit of the state until disbursed according to law. Moneys belonging to the state can only be paid out by the Treasurer when and after the same has been appropriated by the Legislature,

State ex rel Thompson v. Board of Regents, 305 Mo. 57,

and according to the appropriation Act.

Section 8316 Revised Statutes 1929 creates what is designated as the "Department of Penal Institutions", which department it is provided shall have control and jurisdiction over all penal institutions in the state supported by money appropriated out of the State Treasury, referring specifically to the Missouri Reformatory at Boonville; the Industrial Home for Girls at Chillicothe; the State Industrial Home for Negro Girls at Tipton and the State Penitentiary at Jefferson City. By Section 8317 Revised Statutes 1929, five commissioners to be appointed by the

Governor shall have the control and management of the "Department of Penal Institutions". Moneys received on account of the penitentiary shall be paid into the State Treasury.

Sections 8358, 8377, 8378, 8401, 8451, 8454, 8483, 8505, and 8675, Revised Statutes 1929, provide for requisitions being made by the penal board for funds out of the State Treasury.

Sections 8428, 8453, 8455, 8483 and 8489, Revised Statutes 1929, provide for the State Auditor drawing warrants on the State Treasury on account of the institutions controlled by the "Department of Penal Institutions" apparently without requisitions therefor.

So that after funds for the use of the penal institutions are appropriated and after the same are paid into or for the various funds or uses provided for in the conduct of such institutions, such funds pass out of the classification of the moneys referred to in Section 15 of Article 10 of the Constitution and Article 2 of Chapter 72 Revised Statutes 1929, above mentioned and are funds which come under the provisions of Sections 8676, 8677, 8678, 8679, 8680 and 8681 Revised Statutes 1929 with reference to bids for a depository for funds in the custody and for the use of the "Department of Penal Institutions". And as to such funds the state has its right of priority under Section 3152, supra, upon a bank closing and where no depository has been selected, at least until the selection of a legal depository.

Under Section 8666 it is the duty of the commissioners of the "Department of Penal Institutions" to receive sealed proposals from any banking corporations, associations, trust company or individual banker in any city, town or county in which the institutions controlled by the board may be located - that is if any of such institutions is located in a county other than Cole their bids for funds belonging to or appropriated for that particular institution could be received from such banks, associations or trust companins in the city, town or county where such institution is located. Notice that such bids will be received to be published in some newspaper published where such bids are entitled to be received. Section 8666.

Section 8678 Revised Statutes 1929 provides that if a depository be not selected after giving the above notice, then the commissioners may, at any time after giving the above notice and after

giving an additional twenty days notice, receive bids and select a depository as is provided in Sections 8676, 8677 and 8678, although Section 8678 uses the word "may" with reference to re-advertising for bids we think it mandatory on the commissioners so to do.

State ex rel v. Lee, 262 S. W. 344, 345.

Since after the appropriation of the fund for the use of the various institutions controlled by the commissioners of the "Department of Penal Institutions" and after the payment by the Treasurer of such funds for the use of such institutions and if a legal depository had not been selected, such funds would not come within the ruling of In RE: Holland Banking Co., supra, holding that the state waived its preference by accepting security for deposits under Section 15 Article X, supra, then we can see no reason why the funds controlled by such commissioners would not further be entitled to the same preference, in event of insolvency of a bank, as are county funds when a county court fails to select a county depository.

Huntsville Trust Co. v. Noel, 12 S. W. (2nd) 751,

Harrison Twp. et al v. Bank, 46 S. W. (2nd) 165,

White v. Greenlee, 49 S. W. (2nd) 132,

Boone County v. Cantley, 51 S. W. (2nd) 56.

White v. Greenlee holding that if a depository bank disqualified itself during the period for which it contracted to be depository, a trust at once arose in favor of the county that entitled it to a preferential claim. Under the above rulings, those who are in control of funds required to be deposited in a selected depository have no right to permit such funds to remain in a bank not lawfully selected as a depository. If they do, the owner of the fund is entitled to a preferential claim. Of course the commissioners cannot carry these funds in their pockets, so that if the commissioners discharge their full duties in advertising for bids, for a depository and failing to get such a bid and leave the money in a bank, nevertheless, the state would have, at least, some protection by reason of its claim for a perference, should the bank fail.

We think the funds controlled by the commissioners should be deposited to the credit of the "Department of Penal Institutions" and to the further credit of the necessary and respective funds dealt with by the commissioners and not to the credit of the commissioners or penal board.

We suggest that in depositing such funds that the bank records, your pass book and deposit slips should show the following contract,

> "this deposit made and accepted as a special deposit and trust fund to be paid out on proper vouchers on said fund".

You can accomplish this wording by use of a stamp with such words on it. This would further tend to create a preference in favor of the state.

You cannot select a depository outside of the city, town or county where any of such institutions are located and unless you actually carry such funds in cash in a safe or vault, there is no other protection to the funds I can suggest. I might add that if the commissioners, in good faith, attempt to and fail to select a depository, that would be a complete defense to the penalties provided by Section 8681, Revised Statutes 1929.

As to whether the commissioners would be liable on their official bonds given under Section 8334 for the faithful performance of their respective duties, we express no opinion at this time.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

PENAL ITUTIONS: Right to terminate contract to manufacture goods.

Oral

FILED
VJ71

March 13, 1933

Honorable Stephen Hunter
Director Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Hunter:

There has been submitted to this office contract between the Department of Penal Institutions, as party of the First part and Fiber Craft Chair Company, a corporation of Frankfort, Kentucky, party of the Second part, contract dated the 4th day of August 1930. As I understand the facts this is one of successive contracts with reference to the same subject matter between the above named parties. There is also submitted a contract dated January 7, 1932, which I understand has never been considered as having been in force and effect.

As I understand the Department of Penal Institutions furnished the manpower to manufacture furniture, chairs, swings, tables and kindred articles, made mainly of wood fiber, cane and cloth, in accordance with designs, samples and patterns and from materials specified and furnished from time to time by the party of the Second part, under the contract dated August 4, 1930. The latter contract further providing that as it becomes desirable by the Fiber Craft Chair Company to have manufactured other and different articles and styles of furniture than those now set forth in a schedule referred to in the contract, such designated articles, materials and styles shall be made by the Department of Penal Institutions as is in the contract provided and the "cut, make and trim" prices for such work shall be calculated in the same manner and on the same basis as other such similar articles made herein and shall be set out in supplementary schedules from time to time and attached to the contract and made a part thereof. We do not find that such supplementary schedules have been attached to the contract. The "similar articles" undoubtedly refers to the articles to be manufactured and set out on the first page of the contract.

As I understand the facts the Fiber Craft Chair Company desired to manufacture articles other than those described on the first page of the contract, and that such articles and styles of furniture were manufactured in the state penitentiary during the year 1933.

There were both able and disabled men used under this contract. The tabulations submitted show that by multiplying the number of men, able and disabled, used on the above contract by one day that for the year 1930, 89,886 days were used under the contract, with an earning to each man employed of 33.5 cents per day per man; for the year 1931, 97, 926 days were employed with a return of 39.56 cents per man for work done; for 1932, 77,908 days with a return of 28.5 cents per man for labor done.

We are of the opinion that under the contract as provided on the third page thereof, that the articles to be manufactured as provided in the second paragraph on the third page of the contract, are to be paid for on the same basis as the articles otherwise provided for in the contract to be manufactured and if that has not been done and if the Fiber Craft Chair Company refuses to so calculate the amount due the first party, that would be sufficient ground to warrant the first party in refusing to go further with the contract.

We also understand that the Fiber Craft Chair Company pays for the manufacturing of the articles provided for in the contract, as and when it sells the goods so manufactured and we further understand that payments have not been made to the first party for a period of approximately four months, for articles that have been manufactured by first party and sold by second party and for failure to make such payments we are of the opinion that first party would be legally justified in refusing to go further with the contract.

I am returning you herewith contract dated January 7, 1932, also contract dated August 4, 1930, also tabulation of figures.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

Inclosures

PENAL INSTITUTIONS: Right to pay out money convicts acquired under Section 8402 Revised Statutes Missouri 1929.

FILED
71

April 3, 1933

Department of Penal Institutions
Jefferson City, Missouri

Gentlemen:

We acknowledge receipt of your letter dated April 3, 1933, in which you state in part and inquire as follows:

"1. Has a convict the right, legally, to transfer all, or any part, of these said deposits to anyone? In other words, is this money on deposit to his credit considered entirely his, to be disposed of as he sees fit?

2. Has a relative, such as Mother, Father, Husband or wife, any lawful claim to these deposits?

3. Has the Penal Board the right to discriminate in the disposition of these funds? In other words, is it within the power of the Board to refuse to honor orders for payment of all or any part of these funds?

4. Has the Board the right to set a limit on the amount of these withdrawals by relatives, friends, or other persons?"

And you further inquire:

"It also sometimes happens that orders are presented by persons pretending to be relatives of the inmates, when in reality they are not. It is sometimes impossible for the Board to disprove this relationship, and we should like to know if it is within the power of the Board to decide the validity of such claims of relationship".

Section 8402 Revised Statutes Missouri, 1929, provides in part as follows:

> "Said board shall take charge of all money and other articles of value which may be brought to the penitentiary by any convict, or come into his possession while in the penitentiary, which money or valuables, whenever the convict is discharged from prison or the same is legally demanded, shall be returned to such person as may be legally entitled to receive the same; and the board shall keep a book in which such receipts and disbursements shall be duly and properly noted." * * *

You will note that the quoted section authorizes the penal board to take charge only of the money and articles of value brought to the penitentiary by or which may come in possession of the convict and further that such money or valuables shall be legally demanded or whenever the convict is discharged it is the duty of the board to return the same to such person as may be legally entitled to receive the same.

Section 12968 Revised Statutes 1929 provides among other things, that a sentence to imprisonment in the penitentiary for a term less than life suspends all civil rights of the person so sentenced during the term of the sentence.

As to what is meant by the term civil rights is defined in Williams v. Shackelford,97 Mo. 322, 324, in the following language:

> "The right of exclusive individual dominion over property is a civil right, the creature of organized society, the right of a citizen of an organized government, and this right, under our laws, cannot be forfeited by attainder of felony. In the case of a convict felon for life it is transmitted from him to his heirs or legal representatives. In the case of a felon convict for a term of years, it is suspended during the term of his imprisonment unless transmitted ad interim to a trustee under the provisions of the statute, to be exercised for the benefit of his family and creditors, and to be resumed again when he is discharged."

Under the foregoing definition of the civil rights of a convict the exercise of any dominion over the money or articles mentioned in Section 8402, supra, would be the exercise of a civil right which was denied to the convict by Section 12968.

Section 12973, Revised Statutes 1929, provides for the appointment of a trustee of any person imprisoned in a penitentiary for a term less than life, to take charge of and manage the estate of the convict.

The conviction of any person for any offense whatever does not result in a forfeiture of any estate of the convict or any right or interest therein.

Williams v. Shackelford, supra, 324.

The convict simply loses his right of dominion and control over the property and for that reason the appointment of a trustee to exercise such dominion and control is provided for by the Legislature.

We are of the opinion therefore that the sole authority of the board of penal institutions is to take charge of and keep such money and articles as are mentioned in Section 8402, until the same are legally demanded of the board and that the only person entitled to legally demand such money or articles would be a trustee appointed under Section 12973, or an administrator appointed upon the death of the convict, unless of course the disabilities of the convict have been removed by proper authority issued for that purpose and that your board could not do.

The above conclusion results in our answering all of your questions in the negative.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

PENAL INSTITUTIONS: What liability insurance, if any, to be carried by Department of Penal Institutions.

FILED
71

April 11, 1933

Department of Penal Institutions
Jefferson City, Missouri

Gentlemen:

This office acknowledges receipt of your letter dated April 7, 1933, in which you state and inquire as follows:

> "The Board of Penal Commissioners would be pleased to receive an opinion from you at your early convenience on these points;
>
> First:- Should boiler insurance for our Institutions cover injuries to employees or other persons.
>
> Second:- Should insurance on motor vehicles operated by our Institutions cover liability and property damage".

We do not find any statutory requirement that you take out the character of insurance inquired about in either the first or second subdivisions in your letter. If you should have insurance coverage at all then as to what persons or property it should or would apply would depend on the contract itself and upon your judgment as to what protection should be obtained.

While it is true that section 8316, Revised Statutes Missouri, 1929, establishes a department to be known as the "Department of Penal Institutions", with the right to complain and defend in all courts and to adopt and use a common seal, by which section and language we take it the Legislature intended to create a separate legal and suable entity to be known as the Department of Penal Institutions, but your attention is called to the further fact that no provision is made for service of process on the Department of Penal Institutions or any member thereof, and that such legal entity could not be served with

process as is provided in Sections 723 and 735 Revised Statutes Missouri, 1929.

State ex rel State Highway Commission of Missouri, v. Bates, Circuit Judge, 296 S. W. 418, 422.

The State Highway Commission of Missouri is a quasi public corporation, created for specific purposes and the general principles of law governing the State Highway Commission of Missouri would govern the Department of Penal Institutions, as to liability for torts, negligence and damages. However, we might say that the Act creating the State Highway Commission of Missouri provides specifically that it may be sued and the service of process is to be had on the Secretary of the Commission,in Cole County,Missouri.

In the case of Bush v. State Highway Commission of Missouri, 46 S. W. (2nd) 854, the Supreme Court of this state at page 857 of the opinion said:

> "The proposition that the state is not subject to tort liability without its consent is too familiar to deserve extended citations of authorities. Story on Agency (9th Ed.) Sec.319; Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453.
>
> But appellant has sued respondent as "a corporation duly organized and existing according to law", and he contends that this court ruled in State v. Bates,supra, that the highway commission is a corporation and does not enjoy the immunity from suit which is a prerogative of the sovereign state. It is true that the court in its opinion in State v.Bates, supra,says of the state highway commission (317 Mo. 696,298 S.W.loc.cit.420): "It is an entity, with powers of a corporation established and controlled by the state for a specific public purpose, but that does not make this legal entity the sovereign state".
>
> And further on the same page:
>
> "But the views expressed by the court in State v.Bates, supra, do not subject the commission to liability for the tortious acts of its servants and employees".
>
> And again on page 859:
>
> "And it would be against the public interest to rule that the state highway commission was subject to liability for the tortious acts of its agents and employees".

See also Broyles v. State Highway Commission of Missouri, 48 S. W.(2nd) 78.

We call these matters to your attention on the question of the advisability of your Department procuring any insurance mentioned in your letter.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

DEPARTMENT OF PENAL INSTITUTIONS:

State Purchasing Agent has the right when Senate Bill 192 goes into effect to make all purchases heretofore made by the Department of Penal Institutions.

Letter attached to another opinion of same date on S. Bill 204.

May 11, 1933

FILED
71

Honorable George C. Johnson
Superintendent of Industries
Jefferson City, Missouri

Dear Mr. Johnson:

We acknowledge receipt of your letter dated May 4, 1933, in which you state in part as follows:

> "**** Also, we are in some doubt as to the intention and effect of Senate Bill No. 192 as to purchases under the Revolving Fund, which covers the operation of the Industries.
>
> If you will give me your opinion on these matters promptly, I assure you it will be appreciated."

The Department of Penal Institutions is of statutory origin and does not derive its power from the Constitution of the state.

By Senate Bill Number 192 there is created and established the office of State Purchasing Agent. The Governor is authorized to appoint, with the advice and consent of the Senate, a State Purchasing Agent.

Section 2 of the Act provides that the Purchasing Agent shall purchase all supplies, except that provided for in Chapter 115 Revised Statutes 1929, for all departments of the state, except as is in the Act otherwise provided. Section 2 further says that the Purchasing Agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State.

Section 4 of the bill provides that no department shall make any purchase except through the Purchasing Agent as is in the Act provided.

Section 5 provides that the Purchasing Agent may authorize any department to purchase direct any supplies of a technical nature, which in his judgment can best be purchased by such department. He may also authorize emergency purchases direct by any department.

Section 6 requires that on or before November 1st of each year, each department shall submit to the Purchasing Agent a classified list of its estimated needs for supplies for the following year.

Section 8 provides that the Purchasing Agent may prepare rules, regulations, classifications, standards and specifications to be used in the purchasing policy of the state and that the Purchasing Agent shall consult with and have the assistance of a committee, to be appointed by the Governor which committee shall consist among others of one representative from the Penal and Corrective Institutions.

Section 10 provides that any contract or order made by any department or agency of the state government for the purchasing of any supplies, materials, equipment or service contrary to the provisions of Senate Bill 192 shall be void and of no effect.

The term "supplies" as used in Senate Bill 192 is defined in Section 11 to mean:

> "Supplies, materials, equipment, contractual service and any and all articles or things, except as in the Act otherwise provided."

The term "department" as used in the Act shall be deemed to mean:

> "Department, office, board, commission, bureau, institution or any other agency of the state".

The Department of Penal Institutions is nowhere excepted from the operation of the terms of the bill. The bill seems to have intended to cover all of the purchasing activities of the state. That the Department of Penal Institutions was intended to come within the Act is shown by the fact that in Section 8 a representative of the Department of Penal Institutions is to be a member of the committee that shall consult with the Purchasing Agent.

We are of the opinion that if and when Senate Bill Number 192 is signed by the Governor of the State and if and when the same goes into effect in due course, no emergency clause being attached, the supplies, materials, equipment, contractual service and any and all articles and things heretofore contracted for or purchased by the Commissioners of the Department of Penal Institutions shall thereafter be contracted for and purchased by the State Purchasing Agent, unless otherwise directed by the State Purchasing Agent, but that said bill refers alone to the Act of contracting or purchasing and that all other of the duties of the Board of Penal Institutions, including the method of payment for such supplies, as above defined, will remain unimpaired so far as Senate Bill number 192 is concerned.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

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Attorney General.

GL:LC

COLLECTION CHARGES ON BANK DRAFTS CLEARED DURING BANK HOLIDAY.

May 19, 1933.

FILED
71
22

Hon. Henry A. Perriguey
State Oil Inspector
Jefferson City, Missouri

In Re: Collection charges on bank drafts cleared during bank holiday

Dear Mr. Perriguey:

Replying to your inquiry of yesterday wherein you orally requested an opinion as to how to handle the charges made by the Commerce Trust Company for clearing some half a dozen checks on restricted banks during the banking holiday.

It is my understanding that the total charges do not exceed a $1.50, and that this occasion will not arise again in the future. It is with this in mind that this office makes the following suggestions, to-wit, that as the amount involved is considerably less than the expense would be to enforce payment of these small amounts, to-wit, that it would cost more than a $1.50 to mail out a registered notice to each of the six parties of a hearing for revocation of license; that it would be advisable to simply charge these small amounts up to collection expense, if this can be done upon your books. In this way it would not be necessary for you to carry over a delinquency of a few cents from month to month on these accounts nor would it be necessary for you to go to the additional expense of taking steps to require these half a dozen taxpayers to take up the small delinquency.

Trusting that the foregoing satisfactorily answers your inquiry, I remain,

Sincerely yours,

HARRY G. WALTNER, Jr.
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

HGW:EG

RELIEF OF INSOLVENT CRIMINALS CONFINED: Construction of Section 3859 R. S. Mo. 1929.

8-23

August 17, 1933

FILED 77

39

Honorable Herbert Perkins
Clerk of the Circuit Court
Pineville, Missouri

Dear Sir:

Your letter of July 21st, addressed to this Department wherein you desire an opinion as to the construction of Section 3859 R. S. Mo. 1929, has been handed to me for answer. Your letter is herewith quoted:

> "It has been a question here discussed by myself and the Prosecuting Attorney as to whether Section 3859 rules in case of Insolvent prisoners, and if it does as I think and claim, then I or it would be my business to order the release of insolvent prisoner after laying in jail one day for each two dollars of fine and costs, now Puckett the prosecuting attorney claims that it will take 20 days to lay out any amount of costs, and it has always been the practice here to keep prisoner in jail twenty days for the cost regardless of what the cost might be.
>
> If I am called upon to do same I will try the Section 3859, as I now see it, and if it is not too much trouble I would like for you to give me your opinion in this matter."

You state that you are in doubt as to whether or not Section 3859 R. S. Mo. 1929, should be followed in the case of insolvent prisoners. We suppose that the other statutes which might confuse you on the matter are Sections 3727 and 3728 R.S. Mo. 1929, which are as follows:

> "When any person is held in custody or imprisoned for a fine imposed for a criminal offense, as specified in the last section, the court in which the cause was tried, or the judge thereof in vacation, on the petition of the prisoner for that purpose, shall sentence him to imprisonment for a limited time, in lieu of the fine; and at the expiration of such time, the prisoner shall be discharged on the payment of costs, or obtaining his discharge in the manner in the next sections provided.
>
> Whenever any person shall be detained for the costs of a criminal prosecution, he shall, after having endured twenty days' imprisonment in the county jail for the nonpayment of such costs, be permitted to take the benefit of the laws for the relief of insolvent persons confined on criminal process, on making application for that purpose, and conforming to the provisions of such law."

As to which of the above quoted sections or Section 3859 R. S. Mo. 1929, as mentioned in your letter should apply, would in a large degree depend upon the facts and circumstances surrounding the individual case. Under Section 3727 above, if a person is fined in a certain amount which would necessarily carry the costs he could not be discharged or take advantage of paying the costs or enduring twenty days' imprisonment as under Section 3728, unless the trial judge should in lieu of his fine sentence him to imprisonment for a limited time. This was held in the case of Ex parte Roy Secrest, Petitioner, 326 Mo. l. c. 841:

> "The statute authorizing petitioner's commitment is Section 4070, Revised Statutes 1919, as follows:
>
> Whenever any defendant shall, on a conviction, be sentenced to imprisonment in a county jail, or to pay a fine, he shall be imprisoned until

the sentence is fully complied with and all costs paid, unless he be sooner discharged in the manner hereinafter provided,

This statute, within its scope, applies alike to misdemeanors and felonies. It is a part and parcel of every sentence to a fine (Ex parte Parker, 106 Mo. 551, 555, 17 S.W. 658), and the judgment was in substantial compliance therewith. The manner in which defendant could 'be sooner discharged' is thus set forth in the sections immediately following:

Section 4071: 'When any person is held in custody or imprisoned for a fine imposed for a criminal offense, as specified in the last section, the court in which the cause was tried, or the judge thereof in vacation, on the petition of the prisoner for that purpose, shall sentence him to imprisonment for a limited time, in lieu of the fine; and at the expiration of such time, the prisoner shall be discharged on payment of costs, or obtaining his discharge in the manner in the next sections provided.'

Section 4072: 'Whenever any person shall be detained for the costs of a criminal prosecution, he shall, after having endured twenty days' imprisonment in the county jail for the nonpayment of such costs, be permitted to take the benefit of the laws for the relief of insolvent persons confined on criminal process, on making application for that purpose, and conforming to the provisions of such law.'

Section 4071, supra, provides a method, and we are advised of no other, by which a defendant so committed may discharge the fine apart from the

> costs assessed against him by the same judgment. He may petition the court in which the cause was tried, or the judge thereof in vacation, to 'sentence him to imprisonment for a limited time, in lieu of the fine,' When such prison sentence is served he is entitled to be discharged on payment of costs or obtaining his discharge under Section 4072 and the act for the relief of insolvents confined on criminal process. To authorize a discharge there must be a strict compliance with the statutes prescribing the methods by which it may be obtained. Having followed a way of his own choosing not authorized by statute petitioner is not entitled to be discharged."

Now as to the section in controversy, namely, Section 3859 R. S. Mo. 1929, which is as follows:

> "Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being imprisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs, if he be unable to pay the same,"

you state that the prosecuting attorney takes the position that it requires twenty days to be served by a prisoner for the costs regardless of what the costs might be, repeating that portion of the above quoted section "or after having endured twenty days' actual imprisonment for the nonpayment of costs", if he is unable to pay the same we agree with the prosecuting attorney provided that the costs would be $40.00 or more. But for the sake of argument let us assume that the total costs are only $16,00, the prisoner being allowed by the Section $2.00 for each day confined in the jail

for serving his costs should have the costs served in eight days. Why should he be confined in jail twenty days at the rate of $2.00 per day to serve $16.00 in costs? The costs in criminal cases are sometimes very exorbitant and these statutes for the 'relief of insolvent criminals confined' in our opinion were designed to prevent a prisoner from being confined in a jail indefinitely, in the event that he was unable to pay the costs.

We do not believe that the statute contemplates that every insolvent prisoner regardless of the amount of his costs, should be compelled to remain twenty days serving time for the costs but rather if the costs are more than twenty days at $2.00 per day he should be given the opportunity to discharge himself under the procedure as set out in subsequent statutes, if he desires to avail himself of the opportunity.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:MM

CRIMINAL LAW:--Misbranding of motor oil an offense under Section 4302, R. S. Mo. 1929.

8.28

August 23, 1933

FILED
71

Hon. R. S. Peterman
Prosecuting Attorney
Marble Hill, Missouri

My Dear Mr. Peterman:

Acknowledgment is herewith made of your letter of August 21, 1933, supplementing your previous request for an opinion of this office. Your original request reads as follows:

> "Complaint has been made to me that a certain Oil Company which is doing business in this state has in the course of its business had its employees in this state rebrand a number of barrels of oil and then sell same under a different name and at a higher price than said product was originally offered for sale under its original brand. This was done by having said employees paint the heads of the barrels and then rebrand same under a different name.
>
> Do you believe that this is in violation of the Laws of the State of Missouri?"

Your supplementary letter reads as follows:

> "In reply to your letter of the 11th. inst., with reference to the rebranding of motor oil by a certain oil company, please be advised that these brands are trade-marked, and that the rebrand is known and recognized by the customers of this company to be of a higher quality or grade of oil than the original brand, and the original brand was known as a cheaper or inferior grade of oil. Please be further advised that the rebrand is not an imitation of the brand of any other company. Trusting that the above fully covers your enquiries, and that I may hear from you very shortly."

After due consideration it is the opinion of this office that the acts referred too, in themselves, are not prohibited by any law of this State. That is to say, there is no law which would prohibit the oil company from changing a trade-mark, or brand on its own products to another trade-mark or brand, both of which trade-marks or brands are owned and controlled by the said company. This is not to be construed as to state that the sale of such rebranded oil would not constitute an offense, but the act of rebranding it not, in itself, a violation of any law of this state. It seems peculiar that no legislation has been enacted covering the labeling, branding, or inspection of motor vehicle lubricating oils. The oil inspection laws of this State are confined to such petroleum products as may be used as, or combined with other elements and used as motor vehicle fuels, or such petroleum products as may be used for illuminating, heating or power purposes. No provision is made for the inspection, labeling or branding of lubricating oils. Accordingly, there is no penalty fixed for the violation of such inspection laws, and it seems that the matter of branding and labeling lubricating oil has entirely escaped the attention of the legislature.

An examination of Art. 1 of Chap. 36, pertaining to trade-marks, dies, and brands reveals that no section contained in that article is applicable to the facts as related in your supplementary letter. Those sections referred to the infringement of the trade-marks, brands, and labels belonging to others; to the use of dies and plates imitating the labels, brands, and trade-marks of others, and do not apply where the brand or trade-mark is owned, controlled or first used by the party using such brand on another product.

While we find many sections prohibiting the misbranding or mislabeling of various items of merchandise, such as flour and meal, (Art. 6 of Chap. 93), foods and drugs, (Art. 3 of Chap. 93), beverages, (Art. 8, Chap. 93), trees, shrubs, plants, etc., (Sec. 12392), silver ware, (Secs. 4411 and 4412), vinegar, (Secs. 4393 and 4394), oleomargarine, (Secs. 4384 and 4385) and various other specific items of merchandise, yet none of these sections are broad enough to cover the subject of your inquiry.

It is the further opinion of this office that the sale of such misbranded oil would, if proper facts are proved, constitute an offense under section 4304, R. S. Mo. 1929, portions of which section reads as follows:

> "Sec. 4304. Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person; * * *any money* * * * by means or by use of any* * * *deception, or false and fraudulent representation, or statement or pretense,* * * *shall be deemed guilty of a felony,* * * *."

Without question, the entire purpose of the rebranding was to obtain the price of the quality product for the inferior product by selling the inferior product as the quality oil. But no offense was committed until such greater price was obtained through a sale wherein the rebranded product was represented to be and was sold as the product having a higher quality and value. Such an act would constitute a deception or false pretense, obtaining from the customer the difference in price between the two grades or qualities of oils. Each sale would constitute a separate offense. If the necessary facts can be proved a charge might be brought under Section 4095, which refers to the obtaining of money under false pretenses; or under Section 4308, which refers to the publication and circulation of untrue, misleading, and deceptive advertising. It is probable that the oil company has at various times advertised their better oil as containing qualities and properties which the rebranded product did not contain. However, from a practical standpoint, it would seem that Section 4304 is more applicable to the situation.

We trust that the foregoing may be of some assistance to you.

Respectfully submitted

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

Constitution Sec. 13 of Article V of the Constitution of Missouri, adopted Nov 8 1932, is self-enforcing

February 2, 1933

FILED
72

Hon. Richard K. Phelps,
Hon. W. G. Tracy,
Members Sub-Committe on House Appropriations,
Jefferson City, Missouri.

Gentlemen:

The question submitted by you to this department for answer, as I understand it, is as follows:

" Is Section 13 of Article V of the Constitution of the State of Missouri, as amended, self-enforcing?"

The question is general in its nature, therefore we will discuss the several separable provisions of the section referred to.

Section 13 above referred to is as follows:

"Sec.13.(The Governor shall, not later than fifteen days after the convening of the General Assembly in each biennial session, submit a budget showing estimated available revenues of the state for the ensuing biennium and recommending a complete plan of expenditures. All recommended expenditures and appropriations shall be itemized.) If any bill presented to the Governor contain several items of appropriation of money, he may object to one or more items (or portions of items) while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items,(or portions of items) to which he objects, and the appropriations, (or portions thereof), objected to shall not take effect. If the General Assembly be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items (or portions thereof) objected to shall be separately reconsidered. If it be not in session, then he shall transmit the same within thirty days to the office of the Secretary of State, with his approval or reasons of disapproval. (Provided, however, nothing herein contained shall be construed as authorizing the Governor to reduce any appropriation for free public school purposes.)"

The parts of the section above quoted and enclosed in brackets are the amendments to Section 13 of Article V of the Constitution as it existed previous to the adoption of the present section 13. The word so" appearing in the 5th line of old Section 13 is omitted from the new section. The general rule in this state to be applied in determining whether or not a constitutional protision is self-enforcing is stated in Sharpe et al. v. National Biscuit Company, 179 Mo. 553-562. The Supreme Court stating:

> "In Fusz v. Spauhorst, 67 Mo. 256, this court had before it section 27 of article 12 of the Constitution, which makes it a crime, " the nature and punishment of which shall be prescribed by law", for any officer of a banking institution to receive deposits after he knows it is insolvent, and which makes agy such officer individually responsible civilly for such deposits, and it was there said 'The cases are exceptional where constitutional provisions enforce themselves; ordinarily the labors of the convention have tobe supplemented by legislation before becoming operative. Of course if it be evident from the terms employed in any particular provision of the organic law, that it shall go into force forthwith, without awaiting ancillary legislation, it will become an imperative judicial duty to thus declare.' Accordingly it was held that the whole section was not self-enforcing.
>
> Thereafter in Cummings v. Winn, 89 Mo. l. c. 56, the question again came before this court and the decision in the Spaunhorst case was referred to, and it was unanimously held that the first portion of the section that made it a crime,' the nature and punishment of which shall be prescribed by law", was clearly not self-enforcing, but needed legislative action to prescribe the nature and punishment of the offense, but that the latter provisions of the section, which made such officer civilly liable for such deposits, was self-enforcing and needed no legislative aid.(Consult, also, State v. Sattley, 131 Mo. l. c. 493.)
>
> The general rule as to whether the provisions of the Constitution are self-enforcing is thus stated in 6 Am. and Eng. Ency. Law (2Ed.), p. 912:' Constitutional provisions are self-executing where there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed. * * *In case a constitutional provision is ambiguous and the words employed do not plainly evince an intention that the provision is to be self-executing, the court in construing it will resort to other aids than the mere language employed.

"Judge Cooley states the rule to be' A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.' (Cooley's Const. Lim. (7 Ed.),p. 121."

See also State ex inf. Norman v. Ellis, 28 S. W.(2nd) 363.

Along the same line and with reference to a constitutional provision imposing a duty upon an officer, which is true of the provision under consideration, the Supreme Court of New Mexico in State ex rel Delgado v. Romero, 134 Pac. 649-651, said:

"The mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision does not render such provision ineffective in the absence of such legislation. Judge Cooley lays down the rule thus:'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.' Cooley's Constitutional Limitations (7th Ed.) p. 121. Tested by this rule, the clause in question is clearly self-executing. If a constitutional provision, either directly or by implication, imposes a duty upon an officer, no legislation is necessary to require the performance of such duty."

The Supreme Court of Arizona in Campbell v. Hunt, 162 Pac. 883-886, said:

"If a Constitutional provision directly imposes a duty upon an officer, no legislation is necessary to require the performance of such duty. "

Going to the provisions of Section 13, the Governor shall not later than fifteen days after the convening of the General Assembly at each biennial session, submit a budget showing the estimated available revenues of the state for the following biennium , re- commending a complete plan of expenditures. As to whether the time in which the budget shall be submitted is mandatory or directory only is not submitted to us by your question. The Governor is to estimate the available revenues and recommend a plan for expending the same. The expenditures and appropriations so recommended by the Governor shall be by him itemized. If the General Assembly presents an appropriation bill to the Governor containing several items, the Governor may object to one or more items, or he may

object to a portion of any one of the items. If the Governor does object to one or more of the items or if he objects to a portion of any of the items, he shall attach to the bill so submitted to him at the time of signing the bill, a statement of the items or portions of items to which he objects, and the appropriations or portions thereof provided in the bill and objected to by the Governor shall not take effect. If the General Assembly be in session at the time the Governor attaches his objections to the bill, he shall transmit to the house where the bill originated a copy of his statement of objections to the bill and thereupon the items or portions thereof objected to by the Governor shall be separately reconsidered by the house where the bill originated. If the General Assembly shall not be in session at the time, the Governor shall transmit the bill with his approval or reasons for disapproval within thirty days to the office of the Secretary of State.

Under the rules above stated, and from the provisions of Section 13 itself, no reason appears for the Legislature being call on to enact Legislation to enable the Governor to perform the duties imposed upon him by the section, but it is only a question of what the courts might say his duties are under the terms and provisions of the section.

We are of the opinion that Section 13 of Article V of the Constitution is self-enforcing, and does not need additional legislation by the General Assembly to carry the same into effect.

Very truly yours,

GILBERT LAMB
Assistant Attorney-General

GL/N

COUNTY RECORDER OF DEEDS - Marriage license blanks, by whom furnished, Section 11527, R. S. Mo. 1929.

February 13, 1933.

FILED
72

Hon. John S. Phillips
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

Your recent letter directed to the Attorney General has been handed the undersigned for attention. You asked an opinion of this office upon the following questions:

> "1. The question has arisen whether the County Court of this County or the Recorder of Deeds of this County is supposed to pay for the blank marriage licenses for the use of the Recorder of Deeds. There seems to be quite a controversy on this particular point and I would like to have your opinion on it.
>
> 2. There is a man in this City who desires to sell tear gas pencils. These are made to look like ordinary automatic pencils only on the top there is a device for discharging a tear gas bullet. I have searched the statutes and have been unable to find any statute directly bearing on this. I would appreciate an opinion on these two matters."

Section 9055, R. S. Mo. 1899, as carried forward from the Statute of 1889, provided as follows:

> "The recorder shall keep his office at the seat of justice in each county and shall provide the same with suitable books, in which he shall record all instruments of writing authorized or required to be recorded."

In the case of Ewing v. Vernon County, 216 Mo. 681, Lamm, J. writing the opinion of the court, construed the above section in connection with various other provisions relating to county courts and county offices. That action involved a controversy between the county court and recorder of Vernon County, over certain sums claimed by the recorder to be due him for expenditures for janitor service and stamps. By reason of the meager provisions of the statute relating to the expenses which might be allowed the recorder, the court discussed provisions relating to other offices in reaching its conclusions as to what should be provided for the recorder. This case was decided in Division One, February 25, 1909, having been certified from the Kansas City Court of Appeals.

It will be observed by reference to Section 9055, R. S. Mo. 1899, supra, that the duty was imposed upon the recorder to maintain the office at the county seat and provide the same with books. The court in the Vernon County case reached the conclusion that the real intent of the various statutory provisions was that the county court should not only furnish an office to the recorder, books, furniture, stationery and supplies, but that he should also be provided with janitor service and stamps.

By reason of the meager provision of the statutory provision as then existing and possibly of the decision, as above referred to, the legislature, in June following the rendition of the opinion by the Supreme Court, enacted the following section, now designated as Section 11537, R. S. Mo. 1929:

> "The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books, in which the recorder shall record all instruments of writing authorized and required to be recorded. *******"

It will be observed that in this section it is incumbent upon the county court to furnish suitable books in which the recorder shall record all instruments of writing authorized and required to be recorded. No provision is made for the furnishing of any-thing other than books to the recorder. If the plain statutory provision, then, should be the only guide upon the inquiry and if the amended provision was intended to and did limit the articles to be furnished the recorder, the statute

itself would answer the question.

Section 2978 R. S. Mo. 1929, makes it mandatory upon the recorder to issue marriage licenses and he is the only person upon whom that duty rests. In 46 C. J. 1018, the following declaration of law is found:

> "Where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor."

That principle of law is approved in the Vernon County case, supra. Upon that authority, then, it is the opinion of this department that the marriage license blanks required by the recorder should be paid for by the county court from its general revenue fund.

From the description as given of the tear gas pencil, we do not find any criminal statutory provision which would prohibit its sale.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney General.

APPROVED:_____
ROY McKITTRICK
Attorney General.

CCA:EG

IN RE: Power of County Courts to compromise taxes after State Board of Equalization has fixed assessed valuations.

March 6, 1933.

FILED
72

Hon. John S. Phillips,
Prosecuting Attorney,
Butler County,
Poplar Bluff, Missouri.

Dear Sir:

You have asked my opinion as to power of County Court in Missouri to compromise taxes before and after suit begun to restrain collection thereof. You state counsel for the Fuel Company against whom taxes were assessed rely on the two cases of State of Missouri ex rel Brewer, County Revenue Collector vs. Federal Lead Co., 265 Fed. 305, and Southern Railway Company vs. Anthony, 73 Mo. 431 for authority of the County Court to compromise taxes.

In the Federal Lead Company case 265 F.L.C. 309, Judge Faris admitted no statute of Missouri authorizes County Court to compromise taxes except in certain enumerated cases within none of which this case of your county falls. Judge Faris said:

> "Neither is there any statute in existence which expressly places authority on a County Court of Missouri to compromise taxes as such, and which have been levied and assessed and made up into a Tax Book in a case such as is here before me *** There is a statute, however, which confers upon the County Courts of the several counties of Missouri plenary authority to either raise or lower assessed valuations upon property, which lowering of valuations will have the inevitable effect to lower the amount of the taxes. This section reads as follows: (9946)
>
> 'In all cases where the County Court or Assessment Board or any city council or assessment board shall have assessed and levied taxes, general or special, on any real estate according to law whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interest and penalties therein the City Council of any city and the County Court of any county shall have the full power to correct any errors which may appear in connection therewith whether of valuation, subject to the provisions of the Constitution of this state, or of ownership or receivership, double assessment, omission from

> from the assessment list or books, or otherwise and to make such valuation, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient or valid description or designation" (Section 11492, R.S. Mo. 1909, and now 9946, R.S. Mo. 1929.)

The Federal Court quoted as source of power of County Court to compromise taxes, Section 36, Article VI, Missouri Constitution, in connection with Section 9946 R.S. Mo. 1929, and which Section 36 reads as follows:

> "In each county there shall be a County Court which shall be a court of record and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

The Federal Court held the above quoted section, 9946, R.S. Mo. 1929, and Section 36, Article VI, Missouri Constitution, made the County Court the general agent of the county for the transaction of county business and this general agency empowered the County Court to compromise state and county taxes.

It is an elementary rule of construction that all parts of a Constitution and all statutes on the same subject must be construed as related parts of a code of laws to accomplish a common end. Therefore, all parts of the State Constitution and the statutes relating to revenue and taxation must be considered in any effort to arrive at the intent and meaning of Section 36, Article VI, Missouri Constitution, and Section 9946, R.S. Mo., 1929.

Section 3, Article X, of the Missouri Constitution provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected by general laws."

This means state taxes shall be uniform throughout the state, county taxes throughout the county, and city taxes throughout the city.

Section 18, Article X of the Missouri Constitution is as follows:

> "There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties of the state, and it shall perform such other duties as may be prescribed by law."

To carry out these Constitutional provisions, we find the following system for assessment, levy and collection of taxes: A local assessor first fixes the value in the county; the assessment of the county assessor is reviewed by the County Board of Equalization with power therein to lower or raise assessments of individual pieces of property; on completion of County Boards of Equalization the one hundred fourteen counties and the City of St. Louis send the assessments as made and equalized locally to the State Board of Equalization. Sections 9861 to 9865 R.S. Mo. 1929, provide procedure of State Board in equalization of the assessment of the different classes of property among the one hundred fourteen counties and the City of St. Louis, and the statute requires the Board to classify all real estate in cities and towns and villages as town lots and all other real estate as farming lands, and all personal property into twelve (12) named classes, and

"The Board shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

> First - It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value.
>
> Second - It shall deduct from the valuation in each class, of the property, real and personal which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value."

Section 9865 of the 1929 statutes makes it the duty of the State Auditor to transmit to the County Clerks the assessed valuations of all classes of property as fixed and equalized by the State Board. And on the valuation there fixed by the State Board the levy of taxes is made for all state, county, city and school purposes, and the tax rolls delivered to the County Collector for the collection of taxes.

A few facts, the existence of which cannot be denied, should be kept clearly in mind in the ensuing discussion of the above outlined Missouri system of taxation. First - it is a fact that Section 3, Article X of Missouri Constitution commands (not permits):

> "Taxes *** shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax."

Second - the law is therefore in Missouri the same class of property must be taxed uniformly all over the state.

Third - To secure this uniformity in taxation,
First - the rate for state purposes must be the same;
Second - there must be uniformity in the assessed valuation of the same class of property.

Fourth - Uniformity in taxation implies equality of the tax burden.

Fifth - The state rate of taxation is the same in every part of the state.

The Federal Court held while no statute gave County Court express power to compromise taxes, yet the power to compromise existed by indirection, because Section 9946 authorized the County Court at any time before the taxes were paid to lower the assessed valuation fixed by the State Board and thus lower the amount of taxes to be paid to the level of the agreed compromise, because if the assessed valuation is lowered, inevitably the amount to be paid in taxes is lowered.

All provisions of law, Constitutional and Statutory, on the same subject must be construed together.

Grimes vs. Reynolds, 184 Mo. 679

Therefore, all the constitutional and statutory provisions relating to assessment of property for taxation must be taken into account in construing Section 9946. In State ex rel Jamison vs. R.R. Company, 318 Mo., l.c. p. 290, in a tax case, it is said:

> "A construction should never be given to a statute which would work such confusion and mischief unless no other reasonable construction is possible."

Statutes should receive a sensible construction such as will affect the legislative intention, and if possible so as to avoid an unjust or absurd conclusion

State ex rel Cass vs. Gorden, 266 Mo. 394

In State ex rel Macklin vs. Rombauer, 104 Mo. l.c. 631, the court said:

> "It is an established rule of fundamental as well as other laws that the effects and consequences of any proposed interpretation of it may properly be considered to ascertain what was probably the intention designed to be expressed therein."

Apply these rules to Section 9946 and construction thereof by Federal Court and what is the result? What was the object of our constitutional and statutory tax provision? The end sought was uniformity in the burden of taxation borne by tax payers. In

Trust Company vs. Schramm, 269 Mo., l.c. 490

the court said:

> "The State Board of Equalization was created primarily to secure and guarantee uniformity and equality in the burdens of taxation throughout the state."

The Federal Court held County Court could compromise taxes because it was the general agent in county affairs. But in compromising the taxes the County Court would be compromising all state, as well as county taxes. But lay aside that question. Our Supreme Court has had occasion to define what the words "county affairs" means as applied to the powers of a county court in

State ex rel Buckner vs. McElroy, 309 Mo. l.c. 609-610

and said:

> "The general rule is thus expressed in 15 Corpus Juris at page 456: 'Except as otherwise provided by law a Board of county commissioners or county supervisors ordinarily exercise the corporate powers of the county. It is an enlarged sense the representative *** of the county, having *** original and exclusive jurisdiction over all matters pertaining to county affairs. *** The county Board cannot exercise its constitutional jurisdiction within the territorial limits of another county *** county business *** means all business pertaining to the county as a corporate entity *** county affairs are those relating to the county in its organic and corporate capacity'"

Our court in this decision confines the word "county affairs" to affairs relating wholly to the county and says constitutional jurisdiction is limited to affairs within territorial limits of the county and this definition of "county affairs" by its terms prohibits the county court from dealing with state affairs, such as lowering the assessment of values for state taxation purposes as fixed by the state Board of Equalization.

Section 9946 as it now stands first appeared in the Missouri laws in 1909, Session Laws 1909 p. 725 and Section 9317 R.S. Mo. 1909 was repealed and the present 9946 section substituted therefor. Section 9317 R.S. Mo. 1909, prior to the repeal thereof, read as follows:

> "In all cases where any such city shall have assessed and levied taxes, general or special, on any real estate according to law, whether the same be delinquent or otherwise and until the same are collected and paid with all costs, interest and penalties thereon, the Mayor and Council of any such city shall have full power to correct any errors which may appear in connection therewith whether of valuation subject to the provisions of the Constitution of this state, or description of ownership, double assessment, omission from the assessment list or books or otherwise, and to make such valuation, assessment and levy to conform in all respects to the requirements of the law."

It will be observed the county court is not mentioned herein. The county court was brought into this section by the change made in 1909 above referred to, 34 years after the State Board of Equalization had been created by the Constitution and after said Board had been assessing values for state wide taxation for 34 years. This statutory history shows it was not intended to confer any power on the city and

town councils except to aid in the correction of clerical and administrative errors that had crept into the tax books.

Is it likely the Legislature 51 years ago intended to authorize town and city councils to lower and raise at their pleasure the assessed valuation by the State Board of Equalization for state wide levy of taxes for state purposes and for 30 years thereafter refused to give the same power to the 114 county courts in the state?

Section 3, Article X of the Missouri Constitution requiring uniformity of taxation and Section 18 of Article X of the same instrument must be read together and the object of their enactment thereby ascertained. The framers of the Constitution knew uniformity in taxation mean equality of tax payers in the tax burden. The framers of this organic law of the state further knew uniformity in taxation could only be obtained by uniformity in the assessed valuations of the same classes of property in the 114 counties and the City of St. Louis, and therefore in the same article on taxation wherein uniformity in taxation was commanded, an instrumentality was constitutionally created to insure this uniformity of taxation in the form of the State Board of Equalization, and in Section 18, Article X, the mandatory duty was imposed on this Board to equalize the assessed valuation of property among the several counties of the state in the following language:

> "The duty of said Board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state."

Our court holds this section is self-enforcing without legislation.

Railway Co. vs. State Board, 64 Mo. 294

Our Supreme Court has held the functions of the local Boards are purely ministerial after the State Board has acted. In

Trust Company vs. Schramm, 269 Mo., l.c. 498

our court said:

> "As clearly indicating that the functions of the local board are purely ministerial after the state Board has acted we find Section 11408 (now Section 9817 R.S. of Mo. 1929) which provides that when the report of the State Board is not received at or during the session of the County Board, the County Clerk shall adjust the tax books according to such report when the same is received."

And Section 9865 R.S. Mo. 1929 provides:

> "And it shall be the duty of the State Auditor to require the clerks of the several county courts of this state to keep up the aggregate valuation of real and personal property in their respective counties for those years in which no State Board of Equalization is held to the aggregate amount fixed by the last State Board of Equalization."

This section again shows all assessment work by local boards or officials is purely ministerial after the State Board Acts.

The Federal Court held Section 9946 authorizes city councils and county courts (I say city councils as well as county courts, because under Section 9946 city councils are given the same power as county courts) after the State Board has fixed assessments to raise or lower said valuation.

Applying now the rule of construction hereinbefore set forth that consequences of a proposed interpretation may be considered in determining how statute should be construed, let us see what would result if the Federal Court is right. There are 114 counties and scores of cities in the state. No provision is made by law for a meeting of representatives of all these local subdivisions to agree on a common basis on which they would raise or lower the assessed value fixed by the State Board of Equalization on various classes of property. The result would be, of course, about as many different assessed valuations on same classes of property as there are counties and cities in the state. In the Schramm Case the St. Louis City Board raised bank stock assessment above the assessment thereon by the State Board and the Supreme Court held it had no power to increase the State Board's assessments, and in the opinion the Court discusses consequences of such an interpretation of the law and in 269 Mo., l.c. pp.498-499, the Court said:

> "Section 11412 supra expressly authorizes the state board to not only increase the assessments made by the local authorities, but also empowers it in similar language to reduce the same to its true value. If its action in this respect were not held to be conclusive, clashes and conflicts would be inevitable and confusion and chaos would come out of what was intended for order.
>
> Cases from other jurisdictions are cited, but they are of little value here, other than as tending to show that when a constitution provides for uniformity in taxation it is the general public policy, where the property located in different sections is assessed by different boards, to provide a superior board for equalization between them and that the decision of such board is made final. In fact, it has been said that under such circumstances the constitutional requirements of uniformity impose on the State the duty of adequately providing for such equalization.
>
> (Railroad and Telegraph Co. v. Board of Equalizers, 85 Fed. 302.)
>
> We have no doubt that had the Legislature in terms undertaken to provide that the property of banking corporations in the city of St. Louis should be assessed at a value different from the property of banking corporations in other parts of the State, its action could not be sustained. We are equally well satisfied that had the State Board of Equalization undertaken to assess the property of banking corporations in the city of St. Louis at a value different from that placed on the banking corporations in other parts of the State, its action would likewise be invalid. That which cannot be done

directly cannot be done through indirection, and if a method is provided which results in unjust discrimination, the result cannot be upheld. In Railroad & Telephone Co. v. Board of Equalizers, supra, it is said:

> "This is equally so whether such a result is due to erroneous action by the board or to defect in the legislation, in not requiring equalization, and furnishing the means whereby this might be made real and effective."

In that case the court further said:

> "It may be as well to say in this connection that it is now established that the constitutional requirement of uniformity in taxation applies to the mode of assessment, as well as to the rate of levy, and the Constitution may be violated in a lack of just proportion in the value at which property is assessed for taxation quite as much as in the rate or percentage at which the tax is actually laid on the assessed value."

And in the same volume (269 Mo.) l.c. p. 496, the court said:

> "If property of the same class is assessed in one county at fifty per cent of its value, and in another at seventy per cent thereof, the State collects for its own use, as distinguished from what is collected for local purposes, a greater amount from a citizen in one of its parts than from another in a different part, although their property is of the same class and value and is receiving the same public benefits and protection."

No one can doubt but if city councils and county courts were allowed to fix final valuations for assessment in the state the citizens would be paying different amounts of taxes on the same class of property all over the state and this would create a discrimination and inequality which the Federal Courts hold they have a right to remedy by the restraining process of equity court although the legal form of the plan of taxation violates no clause of the Federal Constitution, yet the administration thereof through the inequalities in assessed valuations on the same class of property in different sections of the state causes unjust and illegal discrimination in amount of taxes paid by citizens on the same kind of property.

Thus we see, if the construction of the Federal Court should prevail, the provisions of Section 3, Article X of the Missouri Constitution commanding uniformity of taxation is robbed of its operating power, and Section 18 of Article X creating the State Board of Equalization and the and the work of the State Board both are rendered useless and ineffective.

If the County Court can lower the assessment of Fuel Co. property, it can lower the assessment on every piece of property in Butler County

and so can the county courts in the remaining 113 counties and the assessing officials in the City of St. Louis, and the result would be a chaotic variation of assessed values on same classes of property throughout the state, resulting in an inequality of taxation, which under the decision of the Federal Supreme Court would render all the taxes levies invalid, and in addition the state's income would be at the mercy of the county courts because these bodies would have power to lower or raise the assessed value on which state taxes are collected, and thus raise or lower the state income. Such a construction nullifies our whole constitutional and statutory plan of taxation and to my mind ignores the ordinary rules of construction of constitution and statutes.

The Federal Supreme Court had before it a Kentucyy case wherein Constitution required uniformity and laws erected different assessing Boards and officials but provided no final board to equalize the work, and Federal Supreme Court held while the plan of the Constitution and laws of Kentucky violated no clause of Federal Constitution, yet because lacking equalization of assessment for tax purposes resulting in wide variance in amount of taxes paid by taxpayers on the same class of property in different sections of the state, the tax levy was illegal, and in

Greene vs. R.R. Co., 244 U.S., l.c. 513-515

the court said:

> "The action and effect of such a taxing system depend on two considerations: First - the rate of taxation; second - the basis of the valuation in taxation implies equality in the burden of taxation; and the equality of burden cannot exist without uniformity in the mode of the assessment as well as in the rate of taxation *** Is discriminatory taxation contravening express requirements of the State Constitution beyond redress in the courts of the United States their jurisdiction being properly invoked, when the discrimination results from divergent actions by different assessing boards whose assessments are not subject to any process of equalization by the State and where the direct results are the outcome not indeed of any express agreement among the officials concerned, but of intentional systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other body so that in effect the bodies are in concert?"

If it should be objected the decision in the Schramm Case in 269 Mo. only deals with assessing boards and not county courts, my answer is the court in the Schramm Case said (269 Mo. l.c. 495):

> "Respondents concede that under this section the state board has the exclusive power to determine the minimum taxable value, and that no county or city board can reduce such minimum, but urge that such local boards can increase the same."

The court refuted this argument at length to show action of State Board

was exclusive, both as to raising or lowering assessed valuation and concluded the discussion as follows (269 Mo. lc. 497):

> "The power of taxation has been jealously hedged about and limited to the public needs; it rests upon necessity and is accordingly restricted. *** The rate fixed by the people and the valuation determined by the State Board on the property designated in Section 11357 (now 9863 R.S. Mo. 1929) decide the question of what is necessary.
>
> This much is practically admitted by respondents through their concession that the State Board alone can fix the minimum taxable value."

The court holding that the power to fix the final assessed value is in the State Board, it necessarily thereby excludes the county court from having power to alter same after the State Board acts.

Applying the rule of statutory construction hereinbefore set out that courts will give laws and constitutions a sensible and not an absurd construction, so as to render same effective, I cannot see how a court could well hold any way except that county court has no power to compromise taxes by lowering assessed valuation fixed by the State Board of Equalization.

Butturning now from this phase of the discussion, the complete denial of the applicability herein of the Federal Court's decision in the Lead Company case and of the Anthony Case in 73 Mo. 43 L.C. is the construction placed by our Supreme Court on the Constitution and the Statute of Missouri.

In Trust Company vs Schramm, 269 Mo. l.c. pp. 494-495, the Court said:

> "The law clearly and expressly requires that for the purpose of valuation all property in the State regardless of where situate shall be dealt with in the same manner. For this purpose of valuation, the law decrees uniformity and one standard throughout the State and this without any regard whatever to local needs or difference in local conditions for it ordains that all property wherever situate shall be assessed at its true value.
>
> In order to effectuate this command a State Board of Equalization has been provided, and its arm of authority extended to all parts of the state. It is a creature of the Constitution and by that instrument enjoined to adjust and equalize the value of property among the several counties of the State. *** Respondent concedes *** the State Board has the exclusive power to determine the minimum taxable value, and that no county or city board can reduce such minimum ***"

And in Trust Co. vs. Hill, 323 Mo. l.c. 193, the court said:

> "The assessment of property for taxation, though carried on simultaneously by county officers and boards, is for the purpose in part of affording basis for levy of a state tax; to that extent it is state assessment. As such it is subject to the jurisdiction of the State Board of Equalization, a State Agency created by the Constitution itself. The very fact that the Constitution sets up such a tribunal as the State Board of Equalization demonstrates that it was not the intent of the framers of that instrument that the assessment of property for taxation should be beyond the pale of state supervision and control."

The above is the last expression of the Supreme Court of our state declaring the State Board of Equalization has the exclusive authority to fix the final valuation for taxation of all property in Missouri.

If the Southern Ry. vs. Anthony, 73 Mo. ever was an authority in Missouri authorizing County Courts to raise or lower the assessed valuation fixed by the State Board of Equalization, the decision cited above in the 323 and the Schramm case in 269 Mo. overrules the Anthony case, in my opinion.

The construction given Section 36, Article IV, Missouri Constitution, and Section 9946, R.S. Mo. 1929 by the Federal Court would place the valuation of property in the County Court and in city councils and beyond the pale of the State Board of Equalization and the Supreme Court said in 323 Mo., l.c. 193 this cannot be done.

The construction of the Federal Court nullifies the constitutional provision first as to uniformity of taxation, and, second, the provision of the Constitution creating and empowering the State Board of Equalization to fix final valuation for taxation purposes. Our court said in the Schramm case all taxing officials' acts after State Board finally fixes assessed values are administrative acts only.

The Federal Court should accept the construction of our State Supreme Court placed on our Constitution and Statutes. Of course, discrimination within the meaning of the Federal Supreme Court if cases can be shown to exist as a result of methods of administering our system of taxation authorizes on that ground the Federal Courts can in an equitable suit to intervene to protect constitutional rights invaded.

For reasons above set forth, it is my opinion your county court cannot by virtue of its power as Agent of the County under Section 9946 and Section 36, Article IV, State Constitution, compromise the taxes of the Fuel Corporation. In the Federal case in 295 Mo. 305, referred to by you, the court stressed the fact the County Court's power came from Section 36, Article IV, State Constitution. Equally, the power of the State Board of Equalization to make the final assessment comes from Section 18, Article X of the State Constitution.

You also ask my opinion as to whether or not your County Court can if they believe an assessment is erroneous and excessive, make a valid agreement with the taxpayer under Section 9946, R.S. of Mo. 1929. I assume you mean to ask if under such conditions your County Court could lower the assessed valuation fixed by the State Board of Equalization and compromise the taxes with the taxpayer and in that assumption I answer in my opinion your court could not make and carry out such an agreement.

Long years ago our Supreme Court held in State ex rel v. Western Union Company, 165 Mo. 502, a mere over-valuation in assessing property is no ground for relief.

Very respectfully yours,

ECC:AH

EDWARD C. CROW

APPROVED:

ATTORNEY GENERAL

HIGH SCHOOL:

School District has right to charge tuition on non-residents, the rate to be determined under Sections 14 and 16, Laws of Missouri, 1931, pages 342-344.

June 13, 1933.

FILED
72
28

Mr. John S. Phillips,
Prosecuting Attorney,
Poplar Bluff, Missouri.

Dear Sir:

We are acknowledging receipt of your inquiry of May 10, 1933, as follows:

"I have been requested by the School District of Poplar Bluff, Missouri, to get an opinion from your office in regard to tuition to be paid by students who are not residents of the Poplar Bluff School District. We would like to know if the School District in Poplar Bluff has the right to charge tuition for the pupils in the other school districts in the county which do not have approved High Schools, and if they have such right what could be charged each non-resident student?

The School Board also wants to know if they have the right to refuse to accept these non-resident pupils if the tuition is not paid.

We would like to have an answer from your office as quickly as possible so that we can get the matter settled."

Section 16, page 343, Laws of Missouri, 1931, reads as follows:

§165.257

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the

> ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupil shall not be counted in determining the teaching units of the district maintaining the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final: Provided further, that when any school district makes provision for transporting any or all of the children of such district to a central school or schools, and the method of transporting and the amount paid therefor is approved by the state superintendent of schools, the amount paid in state funds for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district; Provided, the provision of this act regarding the payment of tuition and transportation shall apply if the students attend any school supported wholly or in part by state funds."

Under the above Section it is declared that "the rate of tuition which a non-resident shall pay shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of $50.00 for the entire term." It is further provided that "the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses."

Section 14 of the same Act, page 342, Laws of Missouri, 1931, provides that the cost per-pupil shall be ascertained by taking the average total number of pupils attending the school and dividing it into the cost of maintaining the school.

It is therefore the opinion of this Department, from the foregoing, that the cost of maintaining the school attended will be the amount spent for "teachers' wages" and incidental "expenses" and this sum divided by the average total number of pupils attending the high school is the per-pupil cost of the school as it is then maintained; and the tuition per-pupil cost of an outside pupil would be on the same basis, less a deduction of $50.00 for the entire term. The school district of Poplar Bluff has a right to charge tuition as above indicated, the amount to be determined according to the above provisions.

Under Section 16 above, the tuition of the pupil is to be paid by the school district wherein the pupil resides. This, of course, relieves the non-resident student from paying his own tuition. It is our opinion under this Section that the pupil is entitled to attend high school without his tuition being first paid or tendered. As a matter of fact, the rate of tuition to be paid might not be possible of ascertainment until after the term of school has considerably progressed.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

TAXATION: Property occupied by state militia or national Guard as armories not exempt from taxation.

CONSTITUTION: Section 13870 violates Sections 6 and 7 of Article X of the Constitution of the State of Missouri.

6-20

June 15, 1933

FILED
72
28

Honorable Henry M. Phillips
Prosecuting Attorney
Bloomfield, Missouri

Dear Mr. Phillips:

This Department acknowledges receipt of your letter dated June 9, 1933, in which you state and inquire as follows:

> "There are three buildings in our county occupied as armories by companies of the state militia. The owners of these buildings claim that these buildings are exempt from taxation because so occupied as provided in Section 13870 R.S.Mo. 1929. This would seem to be true if said Section 13870 is constitutional. However Art.X Sec. 6 of the State Constitution designates specifically what property may be exempted by law, and Section 7 of the same Article provides that no other property may be exempted by law.
>
> I would like to have your opinion upon the question for the benefit of our township collectors."

Section 6 of Article X of the Constitution of the State of Missouri provides:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city

> city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law".

Section 7 of Article X of the Constitution further provides:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void".

Section 13870 Revised Statutes Missouri 1929, is as follows:

> "All armories owned by this state or by any organization of the national guard and all buildings leased by the state for military purposes shall be exempt from taxation for all purposes during the period of such ownership".

Cited under the latter section is the case of State ex rel v. Fleming, 275 Mo. 509, which involved a suit to collect taxes against certain lots in the City of Aurora, Missouri, where the building thereon had been leased to the State of Missouri for military purposes and was used by the national guard of the State of Missouri. It is significantly mentioned in the opinion that the constitutionality of what is now Section 13870 was not in the case because not raised by the plaintiff, so the above case is not authority on your question.

Speaking of a prior constitution the opinion in Life Association of America v. Board of Assessors of St. Louis County, 49 Mo. 512, 519, which constitution it seems gave the legislature some discretion as to exempting property from taxation, mentioned that fact and further said:

> "Since these decisions, however, that discretion has been withdrawn from the legislature, and they are now expressly forbidden to exempt any property from taxation".

The case of State ex rel v. Macgurn, 187 Mo.238, was an action to collect taxes on certain real estate in the City of St. Louis. It appears that the property was leased and used exclusively for school purposes but that the lessor received a rental therefor. In the course of the opinion at page 243 the court said:

> "But on the contrary, when the owner leases his land to the public for a public use, or to a quasi-public body for a charitable or religious use, and applies the rents derived from the land to his own personal advantage, he contributes nothing to the public or to charity, he loses nothing by the use, he is not a benefactor to any one, but he stands before the law in exactly the same light as any one else who leases his land for any other purposes, and uses the rents for his own advantage, and, therefore, he is not entitled to any special consideration at the hands of the law or the government, and his property is not exempt.
>
> There would be just exactly as much, and no more or less reason, for holding that the property of one who sold provisions or supplies to a charitable institution which were used to support the lives of the inmates thereof, was exempt from taxation. In both cases he would get and appropriate to his own use the proceeds or products of his property, just the same as if it had been rented or sold to a private citizen or to a business concern, and in neither instance would the State or the charitable institution be benefited one jot or tittle by the transaction, for it would pay a full consideration for all it got".

Assuming that the lessors mentioned in your letter received rental for the property occupied as state armories by the state militia, then the property would be taxable under the above holding because of course schools come within the exemptions of Section 6 of Article X of the Constitution, while property used as an armory by the state militia does not.

If and when the question is properly raised and saved we have no doubt the court will hold Section 13870 Revised Statutes 1929 to be violative of Sections 6 and 7 of Article X of the Constitution of the State of Missouri, because Section 13870 undertakes to do exactly what Section 7 of Article X of the Constitution says shall be void legislation, that is the legislature undertook to exempt property not exempted by Section 6 of Article X of the Constitution and Section 7 of Article X of the Constitution says when the legislature undertakes to do that the enactment will be void.

Assuming that the lessors of the property mentioned in your letter receive rent for the use of same as armories for the state militia, then taxes thereon would be collectible for that reason and we further are of the opinion that Section 13870 Revised Statutes Missouri 1929 is void and in violation of Sections 6 and 7 of Article X of the Constitution of the State of Missouri, and would be no defense to an action to collect taxes on the property mentioned in your letter.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

City Council may not appoint Councilman to remunerate his position under City contract.

September 26, 1933

FILED NO. 72

Hon. H. M. Phillips
Mayor
Palmyra, Missouri

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "Palmyra is building a new sewer line and the City is paying all of the cost of the trunk line.
>
> The Council voted for one of the Councilmen to oversee the job at $3.50 per day. There has been quite a bit of criticism for hiring one of the Councilmen for the work. What I want to know is can he serve as Councilmen and oversee this work on a salary for the City, legally."

In an opinion from this office to the Hon. T. J. Harper, Prosecuting Attorney of Stone County dated February 11, 1933 with reference to the right of Commissioners to employ themselves, this conclusion was reached:

> "* * *It is the opinion of this department that it would be unlawful as against public policy for the member of your Special Road District Board to be employed by the Board or engage themselves as the employee and draw compensation for working upon the highway of the road district in which he is serving as Commissioner."

This conclusion was also reached in an opinion from this office to Hon. J. B. McGuffin, Prosecuting Attorney of Lawrence County, dated March 31, 1933, with reference to the right of commissioners to accept contracts for work performed in their districts.

In the case of State vs. Bowman, 184 Mo. App. 549, the Court had before it the question of whether or not a member of the City Council of Springfield, Missouri, could be appointed City Clerk. The Court said:

> "* * *Other reasons might be given, but it is sufficient to say, and we so hold, that it is against the policy of the law to allow a member of the appointing body, in a case like this, where the appointive office is a lucrative one, to become the beneficiary of the appointment.* * * *
>
> We are not without abundant authority for this ruling. The case of Meglemery v. Weissinger, (K6.) 131 S. W. 40, 31 L.R.A. (N.S.)575, is a leading case on this subject. The editorial note to that case says: 'The adjudged cases upon the validity of appointment to office made from the membership of the appointing body hold uniformly that such appointments are illegal and to be generally discountenanced.' In that case it was held that the fiscal court of a county, empowered to appoint a bridge commissioner, a salaried officer, could not appoint one of their own number. No specific statute or constitutional provision is cited as prohibiting such action. The court held the appointment void as against public policy, and said: 'Nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties

> "and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to the place the other members under obligations that they may feel obliged to repay.' Other cases to the same effect will be found, giving the same and other reasons for so holding. (Smith v. City of Albany, 61 N.Y. 444; Gaw et al. v. Ashley et al., (Mass) 80 N.E. 790; The People v. Thomas, 33 Barbour's Repts. 287; Ohio ex rel. v. Taylor, 12 Ohio St. 130; Kinyon v. Duchene, 21 Mich. 497.* * *"

It is therefore the opinion of this office that it would be unlawful for the City Council to appoint a Councilman to oversee the building of the new sewer line and receive compensation therefor. The attendant evils to any other conclusions would be such as to undermine the very principles of our government and would be in direct conflict with public policy.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

_____
Attorney General.

TAXATION AND REVENUE:-Laws of Missouri 1933, page 419, imposing upon County Clerk the duty to ascertain benefits in the assessment of drainage and levee districts, makes no provision for compensating the Clerk for such services.

10-23

FILED
72

October 18, 1933.

52

Mr. Henry M. Phillips,
Prosecuting Attorney,
Bloomfield, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am writing you for your opinion relative to the construction of certain parts of Senate Bill No. 34 approved March 18, 1933, printed in Laws of Missouri 1933, at pages 419, 420 and 421.

The following questions have arisen in my County in connection with the work required to be done by the County Clerk under this law, viz:

1. What provision, if any, is made by this law, or by any other statute, for determining the amount of compensation for the County Clerk for these services?

2. Should the compensation of the County Clerk for his services under this law be paid by the County from the County revenue fund, or should it be paid by the different drainage districts?

3. Should the County Clerk furnish the required information concerning lands situate in what are commonly termed circuit court drainage districts, or should such information be prepared and furnished by the secretaries of such drainage districts?

4. Is the County Clerk required to account for his compensation, if any, received for his services under this law as a part of the maximum amount of fees he can retain for the salary of himself and his deputies, or is this compensation to be excluded from such maximum amount like the County Clerk's fees which are earned in the organization and incorporation of the county court drainage districts?

The County Court and the County Clerk of this County desire to comply with the laws of this State with respect to the above matters and have requested my

opinion upon them. This law, however, does not appear to be an amendment of any existing revenue law and believing that the same questions will arise or have already arisen in many counties in this State and that the law should have the same construction in every county, I consider it advisable to request an opinion from you upon these questions."

Laws of Missouri 1933, page 420, Section 2, provides as follows:

"It is hereby made the duty of the clerks of the county court to ascertain and determine the aggregate amount and/or amounts of the portion of then existing benefits assessed and/or levied, if any, against lands and other property situate within the limits of all drainage and/or levee districts now organized or that may be hereafter organized under the laws of this state for reclamation and/or protection purposes, in their respective counties and for which portion of assessed benefits no levy and/or assessment for principal has been paid, exclusive of delinquent levies and/of assessments, together with the aggregate amount of principal bonds issued under and by authority of such drainage and/or levee district that are unpaid, if any, and the aggregate amount of all sinking funds, if any, available solely for the payment and discharge of such principal bonds, and in addition thereto the aggregate amount, if any, of such principal bonds herein referred to as are then delinquent and past due, separately stated, and shall also certify the aggregate amount and/or amounts of the portion of then existing benefits assessed and/or levied against any lands or other property situate within the limits of such drainage and/or levee districts that are or may be exempt from taxation for general purposes under the laws of this state, if any, and for which portion of assessed benefits no levy and/or assessment for principal has been paid, exclusive of delinquent levies and/or assessments, together with any other information that may be necessary or required in order that the provisions of this act may become effective and the equalizing of the valuations of lands and other property situate within the limits of all drainage and/or levee districts organized or that may hereafter be organized under the laws of this state for reclamation and/or protection purposes for taxation for general purposes may be expedited, and to, at the time such clerks of the county court are now, or hereafter may be, required by law to make out and forward to the state auditor, the abstract of the assessment book showing the aggregate amounts of the different kinds of real and personal property and the valuation thereof, transmit the information above referred to, to the state auditor, to be laid before the state board of equalization. It is hereby made the further duty of the several clerks of the

> county court to retain a copy of the information, matters and things as herein provided, to be laid before, and for the use of the county boards of equalization and appeals."

We find no provision whatever in Section 2 for the payment to the county clerks for the services rendered under said section. This is a new duty imposed upon county clerks. We have diligently searched all of the statutes which have to do with the allowance of fees to county clerks and we have failed to find any provision in these statutes which authorize the county clerks to charge for the services required under the above section.

In Jefferson Bank v. Refrigerating Company, 236 Mo. 407, 414 the court says:

> "When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same."

In Sanderson v. Pike County, 195 Mo. 598, 605, the court says:

> "It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it."

In State ex rel. v. Hackmann, 265 S. W. 532, 534, the court says:

> "Before the state can be held liable for the payment of a fee or expense incurred in its behalf, a person or official claiming such fee or expense must be able to point out the law authorizing such payment."

In view of the foregoing decisions, before any public officer can claim fees for services performed as such officer, he must be able to point out the statute authorizing the allowance of the fee. The above section makes no provision whatever for compensation for the county clerk in performing the duties required by it. We fail to find in any other section authority for charging for these particular services.

1. In answer to your first inquiry, therefore, we must reluctantly rule that the law does not authorize the allowance of any compensation to the county clerk for the services performed under the above section.

2. In answer to your second inquiry, in view of our holding as to your first inquiry, we must rule that neither the county or the district is obligated to pay for these services.

3. In answer to your third inquiry, we are of the opinion that Section 2 above referred to, makes it the duty of the clerk of the county court to furnish the information required, whether the district be organized under the circuit court or otherwise. The purpose of this Section is that the State Board of Equalization shall be furnished with the information required therein, in order that the assessments throughout the states may be equalized. We find no provision in said Section which would relieve you from furnishing this information for all of the drainage or levee districts. No doubt, however, the secretaries of the districts will be glad to co-operate with you in furnishing this information.

4. In answer to your fourth inquiry, since we have concluded that the clerk is not allowed additional fees for the services performed under this section, the question of whether or not such fees have to be accounted for passes out of the picture.

We realize that this section will impose additional burdens upon the county clerks. It is apparent, however, that at the time the fees for county clerks were provided for, that this new way of assessment was not in contemplation of the law makers. No doubt, at the first opportunity, the Legislature will make adequate provisions to cover this section. As stated above, we have not been able to find any authority for the allowance of fees for the services required by the above section. If, however, you can point out to us any section of the statutes which we have overlooked which might be the basis for the allowance of fees in this connection, if you will call them to our attention, we shall be glad to render you an additional opinion concerning them.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

PUBLIC SERVICE COMMISSION - TRUCK PERMIT -

MOTOR VEHICLES: Trucks of one and one-half ton capacity and less not required to pay truck permit license. Capacity measured how.

12-27

December 12, 1933

FILED
72

Honorable John S. Phillips
Prosecuting Attorney
Poplar Bluff, Missouri

Dear Sir:

This department acknowledges receipt of your letter dated November 23, 1933, as follows:

"I have a matter here which I am unable to find any law on, and I wish you would give me your opinion as to this matter, if the cases have ever been passed on. We have a man in this territory who owns a chevrolet ton and a half truck and is in the transfer business but has no regular route to run over. If a man wants any property moved he merely goes to him and tells him and this man takes his property in his truck to the designated place for a certain amount of money.

Under Section 5372, the Laws of Missouri, 1931, subsection C, it says that the annual license fee on each motor vehicle, trailor or semi-trailor operating under the certificate of convenience and necessity shall pay an annual license fee. Further on the first classification of motor vehicles that is under this section is those trucks which weigh more than one and one-half tons and not more than two tons, on which trucks there shall be a $25.00 license fee paid.

I would like to have your opinion as to whether or not the truck this man has, which as I told you is a ton and a half Chevrolet truck, is required to have this annual license fee of $25.00 or not?

I do not understand whether or not a ton and a half truck shall pay on the classification given it by the manufacturer, or whether it means a truck that carries one and one-half tons on it.

This question has arisen three or four times in this county, and I would like to have your opinion on it.

Thanking you in advance for an early reply, I am. "

We assume that your letter refers to Section 5272 Laws 1931, page 311, instead of Section 5372.

The only case we have been able to find construing the act referred to is Schwartzman Service, Inc., v. Stahl, et al. 60 Fed. (2) 1034, but that case does not in any way determine the question you present by your letter. Subdivision (b) of Section 5264 Laws 1931 page 304, defines "motor carrier" as follows:

"The term 'motor carrier,' when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier."

Section 5268 of the act provides:

"It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation. * * *"

Section 5272, in part, reads:

"In addition to the regular registration license fee imposed on all

motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; * * * * "

Subdivision (c) of Section 5272 further provides:

"In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued. For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the annual license fee shall be as follows:

More than 1½ and not more than 2 tons. .$25.00.**"

By the quoted part of Subdivision (c) of Section 5272 the license fee to be paid by the owner of the truck referred to in your letter, or whether he is required to pay a license fee at all, is to be determined or rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, and the capacity shall be determined by the Public Service

Commission at the time a certificate of convenience and necessity or interstate permit is issued. Assuming the validity of the provision of the section giving the Public Service Commission the right to determine the capacity, the Legislature apparently intended to authorize the Public Service Commission to determine the capacity either by the manufacturer's rated load capacity or by determining the actual weight carrying capacity of the vehicle.

Section 5280 in part is:

> "Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

If the truck under consideration, by applying either the rating of the manufacturer or its actual weight carrying capacity, is not in excess of one and one-half ton, then such a truck is not controlled by the act found in Laws 1931 at page 304. If, by applying either of the standards set forth in subdivision (c) of Section 5272, and assuming the right of the Public Service Commission to use either standard, the truck in question is more than a one and one-half ton truck the owner is entitled to pay an annual license fee thereon of $25.00.

I understand that the Public Service Commission has promulgated some rules with reference to subdivision (c) of Section 5272 and we suggest that you write Honorable Sam O. Hargis, Chief Counsel, Public Service Commission, with reference thereto.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

GAME AND FISH COMMISSIONER: Game and Fish Commissioner and his deputies have a right to inspect hunting licenses of hunters under what circumstances.

12-27

December 12, 1933

FILED
72

Honorable John S. Phillips
Prosecuting Attorney
Poplar Bluff, Missouri

Dear Sir:

This Department acknowledges receipt of your letter dated November 24, 1933, as follows:

"We have a situation in this county which has arisen and I would like to have some advice from your office on it.

There are two strong republicans in this county who were caught, one on a Highway and one in a hunting camp, on the 26th day of October, 1933, and both refused to let the officers, to-wit, the Game Warden, inspect their licenses and talked very strong in regard to what they thought about the game wardens.

The question has come up as to whether or not a game warden has a right to inspect hunting licenses in a camp and upon the Highway when the hunter is not in the actual stage of hunting. These particular men have been giving our game warden quite a bit of trouble and I would like to know just how we stand before we go ahead with criminal prosecution.

I would appreciate an opinion from your office in regard to this matter as quickly as possible."

Section 8257 Revised Statutes Missouri 1929 reads as follows:

> "It is hereby declared to be the duty of every person holding a license in this state to present the same for inspection by the game and fish commissioner, or any of his deputies or any sheriff, marshal or constable. Any person holding a license and refusing to present the same when a proper demand is made therefor, shall be deemed guilty of a misdemeanor."

Section 8295 Revised Statutes Missouri 1929 reads:

> "It is hereby made the duty of every person participating in the privileges of taking or possessing fish, birds, animals, and game, as permitted by this article,to permit the game and fish commissioner or his deputies to inspect,and count such fish,birds, animals, and game, to ascertain whether the requirements of this article are being faithfully complied with. Any person who shall refuse to comply with a demand to permit such inspection and count by any authorized officer of this state,or who shall interfere with such officer or obstruct such inspection or count shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred and fifty dollars ($150.00)."

By virtue of the latter section and Section 8224, Revised Statutes Missouri 1929, the Supreme Court of this state has upheld the right of a game warden to inspect and count fish, birds, animals and game in the possession of a person who has obtained a license to hunt and kill game. In State v. Bennett 315 Mo. 1267, 1275, the Supreme Court, en banc, said:

> "From a consideration of the foregoing rulings and many others that might be cited, we are of the opinion that the defendant, by taking out a license to hunt and kill game, the title to which was in the State, acquired a mere privilege to hunt, subject to the restrictions and limitations of the statute; that the statute requiring him to permit the game commissioner or his deputies to inspect and count the fish, birds, animals and game in his possession to ascertain whether the requirements of the statute were being faithfully complied with is a proper and necessary police regulation to discover and prevent easy evasions of the statute, and is not violative of the constitutional provisions invoked; that the statute, being of general application to all persons alike, is not repugnant to the due-process and equal-protection clauses of the Constitution (Duncan v. Missouri, 152 U.S.377), and furthermore, that the defendant cannot play fast-and-loose; that by accepting a hunter's license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case."

I do not know what you mean by the word "caught" as used in your letter. I assume you mean the persons referred to had game on their persons or in the hunting camp, but you do not say whether either of the persons had had issued to them a license to hunt and kill game.

By the provisions of Section 8257 above set out, and in view of the foregoing holding of the Supreme Court of this State, we are of the opinion that if the Game and Fish Commissioner or any of his deputies has reasonable cause to believe that a person is about to or is in the act of going out for the purpose of hunting and killing game, or if such a person is found while in the act of hunting and killing game or if such person is found in a hunting camp

obviously designed as headquarters for expeditions in hunting and killing game, or if the Game and Fish Commissioner or any of his deputies has reasonable cause to believe that a person is returning from the hunting and killing of game or has just returned from such a mission, then under any and all such circumstances the Game and Fish Commissioner and any of his deputies has the right of inspection of the hunting license of such person and refusal to permit inspection of same renders the person so refusing guilty of a misdemeanor. Therefore it becomes necessary for the holder of such license to carry the same with him under the circumstances above pointed out. Of course, if such person did not have a hunting license then he may be punished under other provisions of the law.

The right to inspect the license of a hunter is, we suppose, really for the purpose of determining whether or not such hunter has a license. However, this same fact could be ascertained from the records of the proper office. The right to inspect the license as provided in Section 8257 is in addition to the right to inspect and count fish, birds, animals and game to ascertain whether the requirements of the game and fish law are being faithfully complied with.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

ASSESSORS, County --Fees to be paid. Section 9806 R. S. Mo. 1929.

February 11, 1933.

FILED
73

Hon. Leo A. Politte
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Politte:

Your letter directed to the Attorney General was handed the undersigned for attention. You asked for the construction of Section 9806, R. S. Mo. 1929, as amended by laws of Missouri 1931, P. 358, and in connection therewith state the following:

"Will you kindly give me a ruling on the compensation allowed the assessor of Franklin County for the year 1932? The population of Franklin County according to the 1920 census was slightly lower than 30,000. According to the census of 1930 the Franklin County population was in excess of 31,000.

The question is whether or not he is entitled to thirty-five (35¢) cents per list or only thirty (30¢) cents per list."

Section 9806 R. S. Mo. 1929, provides,

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding thirty-thousand; thirty cents per list in counties having a population of more than thirty-thousand, * * * * * * *"

The general assembly amended the above section, Laws 1931, P. 358, by providing that the compensation of the assessor shall be thirty-five cents per list in counties having a population not exceeding 40,000.

The legislature, for the purpose of ascertaining the population of a county, enacted what is now Section 11808, R. S. Mo. 1929. It is a general section and intended to be the basis of determining the salary, fees and compensation of all county officers and when no special provision has been made with

respect to any particular office, this section is resorted to for the purpose of determining the population. It specifically provides that,

> "For the purpose of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer for any year, or the amount of fees he may retain, ******* the highest number of votes cast at the last previous general election, ****** shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county."

Section 9806, supra, relating to county assessors, is silent as to the manner of ascertaining the population for the purpose of fixing his fees. The Federal census is not an official or legislative act of the State of Missouri, and in the absence of a legislative act adopting it as a basis for ascertaining population, we are of the opinion that the legislative intent was to employ the method provided in Section 11808 R. S. Mo. 1929, to ascertain the population rather than the adoption of the Federal census.

Section 8, Article 14 of the Constitution provides as follows:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

It will be noted that this inhibition prohibits an increase in salary or fees during tenure of office. The Supreme Court has repeatedly held that under this provision the fees or compensation of a state, county or municipal officer during his term of office cannot be increased.

> State ex rel v. Gordon 250 Mo. 471 l. c. 476.
> State ex rel v. Jost 269 Mo. 248 l. c. 256.

Under the provision of Section 9806, R. S. Mo. 1929, when the population of the county exceeded 30,000, the fees which the assessor should receive for assessment lists would be thirty cents per list.

It is our opinion that the amendment to this law, Session Act 1931, P. 351, did not affect the fee of the assessor for the assessment made for the year 1932, but the fees to which he would be entitled would be based upon the statute in force at the date of his election. We assume that he was elected in the year of 1928 and for a term of four years, as was provided for by Section 9749, R. S. Mo. 1929.

Referring again to Section 11808 R. S. Mo. 1929, under which the population is ascertained for the purpose of determining salary or fees, it is noted that it employes the words "general election". Section 655 R. S. Mo. 1929, provides that the construction of all statutes of this State shall be by the rule set out in such statute, unless such construction is plainly repugnant to the intent of the legislature or the context of the statute. The 16th clause of the statute defines "general election" as follows:

> "The term "general election" refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially;"

Following then the direction set forth in the above sections, it is our opinion that the population for the purpose of ascertaining the fee of the assessor for the 1932 assessment should be ascertained from the result of the vote cast in the general election, taking the highest vote cast thereat and multiplying same by five. Such method meets the requirement of Section 12, Article 9, Missouri Constitution, because it operates uniformly as to a particular class. We are further of the opinion that the amended law appearing in the 1931 Session Act would not affect the fees during the term of the then encumbent of the assessor's office. The fee of the assessor might be increased, or decreased, during the term of his office, dependent upon an increased or decreased population, thereby materially changing his duties, and such increase in that event would not be violative of the constitutional inhibition against an increase of salary during tenure of office; such increase cannot, however, be made by legislative enactment. If the assessor's fees would be affected by the election result in the general election of the year 1930, it being a general election, the result might be used as a calculation for ascertaining the increased or decreased population, if any. Should the fees of the assessor be increased thereby, such increase, as hereinabove stated, would not be violative of the constitutional inhibition against

Hon. Leo A. Politte #4

increase of salary during his term.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney General.

APPROVED:_____
ROY McKITTRICK
Attorney General.

CCA:EG

Duties, power and rights of State Highway Department and County, under Article 2, Chapter 42, to grade and construct roads within the county.

February 23,1933

FILED
73

Honorable Walker Pierce
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

Answering your inquiry:

> "Does the State Highway Department have the right to demand that the County grade a right of way, bought by the County, for a "farm to market" road, before they will complete the road or work on it? In other words, if the County buys the right of way for such roads can they make the Highway Department grade and complete them, or is it right for the Highway Department to demand that the County Grade such right of ways."

You do not state in your letter whether or not you are operating under Article 2, of the Roads and Bridges, commencing with Section 7856 of the R. S. of 1929. I assume that you are operating or intend to operate under that chapter, and accordingly will answer your query as if you were operating or working under what is commonly known as "Farm to Market" road. (Article 2)

After providing for the appointment of commissioners as outlined under Sections 7856 and 7857, the statute proceeds to state some of the power of the commission. Section 7858 states:

> "It shall be the duty of the County Highway Commission and said commission shall have the powers to locate, lay out, designate, construct and maintain, subject to approval of the state highway commission, a system of county highway******* to the end that all parts of the county shall be connected with the state highway system.****"

Then follows Section 7859 which says:

> "Before construction of any county highway located, laid out, and designated as in this article authorized and provided, or any money, in excess of the cost of such location and designation shall be expended thereon, it shall be the duty of county highway commission to submit such location to the state highway commission for its approval, and upon approval of such location by the state highway commission, the county highway commission shall proceed to procure the right of way for said county highways etc.**********"

In Section 7863, the county highway commission is given power to use and employ whatever means, methods, or power, that may be necessary in the construction which would include grading and maintenance of said county highways, including the power to build culverts and bridges.

See also Section 7864. To same effect is se ction 8067.

Harris v. Bond Co., 244 Mo. 664.

From the foregoing it will appear that the state highway commission has no right to compel the county to grade the right of way bought by the county for a farm to market road, it would be a matter within the counties power and discretion.

You will note that at no place in this chapter is the state highway commission compelled to help the county highway commission except and when under 7866 the state highway commission may take over all or any part of the highways system and make refund therefor in such manner as may now or hereafter be provided by law for making refund to the several counties of this state and road districts thereof, for highways taken over by said state highway commission.

If, however, you are not under Article 2 as I have assumed you are through out the foregoing opinion, but that this is one of the

roads mentioned and described under Section 8120, "Howard County, p. 2296, Statutes of 1929." Then and in that event the State Highway system must govern, and the state department would be compelled to construct, reconstruct, and improve and ever after maintain as public roads, and the necessary grading, hard surfacing, bridges and culverts therefor shall be constructed by the state of Missouri.

Of course, if it is one of these roads mentioned just above, it would be up to the state to do all the grading and everything else connected therewith, in addition to reimbursing you for what you have expended. See Section 44a, Article 4, p. 91 of the state constitution. 19 S. W. (2nd.) 642 l. c. 648.

Very respectfully yours,

Geo. B. Strother

Geo. B. Strother
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

GBS:MM

SCHOOL--
IN RE: Majority of TAX PAYERS voting at election under Sec. 9225 R. S. Mo. 1929, increasestax levy; and who is a tax-payer.

April 3rd,1933

FILED
73

Hon. Walker Pierce,
Prosecuting Attorney,
Fayette, Missouri.

Dear Sir-

Answering your letter of March 30th,relative to Section 11151 of the School Laws of 1927 (now Section 9225 R. S. Mo. 1929) which provides the majority of the qualified voters who are tax-payers may increase the tax levy for school purposes. The question has arisen as to whether or not liability for poll tax makes one a qualified voter within this section. If not, the further question arises as to whether or not the tax-payer must be liable for the taxes within the district in which he is voting.

That Section requires that,

> " * * * if A MAJORITY OF THE VOTERS WHO ARE TAX-PAYERS VOTING AT SUCH ELECTION ON THE PROPOSITION TO INCREASE THE LEVY SHALL VOTE IN FAVOR OF SUCH INCREASE, the result of such vote and the rate of taxation so voted in such district shall be certified to the County Clerk * * * who shall on the receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all the taxable property, real and personal of such school district as shown by the last annual assessment for state and county purposes, including all statements, of merchants as provided by law."

Taxes on railroad property in the district would be taxable under this law.

You will note, the statute repeatedly said the majority of the tax-payers voting at such an election.

Black's Law Dictionary says that a tax-payer is defined as a person chargeable with a tax.

The St. Louis Court of Appeals defines a tax-payer as a person owning property in the State subject to taxation on which he regularly pays taxes. (This definition is adopted in Pope's Legal Definitions.) Sutton v. Fassie 71 S. W. (Mo.) 745.

In the following case the party seems to have owned an automobile and was considered a tax-payer, Castilo v. State Highway Department 312 Mo. 244, l.c. 262.

In other decisions, they have defined a tax as "an enforced contribution of money or property and in accordance with some reasonable rule of apportionment by authority of a sovereign state on a PERSON OR PROPERTY within its jurisdiction for the purpose of defraying the public expense."

Balentine's Law Dictionary p.1263
20 R.C.L. p. 13
23 R.C.L. p. 946

" 'THE LEGISLATURE MAKES, THE EXECUTIVE EXECUTES AND THE JUDICIARY CONSTRUES THE LAWS.' Cooley on Taxation p.34.

"Chief Justice Marshall in Wayman v. Southard 10 Wheat,1, p. 46: 'The Legislature must therefore determine all questions of necessity, discretion or policy in ordering a tax and in apportioning it * * * and must decide upon the agencies by means of which collections shall be made.' ".

Patton v. Brady 184 U.S. 608,l.c. 619,621.

The last above cited opinion from the Supreme Court of the United States would indicate that a tax-payer is anyone who pays a tax on real estate, personal property, merchandise or whatnot; the conclusion would be inevitable, a man who pays poll tax (who helps keep the roads in shape for the children to go to and come from school) is a tax-payer.

Village of Nixa v. Wilson 199 Mo. Ap. 33
Castilo v. Highway 312 Mo. 244, supra.

The theory of the law is that a tax-payer's interest is so great that he will exercise his discretion in voting for the best interest of the district.

199 Mo. Ap. 33, l.c. 35, supra
See also Sections 7879-7888 (R. S.1929) inclusive.

"No strict and technical construction is to be put upon the statute involved, nor is a strict and techincal compliance with it to be exacted of the 'plain, honest, worthy citizens, not specially learned in the law' in the performance of their duties under it."

State ex rel. Jones 266 Mo. l.c. 201
State ex rel. Job. 205 Mo. l.c. 34.

"The laws affecting the organization, functions, and powers of the school district are not to be strictly construed."

State ex rel. School District 238 S. W. l.c. 820
State ex rel. Cornahan v. Jones, 266 Mo. 191,l.c. 201

In view of the foregoing, it is our opinion that any tax-payer is a qualified voter in this instance, because it limited it specifically to tax-payers under that particular Section 9225 R. S. Mo. 1929.

Section 9225 expressly includes statements of merchants thereby making anyone who pays a merchant's tax unquestionably a qualified voter. Section 7880 says:

> "The county court of all counties * * * shall at the regular February term in each year LEVY * * * upon every able-bodied male inhabitant in the county over twenty-one and under sixty years of age * * * A (poll) TAX NOT EXCEEDING FOUR DOLLARS, * * * ."

Sections 7879 to and including 7888 make a poll tax payer a voter as he is charged and made to pay a specified sum to be used in that district, which sum may be recovered by suit under Sections 7886and 7887 in practically the same manner as any other tax, real, personal or mixed, can be recovered.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GBS/mh

in this case

FEES: Sheriff not entitled to $1.25 a day fee for keeping prisoner while undergoing examination preparatory to commitment.

May 15, 1933

FILED
73
22

Honorable Walker Pierce
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

This is to acknowledge your letter of May 5, 1933, which is as follows:

> "This request is for an interpretation of Section 11791 of the Revised Statutes of Missouri, 1929, and two cases cited thereunder; State ex rel. Million vs. Allen, 187 Mo. 560; and, State ex rel. Dickmann vs. Clark, 170 Mo. 67.
>
> The sheriff of this County recently demanded that the County Court pay him the sum of $1.25 a day for keeping prisoners until their preliminary regardless of whether they were in jail one day or 15. This practice has not been followed before in this County and the result is that the sheriff's bills have run into large sums for the reason that it is not possible, at all times, for me to immediately give the prisoners a hearing and the situation has proved embarrassing to me for that reason.
>
> Will you please state your opinion as to whether or not the sheriff is entitled to $1.25 a day for the safe keeping of prisoners under these circumstances.
>
> Personally, I can see no reason why it is any more expensive to keep them before a preliminary than it is after, and I don't think that the Legislature intended that this amount be paid for each day of safe keeping.
>
> Trusting that I may hear from you soon and thanking you for the consideration that you have shown me already, I am, "

You desire an opinion as to the interpretation of that part of Section 11791 R. S. Mo. 1929, regarding the $1.25 a day fee due the Sheriff for the safe keeping of prisoners preparatory to committing them to jail. You state that the Sheriff is of the opinion that he is entitled to $1.25 a day fee for keeping prisoners until preliminaries are held on such prisoners.

Section 11791 R. S. Mo. 1929, in part pertinent to the inquiry herein considered reads as follows:

> "The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge. * * * *"

In the case of State v. Wofford, 116 Mo. 223, the court had under consideration the above quoted part of the statute. The facts in that case being: a man was arrested upon a warrant, charged with a felony; he was brought before the justice who issued the warrant, and on motion of the prosecuting attorney, the defendant was committed to jail to await trial; the case was continued for quite a while when it was subsequently dismissed; the marshal applied for the fee of $1.25 per day for the seventy days in which he had the custody of the defendant as he claimed while undergoing examination preparatory to commitment. The Court held in this case that the marshal was not entitled to the fee, holding that under the other sections of the statutes the defendant was committed by the magistrate. These statutes will be hereinafter set out. The Court in its opinion said the following: (l.c. 223)

> "* * * *It is a well settled law that no officer is entitled to fees of any kind unless provided for by statute, and that

> the law conferring such right must be strictly construed because of statutory origin and right." * * * "

And further at page 226:

> "* * * "If the facts showed that there was no jail provided by Jackson county for the safe keeping of prisoners, or that there had been no order of commitment or entry to that effect by the justice on his docket and that for either one of such causes it was compulsory on the part of the marshal to keep the person under his guard, an entirely different rule would prevail, but the pleadings show that the county is well provided with regard to jails and also that the prisoner was committed to jail by the justice to await examination. The statute, giving it the most liberal construction, does not, in our opinion, entitle the relator to the fee claimed."

In the case of State ex rel. Dieckmann, Sheriff, v. Clark et al. 170 Mo. 67, the Supreme Court in Banc, held that the Sheriff was entitled to the $1.25 per day for the keeping of a prisoner while undergoing examination preparatory to commitment. The facts showed that the defendant was arrested and the court had adjourned for the day so the prisoner could not have been brought before the court on that day, and it was the duty of the sheriff to safely keep him until the next day at which time he was produced in court and then committed by the court to jail to await trial. In this case the court discussed the Hofford Case, supra, and distinguished between that case and the instant one, and also the Thomas v. County of St.Louis, 61 Mo. 547.

The case of State ex rel. Million v. Allen, Auditor, 187 Mo. 560, the Supreme Court in Banc, held that the sheriff was not entitled to the $1.25 fee for the keeping a prisoner while undergoing an examination preparatory to commitment because such was not the fact. In this case the prosecuting attorney filed an information in the Circuit Court and the Sheriff arrested the prisoner and kept him in custody under the capias issued by the Circuit Clerk until trial time. The court held that a commitment means a judicial

order, and until such an order is made the person arrested is the sheriff's prisoner, by virtue of the capias. (Thomas v. County of St.Louis 61 Mo. 547). After an order of commitment has been made by the court, the sheriff or jailor is entitled to a sum not exceeding the amount per day for the board of a prisoner. This case also distinguishes the Dieckmann case, supra. The Court had the following to say: (l.c. 564).

> "It may be true that a sheriff runs as much risk and incurs as much expense in keeping a prisoner in such a case as this, as he does in such a case as the Dieckmann case. But these are considerations with which the courts have no concern. Costs and fees are purely the creatures of the statutes, and one who claims them must be able to put his finger upon the express provision of the statutes which allow them or the courts cannot award them. The statute allows a sheriff one dollar and a quarter a day for having a prisoner in his charge 'while undergoing an examination preparatory to his commitment,' and only allows fifty cents a day for keeping and boarding a prisoner after he is committed to prison or while he is in prison awaiting a trial on the merits of the charge against him.
>
> The reason for or injustice in the difference is a matter for the Legislature solely, and not for the courts. The courts can only enforce the statutory law as it is written."

Section 3467 R. S. Mo. 1929, provides that when a complaint is made to a magistrate in writing and under oath, setting forth that a felony has been committed and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant commanding the officer to whom it is directed forthwith to take the accused and bring him before such magistrate.

Section 3468 R. S. Mo. 1929, pertains to bail when such prisoner is brought before the magistrate.

Section 3473 R. S. Mo. 1929, makes it the duty of the magistrate to proceed as soon as may be to examine the complainant and witnesses in support of the prosecution, on oath, in the presence of the prisoner in regard to the offense charged.

Section 3474 R. S. Mo. 1929, provides that a magistrate may adjourn an examination of a prisoner pending before him, and if the party is charged with a bailable offense, he shall be entitled to bail, otherwise he shall be committed.

The provisions supra, and other provisions in the statutes under Article 5, Chapter 29, makes it the plain duty of the arresting officer, when he has a warrant issued from a court in a felony case to bring the prisoner forthwith before that court and then it is the duty of the magistrate to permit the prisoner to bail pending an examination, or commit him pending hearing.

In your case, if the sheriff after serving the warrants, took the prisoners before the court, the court would have committed them either by a docket entry or commitment papers to the custody of the sheriff pending an examination, and when same was done the sheriff would be entitled to only the fee for boarding prisoners as provided by section 11794 R. S. Mo. 1929, and not the $1.25 a day.

From the above and foregoing it is our opinion that the sheriff is not entitled to the $1.25 a day for keeping prisoners until their preliminary examinations, if said prisoners were in jail awaiting examination after they had been brought before a magistrate and said magistrate continued or set the cause for hearing at a future date.

Trusting this answers your inquiry, we are,

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

PROSECUTING ATTORNEY STODDARD COUNTY: DRAINAGE DISTRICTS: Board of Supervisors cannot appoint special collectors to collect tax when the county collectors refuse to give bond for same.

June 1st
1 9 3 3.

FILED
13

Mr. H. M. Phillips,
Prosecuting Attorney,
Bloomfield, Mo.

Dear Mr. Phillips:-

We acknowledge receipt of a letter of May 9, 1933, written by Claude E. Arnold of Puxico, Mo., as follows:

> "I am connected with the Mingo Drainage District, Stoddard and Wayne Counties. We are confronted with a peculiar situation, and the Board of Supervisors has asked that I get a ruling from the Attorney General's office, if possible, concerning the matter.
>
> "According to the Statutes of this State, relating to Drainage Districts organized under Circuit Courts, taxes for drainage purposes shall be collected by the county collectors, or in counties having township organizations, by the township collectors. Since drainage districts have gotten into such bad conditions, the county collectors of Stoddard and Wayne refuse to make the necessary bonds to the district in order to qualify to act as collectors for the district. Now since this is the situation, what we want to know is, can the board of supervisors appoint a collector, who may go ahead and collect these taxes?
>
> "Trusting that you will give us this much needed information, I am,".

Article 1, Chapter 64, Revised Statutes of Missouri, Sections 10743 to 10808 inclusive, same being the statutory article on Drainage Districts by Circuit Courts, sets up the machinery and functioning powers of said Drainage Districts and their officers. The powers granted to the Board of Supervisors are closely drawn and well defined, and no power is given which might permit such Board to appoint the collectors concerning which it is asked in the letter quoted above. Such appointments as are to be allowed the Board are clearly set out as in Section 10750, where it is provided that the Board shall appoint a chief engineer and assistants; Section 10770, providing for the appointment of attorneys; Section 10787 providing for the appointment of overseers, and so on. The statute

cannot in any manner be extended to include the power sought here.

After an exhaustive perusal of the Missouri authorities we are unable to find any case directly in point on this particular question, but the language of the Court in the case of Drainage District No. 1 vs. Charles Daudt, 74 Mo. Appeals 579, seems to indicate how our courts would regard such a matter:

> "It thus appears that all the jurisdiction of official concern the board of supervisors has or can have of the drainage tax is to make the levy and draw warrants upon the funds of the district after they are collected. With the tax collection they have nothing to do; this is placed entirely in the hands of the collector of the revenue of the county in which the lands to be benefitted are situated."

Sections 10761 and 10796, Revised Statutes of Missouri, 1929, provide for the collection of these taxes by the county and township collectors. In view of these statutory sections, placing on said collectors the duty of executing a bond and collecting such taxes, the proper remedy for your present difficulty would seem to be mandamus.

Very truly yours,

CHARLES M. HOWELL, Jr.,
Assistant Attorney General.

Approved:

_____
Attorney General

CMHJr:LC

IN RE: SALE OF BEER: PERMIT REQUIRED TO SELL BEER, FROM WHOM?

7.4

June 21, 1933.

FILED
73

Hon. Leo Politte
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Politte:

Your recent request for an opinion from this office is in words and figures as follows:

> "Numerous requests have been made to my office concerning some arrangements whereby beer may be sold in parks and places where picnics are given, as well as on church grounds where affairs to obtain revenue for charitable purposes are given.
>
> "I am leaving herewith one of the requests received from a city clerk. I am unable to answer these questions or ascertain any means whereby beer may be sold without buying the ordinary permit. Please inform me if there is any special arrangement made to cover these requests."

As referred to in your letter, the following state of facts, as presented by the City Clerk of Gerald, was also submitted with your request:

> "The Town (Gerald) is giving a picnic on July 1st. They contemplate selling Beer and want to know if they can obtain License for one day. And can same be issued to Town Board or to

some individual and the cost for one day.

"Can any one already having a permit move his place of business for the day."

It is the opinion of this office that, under the recent Beer Law, one who sells beer on the premises must have a license whether the beer be sold in "Parks", "Picnic Grounds", "Church Grounds", and in fact wherever it be sold in the State of Missouri.

As to the request of the City Clerk, submitted with your letter, the town of Gerald selling Beer is not excepted within the meaning of the law. As to the right of one, having a permit, moving his place of business for the day, it is the opinion of this office that this cannot be done within the meaning of the law; nor is it possible, within the meaning of the law, to grant a permit for one day as the law specifies that the permits are for one year and no provision is made for any term less than one year.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS/AJ

PUBLIC FUNDS:

Under Section 12186, R. S. Mo. 1929, interest accruing on school funds in public depository shall be credited to school funds respectively, and not otherwise.

10-13

October 11, 1933.

FILED 73

Mr. E. H. Pittman,
Treasurer Clinton County,
Plattsburg, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"In some of our Counties the monthly interest from the depositories are payable to a special fund and some instances the interest is placed to the credit of the various school funds, and I would like very much to be put right relative this matter, and for this reason, would like to ask of you a ruling on this matter.

In our County the interest amounts to about $12.00 to $15.00 per month and to apply this interest to the various school funds would be not right, for the reason, in our County the schools pay nothing towards the ledger for their accounts or the one-half of one per cent for handling their warrants and then there is postage for stamps to mailing the school reports to the district clerks three times a year, however, your ruling on this matter I will follow to the letter. In giving me this information, providing that you rule that the interest is to be applied to the school funds, with the above in mind, advise me if I can accept an order from our County Court to apply this interest to a special fund or say to the County Expenditure Fund, and, of course, if this is done the amount of interest wouldn't by any means take care of the expense that we are to for the schools."

Section 12186, R. S. Mo. 1929, provides as follows:

"It shall be the duty of the county court, at noon on the first day of the May term in 1915, and every two years thereafter, to publicly open said bids, and cause each bid to be entered upon the records of the court, and to select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under

township organization, the deposit of which is not otherwise provided for by law, the banking corporations, associations of individual bankers whose bids respectively made for one or more of said parts of said funds shall in the aggregate constitute the largest offer for the payment of interest per annum for said funds: Provided, that the court shall have the right to reject any and all bids. The interest upon each fund shall be computed upon the daily balances with the depositary, and shall be payable to the county treasurer monthly, who shall place the interest on the school funds to the credit of those funds respectively, and the interest on all other funds to the credit of the road and bridge fund. The county clerk shall, in opening the bids, return the certified checks deposited with him to the banks whose bids were rejected, and on approval of the bonds of the successful bidder or bidders return the certified check or checks respectively to the bank or banks whose bid or bids are accepted."

The foregoing statute expressly provides that interest on each fund shall be computed on daily balances, and that the interest on school funds shall be placed to the credit of the school funds, and interest on all other funds to the credit of the road and bridge fund. In view of the express direction of this statute we do not believe that you would have any authority to apply the interest received from school funds to the credit of any other fund than the school fund. In view of the injunction of the statute, we do not believe that the county court would have any authority to make an order directing you as treasurer to apply the interest off of the school funds to any other funds.

It is unfortunate that the situation is such as you outline in your letter. However, it is the duty of the county court to follow the statute as written, and it is our duty to construe it according to the way it is written. Such being true, in view of the plain wording of the statute, we must rule that the interest derived from the school funds shall be credited to those funds; that an order of the county court directing you to credit them to any other funds would be in violation of the statute.

Very truly yours,

FWH:S

Frank W. Hagan

Assistant Attorney General.

APPROVED:

Attorney General.

TAXATION: Judgment for taxes rendered prior to 4-13-33 not subject to Senate Bill 80.

October 7, 1933

10/7

FILED

Mr. Leon Pugh
Mt. Vernon, Mo.

My Dear Mr. Pugh:

Your request for an opinion of this office reading as follows, has been referred to the writer:

> "Would a Judgment rendered on January 18th, 1933, for back taxes be a void Judgment? Suit was begun in 1932.
>
> Would above Judgment be effected by Senate House Bill No. 80?
>
> An Early reply will be appreciated."

Senate Bill 80 above referred to was passed by the 57th General Assembly to be immediately effective upon the date of its approval. It was approved by the Governor April 13, 1933. The judgment referred to had become final on January 18,1933. At that time the interest of the parties had become finally settled. While the Court has not been called upon to pass upon the effect of Senate Bill 80 upon a judgment rendered prior to April 13, 1933, we find that Judge Hayes in the case of State ex rel. McKittrick vs. Baer made the following statement:

> "* * *The Thirty-eighth General Assembly passed an Act (Laws 1895, p. 243.) remitting penalties which seems to have furnished the pattern for No.80. Unlike the latter the former conditioned the remission, in instances where suits had been filed, upon the taxpayer's paying the costs together with attorney's fees. In construing the latter provision this court in State ex rel. vs. Edwards, 182 Mo. 660, held, that the Act simply gave the taxpayer an opportunity

> to avoid the costs and penalties by tendering the amount of the original tax before suit was brought and before the act expired by limitation. So we think that under a proper construction of the statute assailed in the instant case the filing of suits for delinquent taxes and penalties is not prevented, but that penalties are remitted, in the manner provided in No. 80, upon proper tender of payment of the original taxes, without penalties, fees or costs, before judgment rendered (except as noted later)."

It is our interpretation of this opinion that the exception noted was in the case judgment was rendered subsequent to April 13, 1933, and while Senate Bill 80 was effective, the judgment under such circumstances having no validity or force which would defeat the operation of Senate Bill 80, but if judgment was rendered prior to April 13, 1933, Senate Bill 80 would be inoperative as to that judgment.

The judgment having vested the right to these various additional charges, the right of the Legislature to remit these charges is barred by Section 51 of Article IV of the Constitution. This section reads as follows:

> "The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part the indebtedness, liability or obligation of any corporation or individual to this State, or to any county or other municipal corporation therein."

Therefore, it is the opinion of this office that the rendering of a judgment for delinquent taxes prior to April 13, 1933, establishes a liability within the meaning of Section 51 of Article IV above quoted and therefore the judgment is not void but is effective and not subject to the operation of Senate Bill 80.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

_____
Attorney General.

HGW:MM

County Court--Power to employ one of their own members to perform administrative acts.

FILED 75

March 7, 1933

Honorable Virgil L. Rathburn
Prosecuting Attorney Nodaway County
Maryville, Missouri

Dear Mr. Rathburn:

I am answering your request of November 25th, 1932, to Attorney General Shartel, for an opinion from this office. You state,

> "I am inclined positively to the view
>
> (1) that administrative and ministerial functions of the county court can be delegated.
>
> (2) And I am of the belief that the act of employing one of their own body as an individual to render this service is not prohibited, either by the terms of the nepotism amendment, or by the intent of the legislature in enacting Section 2089 R. S. Missouri 1929."

You further state:

> "If you can see fit to render an opinion on such a state of facts at this time, I shall greatly appreciate the benefit thereof."

On December 6, 1932, James A. Finch, Jr., then Assistant Attorney General, answered your request stating:

> "It will be impossible to prepare the opinion immediately."

On January 12, 1933, three days after this administration took office, I wrote to you stating:

> "I am inclined to believe that the matter has ironed itself out, and that you would prefer at this instant not to have my opinion, but if you insist let me know by return mail."

On January 16th, 1933, I received your letter of acknowledgment where you stated:

> "I am not requesting from your office an opinion at this time. However, I am inclined to believe that others may request such an opinion in the future."

When later I say you in the office you renewed your original request for this opinion.

On February 14th, 1933, this office received a letter from D. O. Belt, Treasurer of the Farm Bureau, where he says:

> "Mr. Rathburn reports to me that he has asked your office for an opinion and that it was referred to Mr. Sawyers, and that he had acknowledgment of its assignment."

Your excellent brief furnished this office on the questions involved is hereby acknowledged, and there is merit in your logic. I must unqualifiedly agree with you on that part of your opinion dealing with the first proposition and say that it is the opinion of this office

> "that administrative and ministerial functions of the county court can be delegated."

The second question involved in your request is not covered by the nepotism law nor Section 2089 R. S. Mo. 1929, hence the second proposition is still and open question unless there be other laws to the contrary. I respectfully offer my opinion on the issue, as per your request.

The Constitution of the State of Missouri, Article 6, Section 36 is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, * * * * *"

Section 12162 R. S. Mo. 1929, provides as follows:

> "The county court shall have the power to audit, adjust and settle all acts to which

the county shall be a party;***"

In State v. Draper, 45 Mo. 355, the court has said, and there is abundant authority for this holding:

> "Common law is that an individual cannot hold two offices, the duties of which are incompatible."

The question may arize that one employed by the county court is not an officer within the meaning of the law. The courts have undertaken to give definitions as to who is and who is not an officer within the meaning of the law, and these definitions vary in different jurisdictions, but in my judgment they are agreed on this general proposition that if an officer receives his authority from the law, and discharges some of the functions of government, he is considered a public officer.

State v. Valle, 41 Mo. 30.

People ex rel v. Langdon, 40 Michigan 630.

Rolland v. Mayor, 83 New York, 376.

State ex rel v. May, 106 Mo. 488.

In the case of Meglemeyer v. Weissinger (Ky), 131 S. W. 40, which is a leading case and has been cited by the Missouri Appellate Court in State v. Bowman, 184 Mo. Ap. 549, you will find the exact statement of facts as presented to this office by you for an opinion. You will find that the court ruled in that Kentucky case without having a specific statute or constitutional provision cited. This is the exact position that I am in now, there being no statute or constitutional provision in this State which are applicable directly to your statement of facts and which your brief will show. In that case it was held that the fiscal county court empowered to employ a bridge commissioner, a salaried officer, could not appoint one of their own number. The court held the appointment void as against public policy and said:

> "Nor does the fact*****that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties and compensation of the appointee is ledged in the body of which he is a member is one, but not the only reason

> why it is against Public Policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay."

Other cases of like or similar holding are numerous.

> Smith v. City of Albany, 61 N.Y. 444.
>
> Gaw et al v. Ashley, 80 N.E. 790 (Mass):
>
> People v. Thomas, 33 Barbour's Reports 287;
>
> Ohio ex rel v. Taylor, 12 Ohio Street 130;
>
> Kinyon v. Duchene, 21 Michigan 497.

To say that the duties of the office of county judge and the office to supervisor of county projects are not incompatible, one must say that the people by their fundamental law, intended that the county judge and his associates could be the dispenser of public funds and at the same time recipient of his own official bargains, which it was his duty as one of the administrative officers of the county to strike. If such be the law, then he has the power indirectly to audit his own account. I have no doubt that in your county such an arrangement can be shown operating at a savings to the tax payers, but as a general proposition of law, to sanction that county judges have the constitutional duty of paying for personal administrative services rendered the county, and at the same time the implied power of receiving money personnally for personal

administrative services in addition to official salary and granting acquittance for the same money which was his duty to pay to himself, seems incompatible. To hold otherwise as a general proposition, judges of the county court throughout this state could conspire together with each other and employ each other thereby perpetuating themselves in office.

It is the opinion of this office, that the offices of county judge and supervisor of county projects are incompatible in the same person, hence the common law rule above set out should apply.

It is the further opinion of this office that county judges employing one of their own body for a wage is unlawful, as against PUBLIC POLICY.

Very truly yours,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED
ROY McKITTRICK
Attorney General.

WOS/mm

TAXATION: DEPOSITS IN UNITED STATES POSTAL DEPOSITORIES HELD TAXABLE.

FILED
75

April 21, 1933

Hon. Owen C. Rawlings
Prosecuting Attorney
Marshall, Missouri

Dear Sir:

In your letter of April 19, 1933, you make the following request for an opinion from this office:

"Please advise me as to whether or not money or a deposit in United States Post Office, situate in Saline County, Missouri, is taxable under the State law. I have reference to such deposits referred to in Sections 751 to 760 inclusive, of Chapter twenty (20), Title thirty-nine (39), The Postal Service, of United States Code, but I do not refer to United States bonds as mentioned in the above Section 760.

This information is desired by the Board of Equalization, Saline County, Missouri, and we should have this information by Saturday of this week."

Section 9742, R.S. Mo. 1929, provides as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743 provides for certain exemptions, though no mention is made of deposits in United States Postal Depositories.

In the case of "State v. Gehner" 9 S.W. (2d) 631, the Court held:

"Money deposited in bank becomes the property of the bank and is never the property of the depositor. The relation of debtor and creditor thereafter obtains between the depositor and the bank. Vandagrift v. Masonic Home, 243 Mo. 138, 145 S.W. 448;

> 37 Cyc. 838. The property of the depositor therefore is a credit which has no situs for taxation purpose except at the domicile of the depositor. It is true that the statute requires a taxpayer to list in his return all money deposited in bank or other safe place. That does not mean that he owns the money deposited in bank, but that such deposit is the measure of the bank's indebtedness to him. It is a credit to that amount."

At this point it might be well to observe that by the postal savings act, June 25, 1910, 36 Stat. 818, a trust with named trustees was created. No part of the fund went into the Treasury of the United States or became the property of the United States. "The contract involved is not with the United States. It is a contract providing that the deposit is to be paid out of the funds deposited under the postal saving system, and the act itself and the regulations promulgated in pursuance thereof are written into and become a part of the contract" Teka, Admx. v. U.S. 69 Court of Claims Reports l.c. 88. That Court continues and on page 90 says:

> "The fund or deposit of which the certificates were merely the evidence had its permanent situs in the State of Utah under the provisions of the act, and was under the control of the laws of that state, if an administrator had been appointed."

The fund then is not the property of the United States. Under the debtor-creditor theory of the Gehner case, supra, the depositor then is not a creditor of the United States, and an exemption could not be allowed on that ground.

In view of the foregoing, and in view of the fact that Section 9743 R. S. Mo. 1929 makes no provision for an exemption of these deposits, it is the opinion of this office that deposits in an United States postal savings depository are taxable by the State of Missouri.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

Attorney General

JWH-Jr.
iac

REQUIREMENTS OF BOND FOR TOWNSHIP DEPOSITORY AND COUNTY DEPOSITORY; ALSO PERSONAL BOND OF TOWNSHIP TRUSTEE.

April 34, 1933

FILED
75

Hon. Virgel L. Rathburn
Prosecuting Attorney of Nodaway County
Maryville, Missouri

Dear Virgel:

I quote from your recent letter requesting an opinion:

"As a newly elected Township Trustee, I ask that you advise whether or not I and my official bondsmen would have any liability for Township funds that might be lost in bank failure, providing such funds were deposited in a bank not designated by the Township Board. Section 12188 Revised Statutes 1929, states that the Township Trustee, shall deposit all school taxes and Township funds in a bank selected by the Board, and it provides further that if there is no selection made by the Board that the Trustee shall deposit school and Township funds in any County depository within the Township, if there be one and if not then in a County depository most convenient to said Township.

If our Township Board does not select any bank then are the funds which come into my hands and which I might deposit in a County depository protected by the bond of the County depository? Would I be relieved of depository liability regardless of whether or not the bond of the County depository is large enough to cover both County funds and funds of our Township? I understand that wherever the Township Board designates a bank it shall follow the procedure outlined in Section 13187 for County depositories and that I would have no personal liability for safety of funds where this procedure is followed. I am quite desirous of knowing, however, just what the situation would be with respect to my personal liability and the liability of my bondsmen in case the Township does not designate a bank and I deposit my funds in some County depository."

Section 12279, R.S. Mo. 1929 provides:

"Every person elected or appointed to the office of township trustee and ex officio treasurer, before he enters on the duties of his office, and within ten days after his election or appointment, shall execute and deliver to the township clerk a bond with one or more sureties, to the satisfaction of the township clerk, payable to the township board in double the amount of all the township funds, including school moneys, that may come into his hands; and every such bond, when deposited with the township clerk as aforesaid, shall constitute a lien upon all of the real estate within the county belonging to such trustee and ex officio treasurer at the time of filing thereof, and shall continue to be allien until its conditions, together with all costs and charges which may accrue by reason of any prosecution thereon, shall be satisfied. * * * *.

Section 12184, R.S. Mo. 1929, provides:

"It shall be the duty of the county court of each county in this state, at the May term thereof in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositories of the funds of said county. * * * Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety: Provided, also, that in all cases of the letting of township funds, three notices, posted in three public places by the township clerk, will be a sufficient notice of such letting."

In the statutory provisions for a township trustee's bond, the Legislature did not provide for any exceptions of liability in case of bank failures or any other possible contingencies. Being a liability bond, the Legislature meant that it should be written to cover the trustee's liability in all events. For his failure to comply with the terms of said bond in the

performance of his statutory duties as set out in Article 7, Chapter 86, Revised Statutes of Missouri, 1929, he and his bondsmen are liable. They are liable under an appropriate action for his negligent, careless or fraudulent acts or for his failure to perform his duties according to law.

The provisions of Section 12184 applying to township depositories should be complied with and the duty to comply is mandatory on the township board, for the Legislature said that they shall exercise the same powers and privileges with reference to township funds as county courts do with reference to county funds. That is to say, that they (the board) must select a depository as prescribed by law and in selecting the same they must act in good faith and with due regard to the best interest of the township. The Supreme Court in a similar question so held, in Denney v. Jefferson County, 272 Mo. 436.

The personal liability of the township trustee and his sureties shifts when township funds are placed in a duly selected township depository. Then the liability shifts to the depository and its bondsmen under the terms of Section 12187, R.S. Mo., 1929.

Answering your first question, viz. "Would the township trustee and his official bondsmen be personally liable for township funds that might be lost in a bank failure where he places said funds in said bank, said bank not being designated as a township depository?", it is the opinion of this office that the trustee and his bondsmen could best avoid liability in the hypothetical case by keeping township funds in a bonded township depository, selected by the board as provided by law. There is no duty on him to select a township depository but when he assumes to act under the provisions of Section 12188, R.S. Mo., 1929, which provides,

> "* * *Provided that in counties under township organization it shall be the duty of the township trustee to deposit all school taxes received by him with the depository selected by the township board of his township as the depository of the township funds; provided, that in default of the selection of the depository by the township board, and during the time when any township shall have no depository of its funds the township trustee shall deposit all school taxes and all township funds received by him in any county depository within said township, if there be one; if not, then in the county depository most convenient to said township, and such county depository shall thereupon pay to the

> township the same rate of interest upon such moneys which it shall have contracted to pay the county upon its funds, and the township may recover the same by civil action; * * * "

he must not act in a negligent manner in making his choice of depositories. Negligence is always a question for the jury, each case depending on its own peculiar facts. It is impossible to give a more definite answer to your question of his liability in such a case.

Your question: "Are township funds, deposited in the county depository and identified as township funds so deposited, protected by the bond of the county depository?" It is the opinion of this office that unless the terms of the county depository bond be broad enough to include township funds, then township funds deposited in the county depository would be protected only by implication under the county depository bond given under the provisions of Section 12187, R. S. Mo., 1929, it would be best to provide that the county depository bond specifically includes by its terms liability for township funds. A separate township depository bond may be provided and should be provided when the township depository is a different bank from the county depository. The township is one legal entity in contemplation of law. The county is another. Their funds are separately identified and should be separately protected unless it be the intention of the bonding company to protect both funds in one bond, the depository selected as provided by law as a depository for both county and township funds. I believe I have answered your question under the facts given and the law.

Respectfully yours,

Wm. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

_____
Attorney General

WOS...iac

HIGHWAY ENGINEER: Power and authority of County Court to remove Highway Engineer, where he is not ex officio Highway Engineer.

June 2, 1933

FILED
75

Honorable Owen C. Rawlings
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We are in receipt of your letter of April 4th, 1933, in which you request an opinion on the power and authority of the county court to dismiss the county highway engineer of your county and appoint another in his place. Your letter is as follows:

> "The County Court of Saline County, Missouri, has requested that I advise it as to whether or not it has the authority and power to dismiss the County Highway Engineer, who at present is the County Surveyor, appointed by the Court for an indefinite term to fill the position of Highway Engineer and to appoint another Engineer for the office of Highway Engineer.
>
> I will advise further that Saline County is a County which comes under the class of 50,000 or less, and that the question of retaining or doing away with the office of County Highway Engineer has never as yet been submitted to the vote of the people of this county.
>
> I should appreciate the advice of your office in this matter."

As will be seen by the statements in your letter, Saline County has a population of less than 50,000 and the question of the suspension of the county highway engineer law has never been submitted to a vote of the people of your county.

For an answer to your inquiry we must first look to the statutes Article 8, Chapter 42, Sections 8006 to 8023, R. S. Mo. 1929, under the county highway engineer law.

Section 8006 R. S. Mo. 1929 provides:

> "There is hereby created in the several counties of the state of Missouri the office of county highway engineer, and the county courts of each county in this state are hereby authorized and empowered to appoint, and may appoint a highway engineer within and for their respective counties at any regular meeting for such length of time as may be deemed advisable in the judgment of the court, at a compensation to be fixed by the court."

Section 8007 R. S. Mo. 1929, provides for a bond for the highway engineer and his assistants.

Section 8008 R. S. Mo. 1929, provides the compensation for the highway engineer.

Since your county has not voted on the question of suspension of the highway engineer law and not suspended same as provided in Sections 8019 R. S. Mo. 1929, and 8020 R. S. Mo. 1929, wherein it is provided that:

> "In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court." * * *

your county does not come within the classification by population and taxable wealth qualification as provided in the second provisonof Section 8011 R. S. Mo. 1929, which is as follows:

> "* * *Provided however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund:* * *"

Therefore, in your county, the highway engineer is not by reason of being county surveyor ex officio county highway engineer. Your county highway engineer receives his appointment by the county court under the provisions of section 8006, R.S. Mo. 1929 supra, and the first twelve lines of section 8011 R. S. Mo. 1929, which are as follows:

> "The county court of the several counties of this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8006, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor;"

And your county court has exercised their discretion as provided in Section 8011 and appointed your county surveyor (an elective office, Section 11571 R. S. Mo. 1929) as county highway engineer.

The county highway engineer law was enacted in 1907, p. 401, et seq. Laws 1907, and the original section on removal was as follows: Section 4, p. 401, Laws 1907.

> "The county highway engineer shall be a resident of the State of Missouri, and he shall be skilled in the laying of drains in bridge, culvert and road building and general road work, and he shall have practical knowledge of civil engineering. He may be removed from office by the county court upon the grounds of incompetency, neglect of duty, or for any other good and sufficient cause."

And the reading of the original section on removal, Laws 1907 above, and comparing same with the present section on qualifications and removal, Section 8009 R. S. Mo. 1929, we find that the statute has been enlarged and amplified as to the causes and reasons for the removal of the highway engineer by the county court.

Section 8009, R. S. Mo. 1929, provides the qualifications and how he may be removed and said section reads as follows:

> "The county highway engineer shall be a resident of the state of Missouri, and shall be skilled in the laying of drains, in bridge, culvert and road building and general road work, and he shall have a practical knowledge of civil engineering, and shall be active and diligent in the discharge of his duties. If any county highway engineer shall fail, refuse or neglect to visit and inspect in person or by his deputy, the roads, bridges and culverts in each road district in the county, at frequent and regular intervals, or shall fail, refuse or neglect to advise with, assist and direct the road overseers of his county in the performance of their duties, or if he shall fail, refuse or neglect to perform any of the duties imposed upon him by law, or if he be found incompetent or in any manner unfitted for such office, he may be removed from office by

> the county court, and it shall be the duty of the county court to remove such county highway engineer forthwith and to appoint a successor in his stead."

When we read Section 8009, R. S. Mo. 1929, in connection with 8008 R. S. Mo. 1929, and the general law regarding the removal of an appointive officer, it is our opinion that under the statements set forth in your letter the county court of Saline County has the power to remove the highway engineer <u>for causes set out</u> in Section 8009, R. S. Mo. 1929.

We further base our opinion on the statutes aforesaid and what the courts have said on similar propositions.

In 46 C. J. p. 964 it is said:

> "Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term;" * * *"

In R. C. L. Section 266 p. 562, it is said:

> "When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal is incident to the power to appoint. The tenure not having been declared by law the office is held during the pleasure of the authority making the appointment." * *"

In 29 Cyc. 1371, it is said:

> "It is the universal rule that where the duration of an office is not prescribed by law, the power to remove is an incident of the power to appoint."

The annotated note set out in 35 L. R. A. (N.S.) 866, the general rule is stated:

> "A person holding an appointive office, or even an elective office, created by statute, wherein is reserved to the creat-

> ing power or to some other official or body the authority to remove at pleasure, holding the office subject to the exercise of this power at any time. He can claim no property or contract rights in the office, and his summary removal if in accordance with the statute authority is a breach of no obligation or duty to him. The exercise of a power of removal may be impliedly as well as expressly conferred."

In annotated cases 1912 C. note on p. 374, note said citing many cases:

> "With respect to the tenure or duration of a public employment, it has been ruled uniformly that where the power of appointment is conferred in general terms and without restrictions, the power of removal at the will of the appointing power without cause or notice, is applied and always exists."

In Horstman v. Adamson, 101 Mo. A. 119, l.c. 124, the court said:

> "But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own." * **

In the case of State ex rel. v. Hedrick, 294 Mo. p. 31 l.c. 64, 241 S. W. 416, the court said:

> ** * *If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or

> the assignment of reasons. Throop on Public Officers, Chap. 354; Mechem's Public Officers, Chap. 445. The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his own'; i.e. he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this state. In State ex rel. Campbell v. Police Commissioners, 14 Mo. App. loc.cit. 302, it is said:
>
> > 'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.' * * *

It is the opinion of this office that the county court of your county where the county surveyor has been appointed highway engineer under Section 8006 R. S. Mo. 1929, and 8011 R. S. Mo. 1929, that the county court has the power under section 8009, R. S. Mo. 1929, herein set out, to remove the highway engineer for the causes set forth in said section, and upon the removal of the highway engineer the authority to appoint another engineer, of course, follows.

If there remains some question which in your judgment is not covered by this opinion we shall be glad to go into the matter further.

Yours very truly,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED_____
ROY McKITTRICK
Attorney General.

CRH:MM

AUTOMOBILE LICENSE: Provisions relating to revocation of.

July 13,1933

7-14

FILED
75
32

Hon. Owen C. Rawlings
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This department is in receipt of your letter of June 20th, in which you request an opinion as to the following state of facts:

> "Please advise as to what steps can be taken and procedure followed, if any, to enjoin a resident citizen of Missouri, from continual and repeated violations of the State Motor Vehicle Law as to the operation and use of an automobile upon and over the public highways of this State. Can his automobile license be revoked and he be prohibited from operating a motor vehicle for some definite period of time?
>
> The individual in question operates an old delapidated truck. Usually, when in operation, this vehicle has no lights, no foot brakes, no emergency brakes and no rear vision mirror." " "

Section 7778 R. S. Mo. 1929, provides in part as follows:

> "" " "Motor vehicles and motor tricycles shall display at least two white lights mounted at the front and directed forward, and one red light mounted at the back and directed to the rear." " ""

Section 7779 R. S. Mo. 1929, provides in part as follows:

"* * * (c) Brakes: All motor vehicles, except motorcycles, shall be provided at all times with two sets of adequate brakes, kept in good working order, and motorcycles shall be provided with one set of adequate brakes kept in good working order.

(d) Mirrors: All motor vehicles which are so constructed or loaded that the operator cannot see the road behind such vehicle by looking back or around the side of such vehicle shall be equipped with a mirror so adjusted as to reveal the road behind and be visible from the operator's seat. * * * "

Section 7786 R. S. Mo. 1929, provides in part as follows:

"* * * (d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment. * * *

(h) When any person who is registered as a motor vehicle owner, dealer, chauffeur, or registered operator is convicted three times within a period of one year of a violation of any of the provisions of this article, or of a city ordinance, if such convictions have been reported to the commissioner, then the commissioner may revoke such certificate of registration and shall give written notice of such revocation to the holder of such certificate, to the sheriff and prosecuting attorney of the county in which said offender resides, or if he lives in a city having a metropolitan police department, to the chief of police of such city, and the person whose certificate of registration is so revoked shall immediately surrender his certificate of registration to the commissioner. * * *"

Section 7783 R. S. Mo. 1929, provides in part as follows:

> "* * *(e) Operating when license is revoked: No person whose certificate of registration for a motor vehicle, or as a chauffeur or registered operator has been revoked shall operate any motor vehicle on the highways of this state during the period for which said revocation is effective." * * *

Therefore, it is the opinion of this department that if a person operates a motor vehicle that has no lights, no foot brakes, no emergency brakes and no rear vision mirror, providing the operator cannot see the road behind such vehicle by looking back or around the side of such vehicle, such person may be punished by a fine of not less than $5.00, nor more than $500.00, or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment. If any person is convicted three times within the period of one year of the violation of the provisions of Chapter 41 R. S. Mo. 1929, or of a city ordinance, and if such convictions have been reported to the commissioner of motor vehicles, then the commissioner may revoke the certificate of registration held by that person and it shall be unlawful for that person to operate any motor vehicle on the highways of this state during the period for which said revocation is effective.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

(Acting)
Attorney General.

JWH:MM

BEER BILL: Various questions answered.

July 28, 1933

FILED 75

Dr. M. O. Raine
Food and Drug Supervisor
Jefferson City, Missouri

Dear Doctor Raine:

A great many inquiries have reached this office growing out of the recent passage of House Bill Number 23, known as the "Beer Bill". In order to expedite present and future handling of the questions presented we are addressing this letter to you which contains the substance of such inquiries and our answers thereto, so that a copy of same may be mailed out to the present inquirers as well as those asking similar questions in the future.

The questions and our answers are as follows:

1. Can wine containing only 3.2 per cent alcohol by weight or 4 per cent alcohol by volume, be legally sold in the State of Missouri?

Section 4481 Revised Statutes Missouri, 1929, provides in part:

"It shall be unlawful for any person, firm, association or corporation, his, its, or their agents or employees to manufacture, sell, possess, give away or transport, intoxicating liquors within, import the same into, or export the same from the State of Missouri, excepting as hereinafter provided* * * *."

The exception made is not material to the question under consideration.

Section 4496 Revised Statutes Missouri 1929, reads as follows:

> "The phrases,"intoxicating liquor", or "intoxicating liquors", whenever used in this article, shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, all alcoholic liquids whether proprietary, patented or not, which contain one-half of one per centum of alcohol by volume and which are potable or capable of being used as a beverage: Provided, however, that when the above mentioned phrases, "intoxicating liquor", or "intoxicating liquors", are hereafter defined in the laws of the United States, then such definition by congress shall supersede and take the place of the definition of said phrases in this section and shall apply to the provisions of this article with the same force and effect as if the same were written herein."

The proviso attached to Section 4496 has been held unconstitutional by the Supreme Court of this state in State v. Berry, 253 S. W. 712. Unless the intoxicating liquor as defined in Section 4496 has been, by legislation, removed from the operation of Section 4496, then that section applies to wine containing one-half of one per centum of alcohol by volume, it being a matter of common knowledge that wine is potable and capable of being used as a beverage.

House Bill Number 23 Laws 1933, page 256, deals only with beer. Section 13139 a, Laws 1933, page 257, reads as follows:

"Beer having an alcoholic content of not less than one-half of one per cent by volume nor exceeding 3.2 per cent by weight, is hereby declared to be non-intoxicating beer, and may be lawfully manufactured and sold, or sold, in this state by any holder of a permit issued by the Food and Drug Commissioner of this state, authorizing such manufacture and sale, or sale, and may be lawfully transported, sold and consumed, in this state, and may be lawfully shipped into, or out of, this state subject to such inspection fees, and/or taxes, and under such regulations as may be provided by law, and such manufacture, sale, transportation, and consumption, shall be exempt from the provisions of Chapter 31, Revised Statutes of Missouri, 1929; and exempt, also, from any of the provisions of said chapter and of any other law of this state in conflict with the provisions of this article. All beverages having an alcoholic content of less than one-half of one per cent by volume shall be exempt from the provisions of this article but subject to inspection as provided in Article 8 of this chapter."

By Section 13139z2, page 265, the phrase "non-intoxicating beer" is defined as:

"The phrase "non-intoxicating beer" as used in this article shall be construed to refer to and to mean any beer manufactured from pure hops or pure extract of hops, and pure barley malt or other wholesome grains or cereals, and wholesome yeast, and pure water, and free from all harmful substances, preservatives and adulterants, and having an alcoholic content of more than one-half of one per cent (½ of 1%) by volume and not exceeding 3.2 per cent by weight."

By no stretch of the imagination can wine be said to come within the definition of non-intoxicating beer.

We are of the opinion that a sale of wine containing 3.2 per centum alcohol by weight or 4 per cent alcohol by volume would be a violation of the criminal laws of the State of Missouri, except where such sale is made for medicinal or sacramental purposes under a permit so to do.

2. Can one person have more than one license?

Section 13139h, page 259, provides in part:

"* * * No manufacturer or distributor to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company, or corporation, applying for, securing, or holding, a permit under either sub-paragraph "c" or sub-paragraph "d" of section 13139e of this act."

The foregoing portion of Section 13139h prevents a manufacturer or brewer from having any interest, directly or indirectly, in the owning or operation of the business where non-intoxicating beer is sold for consumption on the premises or where non-intoxicating beer is sold by grocers, merchants or dealers in the original package direct to consumers and by the quoted part of such section a distributor, which includes wholesaler, within the meaning of subdivision B of Section 13139e, is likewise barred from having any interest, directly or indirectly, in the business where non-intoxicating beer is sold for consumption on the premises and in any business where the sale of non-intoxicating beer is made by grocers, merchants or dealers in the original package to consumers, so that a manufacturer or brewer could not have a license to sell to consumers nor could such brewer or manufacturer have a permit to sell as a grocer, merchant or dealer, nor could a distributor or wholesaler have or be interested in a permit to sell to consumers nor could he have or be interested in a permit to sell as a grocer, merchant or dealer in the original package.

A permit authorizing a distributor or wholesaler to sell non-intoxicating beer is construed in Section 13139ee to,

> "sell non-intoxicating beer in this state* * * only to holders of permits authorizing the sale of non-intoxicating beer to consumers, not for resale, but shall not be construed to authorize the sale by any such distributor or wholesaler of non-intoxicating beer direct to consumers."

Here again a wholesaler is prohibited from selling to consumers and such wholesalers could only sell to consumers on a permit, therefore a wholesaler could not be issued a permit to sell to consumers.

Subdivision B, of Section 13139e, page 258,reads as follows:

> "(b) For a permit authorizing the sale in this state by any distributor or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer, ($50.00) fifty dollars."

This subdivision prohibits the issuance of a permit to a manufacturer or brewer to sell as a distributor or wholesaler.

We think it is the intent of subdivision B of Section 13139e to prohibit the issuance of a permit to a manufacturer or brewer to sell as a distributor or wholesaler.

Section 13139e sets up four classes of business in connection with the making and sale of non-intoxicating beer, but there is no restriction in the act against the person holding a permit under subdivision C of Section 13139e also holding a permit under subdivision D of Section 13139e, and we think one person would be entitled to be issued a permit to do the business permitted under each of the subdivisions.

3. Can a permittee licensed under subdivision C of Section 13139e sell beer in what is defined as the "original package" or can

such permittee sell non-intoxicating beer to be taken from the premises of the permittee?

Section 13139e provides as follows:

"Before any permit required by this article shall be issued, the annual fee required therefor shall be paid into the State Treasury, and the receipt for such payment filed in the office of the Food and Drug Commissioner. Annual fees required for permits authorized by this article shall be as follows:

(a) For a permit authorizing the manufacture, and the sale by the manufacturer, of non-intoxicating beer brewed or manufactured in this state, ($500.00)five hundred dollars.

(b) For a permit authorizing the sale in this state by any distributor or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer,($50.00) fifty dollars.

(c) For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, ($10.00) ten dollars.

(d) For a permit authorizing the sale of non-intoxicating beer by grocers and other merchants and dealers, for sale in the original package direct to consumers, but not for resale, ($5.00) five dollars."

Section 13139u provides:

"Any permit issued under the provisions of this article authorizing the sale of non-intoxicating beer for consumption on the premises described in such permit, shall be construed to authorize the sale

of such non-intoxicating beer by the bottle, by the glass, on draught, and in the original package."

Section 13139z12 provides:

"The phrase "original package" as used in this article shall be construed and held to refer to any package containing three, six, twelve,or twenty-four small standard beer bottles, and any package containing three, six or twelve large standard beer bottles, when such bottles contain non-intoxicating beer as defined by this article."

While subdivision C of Section 13139e above quoted seems to warrant the issuance of a permit to sell for consumption on the premises only, yet a later section, 13139u, above quoted, permits the permittee under Section 13139e, subdivision C, to sell in the original package which means the original package as it is defined in Section 13139z12. In order to give effect to both subdivision C of Section 13139e and Section 13139u, the holder of a permit to sell for consumption on the premises is entitled to sell beer in the original package as the term "original package" is defined in the bill, because the law says so. We cannot disregard a positive declaration in the law as to what or how a permittee may sell under Subdivision C, as against some theory or notion as to the purpose of the act. Such original package or packages can not be broken or the contents consumed on the premises of the permittee under subdivision C of Section 13139e and the package must be taken from the premises where sold.

We realize that this holding, in part, modifies the effect of subdivision D of Section 13139e, but we further are of the opinion that a permit issued under subdivision D Section 13139e would not authorize the permittee to sell for consumption on the premises.

4. Can a license or permit issued under Subdivision C of Section 13139e, to sell to consumers, be transferred from town to town or in other words can a permittee sell non-intoxicating beer to customers at more than one location on the same license?

Subdivision C. of Section 13139e authorizes the issuance of a permit,

"* * * authorizing the sale of non-intoxicating beer for consumption on the premises where sold* * * ."

Section 13139h requires the applicant for a permit to take and subscribe an oath that he will not allow any intoxicating liquor to be kept, stored or secreted in or upon the premises described in such permit.

Section 13139i requires the permits issued by virtue of the act to be prepared by the Attorney General of the state, the forms prepared by the Attorney General require a description of the premises where non-intoxicating beer is sold to consumers.

Section 13139p requires the Food and Drug Commissioner to keep a record of the names and places of business of all persons engaged in the brewing, manufacturing or sale of non-intoxicating beer.

Section 13139u provides that any permit issued under the provisions of House Bill Number 23 authorizing the sale of non-intoxicating beer for consumption on the premises described in such permit, shall be construed to authorize the sale of such beer by bottle, glass draught and in the original package. Certain inspections of beer and the premises where sold are required to be made by the Food and Drug Commissioner, and necessarily there would have to be a record of the description of such premises in the office of the Food and Drug Commissioner before he or his appointees would know what premises to inspect or where the beer to be inspected could be found.

We therefore are of the opinion that a license or permit issued under Subdivision C of Section 13139e

can not be transferred from town to town and that a permit issued under Subdivision C of Section 13139e authorizes the sale of non-intoxicating beer at one location only.

5. Can persons who have a permit to sell on the premises to consumers serve beer to persons seated in cars parked at the curbing of a sidewalk on the streets in front of their respective places of business, and can the persons seated in such cars drink the beer so served publicly?"

As we have above indicated, persons who have a license to sell to consumers must describe the premises where such beer is to be sold for consumption. We think it was the purpose of the act that the beer should be sold on the premises described which would mean, ordinarily, that the beer should be sold within the four walls of the building, or part thereof, occupied by the permittee but we do not find any provision in the law making it a violation of such law to sell beer in the glass or in opened bottle to persons seated in cars at the curbing in front of the building occupied by the permittee who is entitled to sell for consumption. This matter might be regulated by local city ordinances. It is no offense to drink non-intoxicating beer publicly. The bill was drawn on the theory that beer containing no more than 3.2 per cent alcohol was non-intoxicating. Therefore the bill contains no regulations as to locations where the beer might be sold or the persons to whom it can be sold. The theory being that since the beer is non-intoxicating it is entitled to be sold to any person and to be drank anywhere, including public places.

6. Is the holder of a permit to sell on certain described

premises to consumers required to sell something to eat along with and as a part of the sale of beer on draught or in bottles?

There is no such requirement in the law. The beer provided for in House Bill Number 23 may be sold by persons holding permits to sell it for consumption, either with or without selling food along with the beer.

7. Can beer be served over counters or bars to persons standing at such counter or bar?

Section 13139z7 Laws 1933, page 266, is as follows:

"It shall be unlawful for any person holding a permit authorizing the sale of non-intoxicating beer for consumption in or upon the premises described in such permit, to serve any such non-intoxicating beer over, or to allow any person to drink any such non-intoxicating beer at, any bar or counter, or to drink any such non-intoxicating beer while standing at or near any bar or counter in or upon such premises. But this section shall not be so construed as to prevent the holder of any such permit from serving non-intoxicating beer to customers at tables or counters upon which food is served to customers while seated at such tables or counters within or upon said premises."

Under the above section the only way beer can be served over or on a bar or counter is that the customers be seated at such bar or counter, then the customer may be served over the bar or counter with or without the serving of food. The other permissible manner of sales

is at or on tables where persons are seated and in both instances the tables and counters must be used for the serving of food to customers on the premises, but the food need not be bought or sold with the beer.

8. Can brewers or their agents sell or give away taps, vents, or other equipment for the vending of beer?

We find nothing in House Bill Number 23 to prevent such selling or giving away on the part of a brewer or his agents.

9. Can a city in this state charge a distributor of beer a license for operating his truck into such city while the distributor is making distribution or delivery of sales of beer?

While constructions of the ordinances of the cities in this state do not come within the scope of the official duties of any officer to whom this office is authorized to give advice, yet we may say in passing that House Bill Number 23 does not authorize any city in this state to impose a license charge or fee that such city was not entitled to charge or collect prior to the passage of House Bill Number 23.

10. Can a permittee be prosecuted criminally for failure to file the reports required to be filed by House Bill Number 23?

Section 13139q requires the holders of permits under the act to file certain reports at stated times, with the Food and Drug Commissioner. Nothing is contained in the latter section, either expressly or by implication, which would make a permittee criminally liable, either for a felony or misdemeanor, on failure to file such reports. The Legislature failed to make the violation of this section a crime.

11. Is it a criminal offense for a permittee to fail to pay the tax levied or the fee required for inspection, as provided in the act?

Section 13139f and Section 13139g deal with the matter of inspections and inspection fees, and nothing is contained in either of those sections, either expressly or impliedly, making it a felony or a misdemeanor for a permittee to fail to pay the inspection fee required to be paid. This, however, does not mean that such fees may not be collected by a proper proceeding. Though the Legislature has not made it a crime to fail to pay such fees, as a practical matter, it may be reached under Section 13139w. It is our understanding that payment of the inspection fee is required by your department before approval is placed on the package. The Legislature, in Section 13139w has made it a misdemeanor for persons to sell or offer to sell beer which has not been inspected and upon which the certificate of the Commissioner has not been placed. There is no general section in the beer law making the violation of its provisions a misdemeanor. The violations of various sections are made crimes. Section 13139y provides that, "Any person convicted of the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law."

Sections 13139f and 13139g and 13139q do not provide that the violation of those sections shall be a misdemeanor or a felony.

Section 4474 R.S.Mo. 1929,provides as follows:

"The terms 'crime','offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine or both, may by law be inflicted."

The violation of those three sections cannot be termed a crime, offense, or criminal offense because nowhere in the Act is any punishment, either by imprisonment or fine,or both, provided for in case of their violation.

It is, therefore, the opinion of this Department that a person may not be prosecuted criminally for failure to make the reports required in Section 13139q, or for failure to pay the fees required in Sections 13139f and 13139g.

The requested form of information for the prosecution of a person for selling at wholesale without a permit so to do, as well as requested form of information for the prosecution of the holder of a permit to sell packages, not having thereon the certificate of the Food and Drug Commissioner, are transmitted herewith. These are forms only and such changes as are necessary to conform to the facts should be made.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

ALIENS: The right of a Hindu to own real estate in Missouri.

September 27, 1933

FILED NO. 75

FILED
75

Mr. R. L. P. Ram Chandra
c/o 233 Club
648 Hollywood Blvd.
Hollywood, California

Dear Sir:

We are in receipt of your request for an opinion dated September 20, 1933. Your request was as follows:

> "I am personally interested in knowing whether or not it is possible for a Hindu to own and develop real estate in your state. There undoubtedly may be several types of classifications applicable to agricultural land, industrial land, and land used for residential purposes."

In Missouri aliens are not classified by our Statutes according to nationality and hence a Hindu is recognized only as an alien, and the laws relating to aliens generally apply when determining a Hindu's right to own and develop real estate in Missouri, and we find no distinction made as to the purpose for which his real estate be used.

Chapter 121 R. S. Mo. 1929 deals with the Missouri law as it relates to the right of aliens to own real estate in Missouri, and Sections 14013 to 14015 inclusive were passed in 1895 and took away the right of an alien to purchase land in Missouri, which right existed prior to the passage of these sections. Section 14013 provides as follows:

> "It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this state, except such

> as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts: Provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries; which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

Section 14014 provides as follows:

> "No corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in this state: Provided, that nothing contained in this chapter shall be construed to forbid any person or corporation from acquiring an interest in any real estate in this state as cestui que trust or mortgage in any deed of trust or mortgage taken in good faith to secure the repayment of any money lent upon such real estate and interest thereon, nor as assignee of such cestui que trust or mortgagee, nor to forbid the person or corporation lending such money or becoming such assignee from purchasing such real estate as its sale upon foreclosure of said deed of trust or mortgage, when the amount for which such property is sold at said sale does not exceed the amount due under said deed of trust or mortgage at the time of such sale and the costs of such foreclosure; Provided, however, that all right, title or interest acquired by such person or corporation at such sale or foreclosure shall be forfeited to the state of Missouri unless such person or corporation shall in good

> faith sell all of such right, title and interest to a citizen of the United States, within six years after the person or corporation so purchasing at such sale or foreclosure shall have held the possession of such real estate according to the interest purchased or acquired by him or it at such sale or foreclosure."

Section 14015 provides as follows:

> "All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the state of Missouri, and it shall be the duty of the attorney-general, or circuit or prosecuting attorney of the proper city or county, to enforce every such forfeiture by bill in quity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this chapter, it shall be the duty of the court to determine the very right of the matter, without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights, either of the state or of the parties concerned, in any such proceeding arising out of the matters in this chapter mentioned."

In interpreting this law of 1895 our Supreme Court said in the case of Pembroke v. Huston, 79 S. W. 470-180 Mo. 627:

> "An alien's right to hold land cannot be questioned by an individual in any collateral action. * * * *
>
> The right of an alien to acquire and hold real estate has been the subject of legislation in this state, from time to time, from an early date; the earlier statutes conferring qualified rights in that respect upon him. In 1872 our General Assembly enacted that 'aliens shall be capable of acquiring, by purchase, devise or

descent, real estate in this state, and of holding, devising or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this state.' Laws 1871-72, p. 79. That statute passed into the revision of 1879 as section 325, and into that of 1889 as section 342, and was the law when the plaintiff acquired title to the Nodaway county land, and was the law until 1895, when the act which is now sections 4765 - 4766, above quoted, was enacted, and which was the law when the transactions in question occured. The act of 1872 repealed those features of the common law which imposed disabilities on an alien in respect of his capacity to acquire and hold real estate. While that statute was in force an alien had as much capacity to acquire and hold real estate as a citizen had. But after an experience of more than 20 years under the operation of that statute, our General Assembly concluded to change the policy of the state in that particular. As the act of 1872 had repealed the common law on the point, it was at least doubtful, under section 4177, Rev. St. 1899, if a mere repeal of that act would restore the common law, even if the Legislature had intended to restore it in its original form and effect. It was therefore doubtless deemed necessary, in order to accomplish its purpose, that the Legislature should by affirmative act withdraw from the alien the right that had been conferred on him by the act of 1872. When the Legislature in the act of 1895 said it shall be unlawful for an alien to acquire land by purchase, it did not mean that an alien, in taking a deed to land was to be regarded as a lawbreaker, or one guilty of an offense; but it only meant that the right that had been conferred on him by the act of 1872 was withdrawn, and

> that the disabilities that the common law had formerly imposed were now to be imposed by statute, except as in the statute itself otherwise provided. Some of the words of the statute give plausibility to the contention that title cannot pass to the alien at all, the words being that it shall be unlawful for the alien 'to hereafter acquire,' etc.; but, when those words are taken with the immediate context, that idea disappears. The language is that it shall be unlawful for the alien 'to hereafter acquire, hold or own real estate so hereafter acquired.' The sense is awkwardly expressed. There could be 'no real estate so hereafter acquired,' if we give literal meaning to that part of the sentence which says that it shall be unlawful 'to hereafter acquire' such property. This meaning is further shown by the language in the beginning of section 4766: 'All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the state of Missouri,' etc. That is an express recognition that real estate might be acquired by an alien after the passage of the act, but that whenever the state called for it the alien should surrender it. That is just what the common law was on that subject. The act of 1895 was intended to reinstate the common law on the subject of the acquiring by purchase of real estate by an alien. Under that statute an alien can take by purchase a defeasible title, and hold it subject to the same conditions that the common law imposed."

The conditions under which an alien might take title to real estate by purchase and hold the same at common law are very concisely set out in Fairfax v. Hunter, 7 Cranch, 603. l. c. 619, 3 L. Ed. 453, when the Supreme Court of the United States through Mr. Justice Story said:

> "It is clear by the common law that an alien can take lands by purchase, though not by descent, or, in other words, he

> cannot take by act of the law, but he may by the act of the party. This principle has been settled in the Year Books, and has been uniformly recognized as sound law from that time. 11 Hen. IV, 26; 14 Hen. IV, 20; Co. Litt. 2b. Nor is there any distinction, whether the purchase be by grant or by devise. In either case the estate vests in the alien (Pow. Dev. 316, etc.; Park. Rep. 144; Co. Litt. 2b), not for his own benefit, but for the benefit of the state, or, in the language of the ancient law, the alien has the capacity to take, but not to hold, lands, and they may be seized into the hands of the sovereign. 11 Hen. IV, 26; 14 Hen. IV, 20. But until the lands are so seized the alien has complete dominion over the same, * * * and may convey the same to a purchaser;'"

It is the opinion of this office that an alien's right to hold land in Missouri cannot be questioned by an individual in a collateral action, but only in an action brought by the State for the purpose of so alienating and where there is a judgment of forfeiture, in such a case an alien in Missouri looses his title in real estate and the same escheats to the State, but until the lands are so seized the alien has complete dominion over the same.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

_____
ROY McKITTRICK
Attorney General

PUBLIC SCHOOLS: Under Sec. 9329 Laws of Mo. 1931, p. 333, when there is an equal division of the Board in the hiring of a teacher, the Co. Sup't. has authority when requested by three directors to cast the deciding vote.

12-2

October 30, 1933.

FILED 75

Hon. Owen C. Rawlings,
Prosecuting Attorney,
Marshall, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 23, 1933 relating to the interpretation of Sec. 9329, Laws of Mo. 1931, p. 333. Your inquiry is as follows:

> "I should appreciate an opinion as to the authority granted the superintendent of schools by section 9329 of the Revised Statutes of Missouri 1929, as amended by the Laws of 1931 at page 333 thereof, in the following specific instance, to-wit:
>
> Three of the six regular directors of a consolidated school district oppose the hiring of a certain teacher, and the other three directors favor such hiring; the county superintendent of schools is asked to come in and cast the deciding vote for, or against, such teacher. Three of such directors have requested the county school superintendent to attend to this matter. Some of these directors raise a point as to whether the hiring of a teacher is such a 'question' as comes within the purview of the statutes set out in the above section.
>
> The situation is one where the present teacher was regularly hired at this board at the beginning of the present term, and, thereafter, it was found that such teacher was related to one member of the board within the prohibited degree in the anti-nepotism act; so the related director has handed in his resignation and stepped out, new members have been selected to complete the board membership, and, all this time, the teacher in question has been permitted to continue teaching but has never been legally hired.
>
> Much interest is being manifested in this particular community over this matter, and it

> seems questionable as to whether concerted action and harmony can readily be obtained. The county school superintendent, it seems, must be called in to cast the deciding vote on almost every action before the board. Friday morning, October 27th, 1933, the board is to convene again, presumably for the purpose of selecting this teacher and if possible, I should like to have your reply in hand by that time."

The statute upon which you desire an interpretation, namely, Sec. 9329, Laws of Mo. 1931, p. 333, is as follows:

> "Within four days after the annual meeting, the board shall meet, the newly elected members be qualified and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

I.

Under Sec. 9329, Laws of Mo. 1931, p. 333, when there is an equal division of the board in the hiring of a teacher, the County School Superintendent has authority, when requested by three directors, to cast the deciding vote.

The Legislature in 1933 amended Sec. 9329, supra, in only one respect, the same being in the following words, to-wit:

> "When there is an equal division of the whole board upon any question, the County Superintendent of Schools, if requested by at least three members of the board, shall cast the deciding vote on such question, and for the determination of such question shall be considered as a member of such board."

When the whole board (six members) are three for the hiring of a teacher and three against the hiring of said teacher, the same creates an equal division, and if the hiring of a teacher can be classified under the expression "any question", then the County Superintendent of Schools may cast the deciding vote.

In the sentence just preceding the one above quoted, it is provided that a quorum may transact business with the following exceptions: relating to a contract, employing a teacher, approving a bill, and ordering a warrant. When any matter involves these exceptions, it is necessary that a majority of the whole board shall vote, but the Legislature has not seen fit to define "any question", nor has it placed any exceptions thereon, and we cannot draw any hair-line distinction nor classification as to just what questions the County Superintendent may cast the deciding vote on, and on what questions he may not cast the deciding vote. The plain language of the statute reads "any question", and when a situation exists as to whether or not a certain teacher shall be hired and the board is hopelessly deadlocked, it is the opinion of this department that it involves a question. If the same involves a question and is to be classified under "any question", then the County Superintendent of Schools has the right to cast the deciding vote.

Black's Law Dictionary, p. 978 defines "question" as follows:

> "A point on which the parties are not agreed and which is submitted to the decision of a judge, jury, or board of arbitration."

The general section relating to the duties of the board is Sec. 9327, R.S. Mo. 1929, which is as follows:

> "The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term."

By this section the government controlling the business of the district is in the hands of the board, and the amended section, quoted supra, was evidently intended to be a solution of any difficulty when the board is unable to decide on any problem or question.

We can only conjecture as to what was in the minds of the Legislators when this amendment was made, but it is reasonable to assume that this was one of the very conditions which the Legislature by the amendment was seeking to remedy. Perhaps it had observed a school board involved in a hopeless wrangle over the selection of a teacher, the result being that no school was being conducted in the district or the school was delayed in starting its term.

CONCLUSION

Your question has never been decided by any court in Missouri and we have arrived at our decision solely by interpretation of the plain language of the statute and that is: When the whole board is equally divided on the question of hiring or not hiring a teacher, then the County Superintendent of Schools, after being requested by three or more members, may cast the deciding vote.

This department has heretofore rendered an unofficial verbal opinion to members of a school district in your county involving the same situation. However, after due consideration of the matter, we have come to the conclusion that we were in error.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

COUNTY COURT - Right to compromise back taxes

FILED
76

January 10, 1933.

Hon. E.L. Redman,
Prosecuting Attorney Gentry Co.,
Albany, Missouri.

Dear Mr. Redman:

This office is in receipt of your letter dated January 9, 1933 in which you make the following inquiry:

> "There are a number of delinquent tax payers in Gentry County. Some have been delinquent as long as three or four years. The penalties in such cases amount to a large figure. The county court and county treasurer, as ex officio collector, feel (and tax payers have so offered) that if these penalties could be stricken off and forgiven by lawful and legal means, that a lot of these delinquent taxes would and could be collected. The county court is disposed so to do if they can lawfully and without any breach of duty on their part.
>
> I am therefore asking for an opinion from your office as to whether or not such procedure can be had."

This office has heretofore written an opinion on the question of the right of county courts to compromise taxes. I think the law is clearly stated in that opinion, copy of which for your information is enclosed herewith.

I take it, however, that this opinion does not exactly cover your case, as your inquiry seems to be directed to delinquent taxes, presumably contained in a "Back Tax Book". Sec. 9950 R.S. 1929 provides that a county court may compromise delinquent taxes when the same are charged in a Back Tax Book and when it appears to the court that any tract of land or town lot contained in the Back Tax Book is not worth the amount of taxes, interest and cost due thereon as charged in said Back Tax

(Hon. E.L. Redman)

Book, or if it appears to the court that the land would not sell for the amount of such taxes, interest and cost, then the county court is authorized to compromise the taxes, interest and cost. That, of course, becomes a matter of fact for the county court to pass on.

Very truly yours,

GILBERT LAMB,
Ass't. Attorney General

APPROVED:

_____
Attorney General

TOWNSHIP ORGANIZATION LAW - Right to repeal enabling act carrying out Sec. 8 of the Constitution of Mo. and filling vacancies in office caused by such repeal.

JEFFERSON CITY, MISSOURI,
January 13, 1933.

Hon. W.H. Meredith,
Speaker House of Representatives,
Jefferson City, Mo.

FILED
76

Dear Sir:

The question to be answered by an opinion, as I understand, is:

> "Can Chapter 86 of the R.S. of Mo. 1929 be repealed without violating the provisions of Secs. 8 and 9 of Art. 9 of the Constitution of the State of Missouri, and if so, how are the vacancies in office caused by the repeal of Chapter 86 to be filled."

Sec. 8 of Art. 9 of the Constitution of the State of Missouri with reference to the adoption of township organization in the State of Missouri provides as follows:

> "Township organization adopted, how - county justices.
> The General Assembly may provide, by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting upon that proposition, at any general election, shall so determine; and whenever any county shall adopt township organization, so much of this Constitution as provides for the management of county affairs, and the assessment and collection of the revenue by county officers, in conflict with such general law for township organization, may be dispensed with, and the business of said county, and the local concerns of the several townships therein, may be transacted in such manner as may be prescribed by law: Provided, that the justices of the county court in such case shall not exceed three in number."

The whole matter is to be determined upon the question of whether or not Sec. 8 of Art. 9 of the Constitution is addressed to the Legislature or to the courts, or in other words, whether or not the constitutional provision can be put into effect of its own force, meaning and provisions, or whether legislation is necessary in aid thereof.

The case of State ex rel Burns vs. Gibson, 195 Mo. 251 involved the question of the validity of the adoption of the township organization law in Linn County, Mo. under the constitutional provision above quoted. There arose in that case substantially the same question that

that is presented here. The court at P. 260 of the opinion covered the entire situation at hand where it said:

> "The test in such cases is, Can the Constitution be enforced without the aid of legislation? "The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature. Does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language is addressed to the courts." (Willis v. Mabon, 48 Minn. l.c. 150)
>
> That this provision was addressed to the Legislature and not to the courts is, we think, too plain for argument. It starts out by saying: "The General Assembly may provide, by general law, for township organization, whenever a majority of the legal voters of such county, voting at any general election, shall so determine," thus clearly indicating that it was not intended for a present enactment complete in itself, but that legislation would be required to make it operative. It makes no provision whatever for holding the election, who shall be qualified to vote at it, or the form of the ballot. It would be difficult to indicate by stronger language than that quoted, that the framers of the Constitution intended that there should be legislation in order to put the provision in force, otherwise than by express words to that effect."

To the same effect is State ex inf. vs. Munn, 201 Mo. 214.

Attention is directed to the permissive term or use of the word "may" as used in Sec. 8 above quoted; that is to say it is not

mandatory upon the General Assembly to provide for township organization. The General Assembly may or may not pass an enabling act carrying out the provisions of Sec. 8. Even if the Constitution had used the word "shall" instead of the word "may" the General Assembly would not be compelled to carry out the constitutional demand. The principle of law in that respect is stated in

Fahey vs. Hackmann, 291 Mo. 351

where was involved the question as to whether laws passed by the General Assembly in pursuance of a "shall" mandate in the Constitution was referable for a vote. The court, page 379 of the opinion holds:

> "It does not and cannot follow that the laws passed in pursuance of these numerous "shalls" are not referable laws, under Section 57 of Article IV. It is true that the use of this word emphasizes the fact that the framers of the amendment desired legislative action, but its use cannot compel the Legislature to act. Such Legislature might refuse to act, and the only remedy of the people who framed the amendment would be to (1) elect a different Legislature, or (2) to initiate and adopt the necessary laws."

Whether the General Assembly would in the first instance pass an enabling act to carry out the provisions of Section 8 of Article 9 of the Constitution is obviously addressed to the wisdom and discretion of that body, and it necessarily follows if upon further consideration and observation of the results of the operation of the township organization law the General Assembly concludes that its action in passing the enabling act was unwise legislation, that body would have the same right to repeal the enabling act as it had to enact it.

Upon the repeal of the enabling act all laws in force in this state in relation to counties not having township organization shall immediately take effect and be in force in such county as provided in Section 9 Article 9 of the Constitution of the State of Missouri.

Thereupon, the offices held by the respective officers under the township organization law would be vacated and the various county offices for the administration of county affairs would be unoccupied and vacant and those vacancies would be filled as any other vacancies in county offices as provided by the Constitution and laws of the State of Missouri.

Very truly yours,

GILBERT LAMB,
Assistant Attorney General

APPROVED:

Attorney General

GL:AH

SOLDIERS HOME: Board of trustees Soldiers Home at Higginsville, Missouri, has authority to appoint and employ superintendent for that Home.

February 4, 1933

FILED
76

Honorable Chilton J. Estes
House of Representatives
Jefferson City, Missouri

Dear Mr. Estes:

The question submitted for answer to yourself as we understand is as follows:

> "In whom is vested the authority to appoint a superintendent of the Confederate Soldiers Home located at Higginsville, Missouri."

Section 13928 Revised Statutes Missouri, 1929, provides that the control and management of the Confederate Soldiers Home at Higginsville, Missouri, shall be vested in a board of trustees composed of five members, all of whom shall be appointed by the Governor, by and with the advice and consent of the Senate.

Section 13929 provides that the board of managers (which we take it refers to board of trustees) shall elect a president, secretary and treasurer from their number; that the board of managers shall have power and authority to make all necessary rules and regulations for the control and maintenance of the Home, and shall "also provide for the necessary employees".

It is the duty of the board to appoint all employees that are necessary to carry out the object purpose of the establishment, maintenance and operation of the Home, and to that end the board may do as the statute says they may do, provide for employees or appoint employees and that would be true whether such employees were designated as superintendent or any other name that might seem appropriate. The superintendent of the Home would be as much an employee as any other person that might be employed in connection with the operation of the Home.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

Attorney General.

GL:LC

COUNTY COURT: Right to regulate directions and locations of billboards

Op. 7/11

FILED
76

February 4, 1933

Honorable F. R. Weber
Representative from Tenth District
House of Representatives
Jefferson City, Missouri

Dear Mr. Weber:

We have your letter dated February 1, 1933, in which you make inquiry as follows:

> "As Attorney General for the State of Missouri, Honorable Quinn, chairman of the Committee on Criminal Justice, and myself request that your office submit to us an opinion on the constitutionality of House Bill No. 155, which is an act to license and regulate sign boards, bill boards, and other forms of out-door advertising within 300 feet of all county and state roads outside of any incorporated city town or village, by the county courts of all counties and providing a penalty for the erection and maintenance thereof without such licenses."

House Bill Number 155 in its title states it to be an Act,

> "To license and regulate signboards, billboards and other forms of outdoor advertising within 300 feet of all county and state roads outside of any incorporated cities, towns or villages by the county courts of all counties, and providing a penalty for the erection or maintenance thereof without such license".

The inquiry made involves the right of the state in the exercise of its police power through the legislature to enact the proposed bill.

There are numerous cases involving the right to license the erection of billboards through ordinances of cities. The primary Repository of police power is in the state. This same power may be transmitted to municipalities of the state by means of legislation.

The case of St. Louis Gunning Advertising Company v. City of St. Louis, et al, 235 Mo. 99, involved the validity of an ordinance regulating the erection, alteration, refacement and reconstruction of billboards in the city of St. Louis. The opinion by Woodson, J.,for the court en banc, discusses and reviews substantially all of the decisions of the courts of this country on the subject involved. At page 200-201 of the opinion the court said:

> "Because of the very great importance of the questions involved in this case, both to the public at large, and especially to the inhabitants of municipalities and to the real estate owners therein, I have reviewed and carefully considered at some length all of the authorities cited by counsel for both parties to this suit,and, in addition thereto, several, I found, which I thought bore upon some of those propositions.
>
> While the authorities are conflicting upon some of the questions presented and discussed, yet it may be fairly said that all of them agree upon the following legal propositions:
>
> First, that municipal corporations, even under their general police powers, may, by ordinance, exercise reasonable control over the construction and maintenance of billboards, house signs and sky signs.
>
> Second, that said power to regulate said matters begins where the public safety, health, morals and good government demand such regulation, and ends where those public interests are not beneficially served thereby.
>
> And, third, that the mere unsightliness of billboards and of similar structures, as well as their failure to conform to aesthetics, is no valid reason for their total or partial suppression.
>
> But the division of the courts, as is often the case, was brought about in the application of those rules of law to the facts of concrete cases. Some of them were of the opinion that the ordinance as applied to a particular case was unreasonable, or was not necessary for the public safety, etc.,in that particular case; while other courts were of the opinion that similar ordinances, equally drastic, were reasonable and necessary.
>
> In our opinion the latter cases are based upon more solid ground and are supported by better reason, though not by the greater weight of authority, if we determine weight by the number of adjudications,upon that subject".

See also Kansas City Gunning Co. vs.
Kansas City, 240 Mo. 659.

The above quotation is a brief but clear outline of the underlying principles of law controlling a situation such as is presented by your question, from which we understand the law to be that legislation such as House Bill Number 155 must have relation to public safety, health, morals or good government and that such public interest must be served by the legislation and that whether billboards are sightly or unsightly and whether they beautify the landscape or have a different effect on an eye or taste for beauty cannot be made the basis of such legislation as is under consideration here. As to how the reasonableness or unreasonableness of an act of the legislature may be tested, or, in other words, the process by which it is determined whether public safety, health, morals or good government are promoted by the legislation is stated in St. Louis Gunning Company v. St. Louis, supra, page 203, in the following language:

> "There is another class of cases which, in our opinion, announced the correct rule as regards the reasonableness and unreasonableness of this class of ordinances. That rule is, that all ordinances must be held valid by the courts except, first, where the unreasonableness appears upon the face of the ordinance itself; and, second, where the evidence introduced clearly shows that the ordinance is in fact unreasonable".

House Bill Number 155 seems to be directed more at the prevention of a certain character of advertising than as to whether a certain structure would affect the public health, safety, morals or good government. It is difficult to discern how the fact of whether a structure had any wording pasted or painted on it would affect public health or safety, since the aesthetic view does not prevail in this state. St. Louis Gunning Co. v. St. Louis, supra, 189 et seq.

The bill is general in its nature and applies to all roads and highways in the state, outside of incorporated cities, towns and villages. The word "road" may mean private roadways. Even under present travel conditions, it is not reasonable to assume there would be the same congestion of pedestrians or vehicles in the country as in cities, towns or villages. The size of the prohibited structure is not prescribed, nor are all structures that may be erected or maintained within 300 feet of a road or highway included nor is it provided that structures may not be erected or maintained when they would affect adversely

public health, safety, morals or good government but the county court is undertaken to be given the power to prevent the erection of the prohibited structures absolutely and the distance of 300 feet mentioned in the bill, standing alone, seems to be arbitrary.

While the use of private property may be regulated by the state, yet such regulation must be reasonable and so as not to encroach on the Constitutional rights of the owner in the use of his property. In Kansas City Gunning Co. v. Kansas City, supra, a provision of a city ordinance providing against the erection of structures within 100 feet of the line of any public park or boulevard was void for unreasonableness. To the same effect see, Curran Bill Posting & Distributing Co. v. City of Denver, 47 Colo. 231. Chicago v. Gunning System 214 Ill. 628. Crawford v. City of Topeka, 51 Kans. 756.

We think a bill of this character should show on its face that the acts prohibited cannot be done when they affect adversely public health, safety, morals or good government. If the bill here should be construed to apply to buildings or structures in existence at the time the same would go into effect, then no notice for or time of removal is provided for nor provision for compensation for destruction for public use as is required by the Constitution of this state.

We are of the opinion that House Bill Number 155, as drawn is unreasonable and arbitrary and would be unconstitutional if passed and approved.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

RIGHT OF OFFICER TO MAKE CONTRACT BEYOND HIS TERM.
RIGHT OF PENAL BOARD TO MAKE CONTRACT WITHOUT APPROVAL
OF GOVERNOR.

FILED
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February 28, 1933

Honorable Paul V. Renz
Farms Commissioner
Jefferson City, Missouri

Dear Mr. Renz:

We have your letter dated February 25, 1933, in which you state and inquire as follows:

> "Enclosed herewith find copies of lease for the years 1932 and 1933 by which the Department of Penal Institutions at Jefferson City, Missouri, acquired the Dr. Jose farm (148½ acres) in Calloway County, Missouri. The Department of Penal Institutions operated this farm during the year 1932 and have made and signed contract for the same farm for the year 1933, extending over into the new administration.
> We would like an opinion from your Honorable Office as to whether it is legal for the old Board to contract for the lease of this farm extending into the new administration.
> Your opinion before March 1st would be much appreciated".

One of the attached leases expires by its terms March 1, 1933, the other on March 1, 1934.

Section 8316 establishes the department of penal institutions, which department shall be under the control and management of a Commission composed of five members to be known as commissioners of the department of the penal institutions. The commissioners are appointed by the Governor, and the Governor shall designate one of the commissioners as director of penal institutions, one as warden of the penitentiary, one as superintendent of industry, one as superintendent of prison farms and one as commissioner of paroles and pardons.

After giving the commissioners certain powers and authority in the direction, control and management of the penal institutions it is provided in Section 8339, that the commissioners of such department, with the approval of the Governor, has authority to lease or purchase lands suitable for farming, rock quarries or grazing purposes or for any or all of said purposes if deemed by said board necessary and proper for said purposes, which land is to be used by the board for the employment at useful work of the prisoners of the penitentiary and for training such prisoners.

It will be noticed that neither of the attached leases bears the approval of the Governor of the State of Missouri at the time such contracts were entered into.

The force and effect of the word approval as used in Section 8339 is stated in Brown v. City of Newburyport, 95 N. E. 504. The quotation following shows the connection in which the word was used in that case, it is said, page 507:

> "The crucial word to be construed is "approval". This word, like many others, has different meanings, depending upon the connection in which it is found and the subject-matter to which it is applied. It is used here by a municipal legislative body in a formal order to express a supervisory power reposed in one of its sub-committees as a restraint upon the action of an executive officer of the city, which might serve the purpose of enlightening his judgment, controlling his discretion and limiting his opportunity for folly or dishonesty. It occurs in a vote relating to the borrowing of money for municipal purposes. This is no simple matter, but involves a high degree of skill in order to determine the time and conditions, under which most favorable rates of interest and discount may be secured in the light of the actual financial necessities of the city. It does not show an intention to confer a perfunctory commission to be exercised once for all at the beginning of the year. That would be an idle ceremony, and would accomplish none of the results which the use of the language imports. The finance committee, as its name indicates and the ordinances of the defendant city provided, was the general legislative guardian of the financial affairs of the city. Approval, in this connection, means that the members of the finance committee, acting upon their official responsibilities and having in view the public welfare, shall investigate and sanction according to their own independent judgment, each separate borrowing made under the order. It implies reflection and sound business discretion as to each loan proposed. It did not confer a mere ministerial function, but imposed active and important prudential obligations."

If the Governor did not, in fact, approve the leases so made then the same would not have any validity.

We are assuming the board authorized the making of the leases.

Could the predecessors of the present commissioners of the department of penal institutions bind their successors by or compel observance of a lease made by such predecessors?

The question seems to turn on whether it was necessary, such as under a building contract, to make an agreement beyond the term of the then officers and whether such contract was entered into in good faith and with an honest intention to serve the best interest of the state.

The general rule in this regard is stated in 15 C. J. page 542, in the following language:

> "The general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest".

The case of Moore v. Luzerne County, 262 Pa. 216, was a suit on contract made by the officers of the county, the fulfillment of which ran beyond the terms of the officers making the contract. On that point the court at pages 220 and 221 of the opinion held:

> "The contract was made by the county commissioners but a few days preceding their retirement from office and the induction of their successors, and related to work, all of which was to be performed after they had ceased to be public officials. As the record now is, it is barren of any explanation of that material fact. It is a mistake to suppose that, because a public official, or indeed any other agent for a known limited term, has power to make a contract, he is authorized thereby to make one for an indefinite or long extended term. If the agency itself does not expressly limit the extent of the agent's power, then the facts and circumstances of each case must be considered in determining it. Ordinarily it is limited in time to the term of the agent who makes it. Necessity, or its equivalent of great advantage to the principal, may furnish a

reason for enlargement beyond the term, but he who asserts the existence of the necessity of great benefit has the burden of proving it. This is particularly true of public officials, else those going out of office might so tie the hands of those coming in as to cause serious embarrassment and loss to the public. Every one would concede, for instance, that an outgoing board of county commissioners might well contract for the coal needed in the county offices during the existing or ensuing winter, although their terms ceased on the first of January; and every one would likewise concede that their contract for coal to cover a decade would ordinarily be wholly beyond their powers."

To the same effect are a great number of cased cited in 15 C. J. 542.

It seems a fair statement of the rule to say that under some contracts, such as one for the erection of a building, a contract might be made by officers to extend beyond their terms, but generally speaking we think the rule is that a contract made by officers to be wholly performed beyond the term for which such officers will continue in their official capacity, is prima facie void, with the burden on and the right in those who are entitled to assert the validity of the contract to show that the same was entered into in good faith and with an honest intention to serve the best interest of the state, that of course would be a question of fact for a court or jury to pass upon.

In our opinion unless the then Governor of the State of Missouri actually approved the contracts so made the same did not have validity and we are further of the opinion that the contract dated October 15, 1932, expiring on its face March 1, 1934, was and is prima facie void and unenforceable.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

Attorney General.

OFFICERS--In view of Section 11202, county officer may not be removed except for neglect of duty, as specified in Section 11202; mere arbitrary removal or for cause not specified therein would be illegal.

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10-23

October 20, 1933.

Mr. C. M. Reid,
113 Madison Avenue,
Aurora, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We have a situation in Lawrence County with reference to our County Physician that I would like to explain to you and see if you could advise some method for it to be corrected.

At the present time we have Dr. Fulton, a republican, who was appointed in January 1932, by a republican County Court and his salary put at $1000.00 per year in February of the same year. If he visited the County Farm or the County Jail he was paid for his visit in addition to his regular salary.

The present County Court claims they are willing to make a change if they could get rid of Dr. Fulton but on account of him being appointed for three years he can not be removed.

It so happens that I am Chairman of Relief for Lawrence County and I have been trying to get the Court to divide this thousand dollars and give some medical relief in different parts of the County. If they could remove Dr. Fulton or cut his salary to $1.00 per year the balance of the $1000.00 could be used for medical relief and the man who was appointed to take the place of Dr. Fulton could handle the health work at a great deal less than the amount they are paying him.

The present court is democratic and believe they would do what you say in reference to this, as Dr. Fulton is doing no good and never has. This is the first time in a long while that we have had charge of the court and it is a shame to let this man draw this salary for doing practically nothing. Will you please advise."

Section 9025, R. S. Mo. 1929, provides as follows:

"At the first regular February term of the county court

> in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years.* *"

Under the foregoing section the county court of your county appointed the present deputy commissioner of health for a term of three years. When the physician accepted the appointment and qualified thereunder, he became the duly qualified and acting deputy commissioner for a period of three years, which is the term of office as provided by the statute. Such being true, the county court cannot arbitrarily or capriciously remove this physician from office. He may be removed as any other county officer for neglect of duty or for other good cause.

Section 7 of Article XIV of the Constitution of Missouri provides as follows:

> "The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Pursuant to the above constitutional provision the Legislature has enacted Section 11202, which is a part of Article II, chapter 68 of the Revised Statutes of Missouri, 1929. Said section provides as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

The balance of this chapter provides for a hearing before the Circuit Judge to determine whether or not the individual has violated said section. According to the constitutional and statutory provisions above quoted, an officer may be removed for willful violation or neglect of official duty or for his failure to do or perform any official act. The sections of the statute which authorize the county court to appoint the deputy health commissioner made no provision whatever for his

removal. There is no special section in the statute which would give the county court authority to remove this official. The section of the statute which authorized the appointment for a definite term of three years not having given to the county court the right to removal, and there being no special section in the statutes which gives them that arbitrary power, the right to removal must be determined according to Section 11202, above quoted.

In State ex rel. v. Morehead, 256 Mo. 683, 691, it is said:

> "No particular statutory method has been provided, however, for the removal of members of county highway boards, and a reference to the general statute in regard to the removal of county, town and township officers is necessary to determine where the authority lies and what facts will sustain such a proceeding. Without literally quoting the general statute it will suffice to say that while broader than the constitutional provision (Sec. 7, Art. 14, supra) it limits the causes of removal to dereliction of or willful refusal to perform official duty, and requires the proceedings to be commenced and heard in the circuit court.
>
> In the absence, therefore, of particular statutes, the method prescribed and the reasons assigned in section 10204 et seq., supra, are the limits of authority for the removal of members of any of the classes of officers therein specified. Members of county highway boards being public officers are properly designated as one of such statutory classes, and, therefore, subject to the provisions of the general statute in regard to removal. Their terms are definitely defined by law, and their duties are all of a public nature, and, while the statute is silent in regard to the subject, their removal will not be justified unless in each instance notice of proceedings therefor is given them, and they are afforded an opportunity to be heard in their own behalf; or, in other words, as elaborately and learnedly discussed in State ex rel. v. Sheppard, 192 Mo. 497, they cannot be deprived of their offices without resort to the forms of the law."

In view of the foregoing statutes and decisions, we are of the opinion that the deputy state commissioner of health may be removed for cause in a proper proceeding in the Circuit Court whenever such officer has violated the provisions of Section 11202, R. S. Mo. 1929. If such officer is not guilty of the violation of Section 11202, he may not be removed for any other reason or arbitrarily or without cause.

In answer to your inquiry, therefore, it is our opinion in the absence of any facts stated in your inquiry showing that the deputy state commissioner of health has neglected his duty in violation of Section 11202, we do not believe that the County court may remove him arbitrarily, or because of their desire to

make a change in this office. If he has violated Section 11202 in the performance of his duties, a proceedings may be brought against him for his removal, at which time he is entitled to a hearing.

Very truly yours,

Frank N. Hayes

Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

CORONER: Duty to hold inquest, When.

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March 8, 1933

Honorable L. D. Rice
Prosecuting Attorney
Neosho, Missouri

Dear Mr. Rice:

We acknowledge receipt of your letter dated March 6, 1933, in which you state in part and inquire as follows:

"I. In case a person is killed in this county in an automobile accident where it is very apparent that it is caused by negligence of the person killed and there is no criminal liability whatever, is it necessary that the Coroner hold a Coroner's inquest? Or where the accident is caused by negligence of a person other than the person killed, but it is apparent that there is no criminal liability, is it necessary that the Coroner hold an inquest? In the above instances, if you hold there is no Coroner's inquest necessary, would a certificate from the attending physician be sufficient?

On account of the numerous violent deaths caused by automobile wrecks, if it is legally necessary to hold an inquest in every case, it would impose great financial obligation on the county which we cannot afford at this time. So we would like to get your opinion on these questions.

II. In case injury occurs to a party in Newton County and the party is taken to the hospital in Jasper County and later dies of said injury and it is a case in which it is necessary that a Coroner's inquest be held, where is the proper place to hold said inquest, in the county in which the injury occurs or where the person dies?

I have construed Section 11612 as giving jurisdiction to the Coroner of the county in which the dead body was found. This, of course, would

be in the county where the person died unless the body was transported back into Newton County and report given to the Coroner of this county. The Coroner of this county seems to want to claim jurisdiction in every case in which injury occurs in this county although the death occurs in the adjoining county. Please give me your opinion on this question, also".

Section 11608 Revised Statutes Missouri, 1929, provides as follows:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

By the words "take inquests" is meant the holding of an inquisition or examination on account of the death or deaths referred to.

Section 11612, Revised Statutes Missouri, 1929, provides in part as follows:

"Every Coroner so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant * * *".

With reference to the liability for costs of an inquest and after making certain other provisions with reference to the payment of same, Section 11630 Revised Statutes 1929, in conclusion says:

" But where there is no person liable and able to pay such expenses, they shall be allowed by the county court out of the county treasury".

These are the sections of the statutes having direct bearing on the questions you desire answered.

Taking up first paragraph one of your letter.

Section 11608 says in substance and effect that the Coroner shall hold an inquest or take testimony about and concerning deaths in the county where such Coroner is an official, where a death has been occasioned by violence or by casualty.

There is no restriction or reservation in the section as to what particular character of violence or casualty must have caused the death before an inquest should be held, but the section says the Coroner shall take inquests of violent and casual deaths.

The word violence is defined in Agee v. Employer's Liability Assurance Corporation, 213 Mo. App. 693, 698, to be:

> "Violence is defined as force, "physical force; force unlawfully exercised". Anderson's Law Dict."

In Morris and Company v. Industrial Board, 119 N. E. 949, involving a case under the Workmen's Compensation Act of Illinois, the Supreme Court of that state, at page 946 of the opinion, and in referring to the word casualty as used in the Workmen's Compensation Act, said:

> "It is made the duty of the coroner to inquire into the cause of death where it is supposed to have resulted from "casualty" as well as where it is supposed to have resulted from "violence" or "any undue means". Webster's New International Dictionary defines "casualty" to mean "chance, accident, contingency; also that which comes without design or without being foreseen; an accident". "Mishap", "misfortune," "disaster", are given as synonyms. The Standard Dictionary defines "casualty" to mean "a fatal or serious accident; disaster; accidental death or disablement; that which occurs by chance". We must assume the word "casualty" was understandingly used by the Legislature, and was intended to be given its usual and ordinary meaning".

Answering the first paragraph of the inquiry in your letter we are of the opinion that in every case where death has been occasioned by violence or casualty, as those terms are above defined, the Coroner is required to hold an inquest and that without regard to any criminality or negligence that might be involved in or grow out of the death.

We do not think the cases of State ex rel v. Marshall, et al, 82 Mo. 484, or Houts v. McCuney, 102 Mo. 13, in anywise effect the result we have reached as to Section 11608, as those cases dealt with matters of costs to be audited and allowed by the county court. Of course if a man dropped dead in the street from heart failure, with no one within a hundred yards of him, it could not be said he died from violence or casualty and it would be such a gross abuse of the discretion of the Coroner that the county court would be warranted in refusing to audit the paying

of the costs in such a case.

Answering the second paragraph of your letter and your second inquiry, Section 11608 referred to provides that a Coroner shall take inquests where the body shall be discovered in his county, meaning the county where the Coroner is elected and where the body is found. Section 11612 provides that the Coroner when notified of a dead body supposed to have come to his death by violence or casualty being found within his county, shall issue a warrant for a jury and proceed with the inquest and the warrant shall be directed to the Constable of the township where the dead body is found.

Under the foregoing sections we think the Coroner of the county where it is known death occurs and the body is found, that is to say where the body is upon death occurring from violence or casualty should hold the inquest and where a body is found supposed to have come to his death by violence or casualty and there is no infommation as to where death actually occurred, the Coroner of the county where the body is found should hold the inquest.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

IN RE: County Court - school mortgages
(1) Cannot accept deed but must foreclose mortgage
(2) Has discretion when to foreclose; in meantime can accept part payment if without extending
(3) If bid in by county, must be in name of whom

FILED
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March 14, 1933.

Hon. Nat B. Rieger,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.

Dear Sir:

Answering your letter of March 8, 1933, in the first paragraph of which you ask:

> "Can the County Court of a Missouri County legally accept a deed from a delinquent borrower of county general funds or County School Funds, in lieu of ordering foreclosure and public sale as provided in Section 9254?"

will say the following opinion recently rendered by this office will answer that question:

The County courts of the State get their authority largely from Section 36, Article VI of the State Constitution and from the following sections of the statute (which statute I am setting out pretty fully):

> "SEC. 9243--COUNTY SCHOOL FUNDS. It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion require personal security in addition thereto, *** belonging to the County school funds; ****
>
> "SEC. 9245--COUNTY COURT TO HAVE JURISDICTION OF COUNTY SCHOOL FUND. Whenever any county in this state may have separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds."

Then to the same effect they have power to manage the several township funds in their counties.

"SEC. 9248--MANAGEMENT OF SCHOOL FUNDS. The County Courts, respectively shall have the care and management of the school funds of the several townships within their respective jurisdictions.***"

The county courts have power to require additional security.

"SEC. 9253.- COUNTY COURT MAY REQUIRE ADDITIONAL SECURITY. The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. ***"

"SEC. 9254.--COUNTY COURT MAY MAKE ORDER OF SALE, WHEN. Whenever the principal and interest, or any parts thereof secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, having delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the Circuit Court, and shall be proceeded with accordingly."

The county courts have power to sell, but should make order first.

"SEC. 9252--FORM OF MORTGAGE-NOTICE OF SALE-FEES, HOW PAID. Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser. ***"

May become the owners when and how.

"SEC. 9256--AUTHORITY TO REPOSSESS PROPERTY BY PURCHASE. Whenever any property heretofore or hereafter conveyed in trust or mortgage to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue or any power in

such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made, may in its discretion, for the protection of the interest of the schools, become through its agent thereto duly authorized, a bidder on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquite at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale as said court may deem best for the interest of said school or schools.***"

You will note:

"The statutes provide that when money belonging to the school fund shall be loaned, the county court shall cause the same to be secured by a mortgage in fee on real estate situated within the county, ***and of the value of double the amount of the loan, and also with a bond and personal security. *** No authority is anywhere conferred upon the county courts to dispense with the real estate security required to be taken.***"

Lafayette County v. Hixon, 69 Mo. 561.

"The county courts of Missouri are creatures solely of statutory origon and have no common law or equitable jurisdiction.

State ex rel V. Johnson, 138 Mo. App. 306, l.c. 314.

"In relation to these funds the county courts are trustees. They have no authority to dispose of the principal entrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and interest of these funds. If they can give away the one they can give away the other *** The welfare of the State is concerned in the education of the children. She has provided and is providing means for that purpose, not only for these now in existence, but for those who may come after them. The fund as has been said, is a permanent one, and if every man, woman, and child in a township should petition the county court to give away that which is by law entrusted to it, for the education of its children, it should without hesitation reject their prayer."

Montgomery County v. Auchley, 103 Mo. 492, l.c. 503
Veal v. County Court, 15 Mo. 412, l.c. 414

We are therefore, of the opinion that while in this instance, it might seem to be expedient and less expensive as you say, to the county to accept a deed instead of foreclosing the mortgage, yet it would be unwise, (on account of the bad precedent) and I think unconstitutional and without authority of law to do otherwise than to foreclose the mortgage as provided in the statutes above quoted.

Under no circumstances, can the County Court knock off any of the principal or interest as can be readily seen by the foregoing opinion.

In the matter of disposing of the property after the county acquires it by foreclosing, the comparatively new section of 9258 will govern and prescribe their duties regarding same.

In answer to your second question:

> "Is the County Court of a Missouri County authorized to exercise its discretion and accept part payment of the interest and extension of the time, etc."

will say we are of the opinion the County Court can exercise its discretion and take such payments as they can possible get on the interest and/or principal as in their discretion may seem for the best good of the funds either township or county if absolutely necessary to let them run awhile, but I do not think it advisable to actually extend the time of payment in view of the fact that the personal securities might be thereby released.

Your third question in regard to the event that the foreclosure is had and the property is bid in by an agent appointed according to law, in what name should the county take title, will say that Section 9248 states:

> "The County Court shall have the care and management of the school funds of the several townships"

and Section 9254, says:

> "When delinquent the County Court to make order *** to sell."

Section 9256 states:

> "The county court has the care and management of the school funds or funds out of which loans may be made in its discretion "

And further on provides:

> "And may purchase, take, hold and manage for said county to the use of the township out of the school

fund on which said loan was made, or in its own name where such loan has been made out of the general school fund.

In other words, if it is a township fund that has been loaned, it seems proper to make the deed to the county for the use of the township to which the same belongs, or if it is a county fund, then just to the county for the use of the fund to which it belongs.

Yours very truly,

Geo. B. Strother

GEORGE B. STROTHER,
Assistant Attorney General

APPROVED:

Attorney General

GBS:AH

IN RE:

Right of sheriff to practice law.

FILED
77

March 24th,1933

Mr. Nat B. Rieger,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.

Dear Sir:-

I have your letter of March 22nd,1933 requesting an opinion upon the following facts:

> "I would appreciate an official opinion from your office as to whether a duly licensed and practicing attorney at law who has been elected Sheriff of a Missouri County is privileged to continue his practice of law, and if so the extent to which he would be disqualified as sheriff when he is of counsel in a jury case."

The sheriff is an officer of the courts within his county, and should at all times be free of interest and prejudice in discharging the official business of any court. The position of the sheriff is so powerful that the framers of the Constitution prohibited him from succeeding himself, Article IX, section 10. It was the intent of the lawmakers that the sheriff should have no interest in any litigation in the courts within his county. Disqualification of the sheriff for either interest or prejudice is made easy by law, 11206, 1845, R. S. Mo. 1929.

It is the duty of the sheriff to attend each court held in his county, 1870 R. S. Mo. 1929, and for such services he is allowed certain fees, 11789, R. S. Mo. 1929. This duty of the sheriff to attend and remain in attendance upon the courts of his county except in case of illness and absence on account of official duties, is mandatory, and the failure to do so is neglect of duty for which the sheriff may be removed. State v. Yager 250 Mo. 388. In some instances the sheriff selects the jurors, 8775 R. S. Mo. 1929.

Whenever the sheriff is interested in any suit it is made the duty of the coroner to serve and execute all writs and precepts out of the sheriff's office, 11524, R. S. Mo. 1929.

In construing this statute disqualifying the sheriff for interest, the Kansas City Court of Appeals in State ex rel. v. Duncan 195 Mo. Ap. 541, l.c. 552, held that the ministerial act of serving process

could not be performed by the shdriff interested in the litigation, and said:

> "Our Statute, section 11218 R. S. 1909 provides that when the sheriff, whose duty it is to serve process is a party or is interested in the suit, related to or prejudiced against any party or is in any way disqualified, the coroner shall serve and execute all writ and processes and perform all the duties of the sheriff. So that even in the case of an ordinary civil action, involving no more than a mere civil liability for a limited sum of money, and where the regular process server is an official under heavy bond for the faithful performance of his duties, still the statute would not permit him to act in the case where he is plaintiff or is interested in the outcome of the suit. And the same is true at common law. According to Blackstone, it is the duty of the sheriff to execute all process issuing from the king's court of justice, and that 'when just exception can be taken to the sheriff for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must then be awarded to the coroner instead of the sheriff'."

Among other things, it is made the duty of the sheriff to serve executions and collect money thereon, all of which money shall be paid to the plaintiff or his order or his attorney of record. 11519 R. S. 1929. The intent of the lawmakers to be gathered from this statute is that the sheriff and the attorney for the person entitled to the money should be separate and distinct individuals, and that the office of sheriff and attorney of record should not be jointly occupied by one person. It therefore appears that the sheriff would be interested within the meaning of the statute whenever he holds himself out as attorney to engage in any particular class of litigation. If the sheriff is to engage in the practice of law in divorce cases exclusively he is thereby interested in all divorce cases filed or tried in his county, and is therefore disqualified from performing any of the duties of sheriff in that particular class of cases. It goes without argument that the sheriff is disqualified from defending defendants in criminal cases, yet by the same law it is made the duty of the sheriff to serve all process and writs in both criminal and civil cases. The practice of law therefore, either direct or indirectly, by the sheriff in any particular class of cases, at once disqualifies him from acting as sheriff in that particular class of cases.

It is the further opinion of this office that the practice of law by the sheriff within his county is contrary to public policy. In advancing this opinion, we are not unmindful of the fact that the term public policy has no fixed meaning, but should be applied to each particular set of facts, and the reason for this is pointed out in Lipscomb v. Adams 193 Mo. 530, l.c. 542, in the following language:

> "To limit the term 'public policy' within the bounds of a fixed definition would be to render evasion of the law in that respect a matter of easy invention."

In Tallman v. Woodworth, 2 Johns. 385, the court of New York condemned the practice of a public officer serving processes in the following language:

> "The practice of a constable who acts as such officer in the cause, to appear also as attorney for either party, is certainly not to be approved of, since it may lead to great abuse."

It is further the opinion of this office that a Missouri sheriff in his county, cannot directly or indirectly engage in the practice of law without disqualifying himself as sheriff, for the reason (1) that such practice would be in conflict with official duty and (2) is contrary to public policy.

Respectfully submitted.

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER/mh

SALE OF NON-INTOXICATING BEER for consumption on premises and sale for consumption off of premises by holders of the two class of retail permits -- WHEN ILLEGAL.

May 2, 1933.

FILED
77
19

Hon. L. D. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

Your letter reads as follows:

"(1) Is the holder of a permit allowing persons to sell non-intoxicating beer for consumption on the premises allowed to sell under that permit in the original package as defined in the act?

(2) Can holders of permits allowing them to sell in the original package as defined in Section 13139z12 put three or six bottels of beer in a sack and sell them as original package, or must it be the original package as delivered to such permit holder from the jobber or manufacturer?

I have been told here that your office has given an opinion in which you have held that a holder of a permit allowing the sale of non-intoxicating beer on the premises is allowed to put three bottles in a sack and seal it in some way and deliver it to a customer to be taken away as an original package. I had been holding contrary to that, and I would like to be straightened out on the proposition. My construction has been that it must be in the original package as delivered to the holder of the permit, as defined in the above section."

Holder of permit to sell non-intoxicating beer for consumption on premises in my opinion cannot sell non-intoxicating beer in original package as defined in the act where same is to be removed from the premises and be consumed.

Holder of a grocer's or other merchant's permit to sell in the original package for consumption off the premises cannot legally, in my opinion, put three or six bottles of beer in a sack and sell same as original package. I construe the term "original package" to mean just what the statute says it is.

Very respectfully yours,

EDWARD C. CROW.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC:EG

SCHOOLS AND SCHOOL DISTRICTS: Issuing of warrants by a school director.

8-2

July 28, 1933.

FILED
77

Hon. Nat B. Rieger,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.

Dear Mr. Rieger:

In your letter of July 8 addressed to General McKittrick you request an opinion in regard to a school director issuing a warrant without proper authority. Your letter is herewith quoted below:

> "I would appreciate an official opinion from your department on the question: Can a rural school district recover from a member of the board of directors money paid out of the school district's funds upon the warrant of said director when no meeting of the board of directors has been had and no minutes of any meeting were made or kept as provided by Sec. 9205 R.S. Mo. 1929, the warrant being issued by the clerk at the request of one member of the board, and thereafter cashed. The school district never receiving anything of value for the money so expended.
>
> And too, whether such suit can be brought by a resident taxpaying citizen of the school district to the use of the district in the event the board of directors of said district neglect or refuse to file such suit."

It is noted that you state in your letter above "and no minutes of any meeting were kept as provided by Sec. 9205, R.S. of Mo. 1929". This section deals with the care of property, purchase of materials, etc. We quote below a portion of the statute

which you evidently think pertinent:

> "The board of directors or board of education shall have the care and keeping of all property belonging to the district, and shall provide the necessary globes, maps, charts, apparatus, supplementary books, and other material for the use of the school. The board shall keep the schoolhouses and other buildings in good repair, the grounds belonging thereto in good condition, and shall provide fuel, heating apparatus, and other material and appliances necessary for the proper heating, lighting, ventilation and sanitation of the schoolhouses; shall have the floors swept and the fires made at the expense of the district, and cause an accurate account of the expense thereof to be kept and a report of the same to be made at the next annual meeting ****"

It is the opinion of this department that no minutes were required under this section, but only that"the clerk shall render an accurate account of all such expenditures at the next annual meeting". The minutes regarding the substance contained in your letter would evidently be covered by Sec. 9289 R.S. of Mo. 1929, which is as follows:

> "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

You state that the warrant in question was issued by the clerk at the request of one member of the board. Sec. 9311, R.S. of Mo. 1929 provides for the manner in which warrants may be drawn, and is as follows:

> "Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a schoolhouse for said district--the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district.***"

Sec. 9312 R.S. of Mo. 1929 states that "the warrant thus drawn shall be in the following form and shall be signed by the president of the board and countersigned by the district clerk ***"

Due to the fact that the warrant was cashed, which must have been in regular form, although you have not stated; and the director in question must have been the president of the board; you further state the school district never received anything of value for the money so expended; we are unable to determine from this statement as to whether or not the board member by his actions misappropriated the funds in question, whether he connived with the payee of the check to defraud the school district; or whether the warrant was issued on the theory that it was a valid indebtedness had the warrant been legally issued but in reality the district received no benefit from the money expended. We are inclined to believe that the latter is the construction which we should place on that portion of your letter.

Assuming then that the director gave the warrant for a valid indebtedness, is the warrant a valid one? In the case of School District No. 3, Township 28, etc., Plaintiff in Error, vs. E.C. Smalley, et al, Defendants in Error, 58 Mo. App. 659, the case being short, it is quoted in full:

> "This is an action by a school district to recover from one of its directors and the clerk of the school board the amounts of certain school warrants, which had been issued and paid by the county treasurer out of funds belonging to the district. The grounds of recovery relied on are that the warrants were not issued at regular meetings of the board, and that there was no record kept of the action of the board authorizing their issuance.

The evidence introduced and relied on by the plaintiff was to the effect that some of the warrants were ordered to be issued by two members of the school board at meetings called without notice to the other member, and that no record was kept of the proceedings at any of the meetings at which the warrants were authorized to be issued. On the other side the evidence tended to show that all meetings of the school board were held after due notice to each member, and that the warrants in controversy were issued in good faith in payment of valid obligations against the school district. There was a judgment for the defendants, and the plaintiff has brought the case here by writ of error.

The discussion of the plaintiff's assignments of error would be a useless task, for the reason that under no possible theory of the evidence is the plaintiff entitled to a judgment. The contention is that the defendants are personally liable, merely from the fact that the clerk of the district failed to keep a record of the meetings of the school board at which the warrants were ordered to be issued; or, if such meetings were held without notice to all members of the board, then the defendants must be held on that ground. This is a doctrine too harsh for any court of justice to enforce. If these facts had been supplemented by evidence tending to prove a misappropriation of the money of the district, it would have authorized a recovery. But the plaintiff's evidence fails to disclose this. On the contrary, the evidence for the defense is that all the warrants were issued in payment of demands for which the school district was legally liable. The case of Knox County v. Hunolt, 110 Mo. 67, is no authority against our views, but on the contrary supports them. There the county judges knowingly and willfully misappropriated the county school funds by applying them to the payment of ordinary demands against the county. This was in direct violation of the statute governing the subject, and also against the express inhibition of the constitution of the state. The court held such action to be malfeasance in office, for the consequences of which the judges were personally liable. But, in the case before us, there is no pretense that the money belonging to the

district was misapplied, the contention being merely that there was irregularity in the manner in which the money was withdrawn.

The authorities cited and relied on by the plaintiff would be pertinent, if the plaintiff was defending an action on the warrants themselves. In such a case the holder would be compelled to show that they were issued by order of a majority of the board of directors (R.S. 1889, Sec. 7990), which could only be shown by the record evidence which the statute requires to be kept. (R.S. 1889, Sec. 8012).

With the concurrence of the other judges the judgment of the circuit court will be affirmed. It is so ordered."

This case is further cited and upheld in the Consolidated School District No. 6 of Jackson County v. Shawhan, et al, 273 S.W., l.c. 185.

From the foregoing authorities, it will be noted that if this department has assumed the correct facts, the director would not be personally liable for having issued a warrant, the general rule being that school officers in the absence of fraud, false representation or corrupt motives, are not personally liable.

Since it is the opinion of this department that the director is not personally liable and no action can be brought, the second paragraph of your letter as to whether or not a resident taxpayer can bring suit in the event the directors refuse is not being answered at this time.

If this department is incorrect in its assumption of the facts, we would welcome another letter from you.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY M cKITTRICK,
Attorney General

OWN:AW

NEPOTISM:--While appointments prohibited by Section 13 of Article XIV are illegal, members of the board voting for related teacher, until they resign or have been removed, may function as directors and their actions bind the district; board may not date contract back so as to reward teacher for services performed under illegal contract voted by related directors.

10-23

FILED
77
52

October 17, 1933.

Mr. Nat B. Rieger,
Prosecuting Attorney,
Kirksville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Your opinion on the above subject issued under date of August 23, 1933, was by the County Superintendent of Schools sent to each school board member in the County and under it a question has arisen which the members of the board insist be certified to you.
>
> In a six member board early after it was organized a teacher was elected that was related within the prohibited degree to three members of the board. Thereafter the board proceeded to elect other teachers. After the receipt of your opinion the three offending directors resigned and new members were appointed and the board reorganized. By the time the new board was organized the school had been conducted one month.
>
> The new board, in view of your holding that the members of a school board are personally liable for moneys improperly paid to school teachers, are refusing to pay the teachers elected after the election of the related teacher, on the ground that if the board members voting for their relative did thereby forfeit their office that thereafter there was not a sufficient board to elect teachers and that after the illegal election of a related teacher the remaining acts of the offending directors were void.
>
> The new board have re-elected the teacher that was related to the board members. She has taught one month. The board desire to pay her for the services rendered and to date back her contract but do not want to become personally liable therefor. Would the new board be so privileged?"

You state that there were six members on your board and that three of them were related within the prohibited degree to a teacher which was elected. These related members of the board afterwards

resigned and the remaining three directors appointed new members to take their places. Before their resignation they participated in the election of other teacher. The related teacher was afterwards re-elected by the non-related board. You inquire first, whether the election, by the original board, of the unrelated teacher made their election illegal, and second, whether the related teacher who was re-elected by the unrelated board one month later, can be paid for the services rendered while she served under the contract made by the related directors.

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above provision of the Constitution, a director who votes for the election of a relative within the fourth degree, either by consanguinity or affinity, shall forfeit his office. Under that section of the Constitution, when the director has committed the prohibited act, he is subject to be removed in a proper legal proceedings brought for that purpose. He is entitled to his day in court and a hearing before a court of competent jurisdiction as to whether or not he has, as a matter of fact, committed acts which would cause him to forfeit his office. At such hearing he might show that the teacher for whom he voted was not related within the prohibited degree. In other words, he has the right to hold office until he has been convicted of violating Section 13 of Article XIV. The mere fact that he might have committed an act which would be cause for the forfeiture of his office does not mean that the committing of the act in itself automatically removes him from the board. It is always a question of fact as to whether or not such act has been committed and such accused director is entitled to a hearing on such question. Even though the director might have voted for a related teacher, he is still a member of that board until such time as he resigns or is removed therefrom.

(1). In answer to your first inquiry, therefore, it is our opinion that even though three of the members of the original board were related to a teacher which they elected, such action on their part made them liable for forfeiture of office, but that the act in itself did not automatically remove them so as to make their subsequent acts illegal. We are of the opinion that even though they had voted previously for the related teacher, that when they afterwards voted for the election of non-related teachers, that those non-related teachers were legally elected and are entitled to be paid for the services which they perform. At the time of the

election of these non-related teachers, the three members of the board had not resigned and had not been removed. Their actions, therefore, as members of the board would bind the district on their contracts with the teachers.

(2). In answer to your second inquiry, we are of the opinion that the contract of the related teacher, which was entered into by the original board, was void because three members of the original board were related to the teacher. The contract being void, she would not be entitled to be paid for her services during such period of time, as she taught under the original contract. After the resignation of the three related members from the board, three new members were appointed which completed the organization of the board. This second board was legally constituted and they entered into a new contract with the teacher who was related to the three members of the original board. This contract became legal and enforceable from the date of its execution. You would have no authority to date this contract back to cover the months' service which she performed under the illegal contract. If such could be done, then the effect would be that so far as she is concerned, the first contract was not illegal and was enforceable. If the new board did date the present contract back, such action on their part would breathe new life into the old contract for all intents and purposes, and one of the evils sought to be corrected by this amendment would not be eliminated. We are of the opinion, therefore, that the new board has no right to date back the new contract to cover the period of time during which the teacher taught under the illegal contract.

Very truly yours,

Frank W. Hagan

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

FEES OF COUNTY CLERK:

1. County clerk making up tax books and using ditto marks to designate townships and ranges allowed to charge for same at rate of ten cents per hundred words and figures.

2. County clerk not allowed to charge for writing the minutes of the County Court Record from which the record of the court is written.

FILED
77

11-3

October 21st, 1933.

Mr. Homer Rinehart,
Prosecuting Attorney,
West Plains, Missouri.

Dear Mr. Rinehart:-

We have received your letter of September 14, 1933, in which was contained a request for an opinion as follows:

> "I desire an opinion from your office in reference to the fees allowed a County Clerk on the following items:
>
> "1st. Is a County Clerk in making up tax books for the use of County Collector whereshe uses ditto marks to designate townships and ranges, etc., allowed to charge for ditto marks at the rate of ten cents per hundred words and figures?
>
> "2nd. Is a County Clerk allowed to make any charge for writing the minutes of the County Court Record, from which the record of the court is written, if so how much?"

I.

As to the first question propounded in the above letter it is the opinion of this office that a county clerk may charge for ditto marks used in making up tax books at the rate prescribed by the statute.

Senate Bill 50, Laws 1933, pages 421 and 422, repealing and reenacting sections 9876 and 9877, Revised Statutes of Missouri, 1929, provides on page 422, Laws 1933, in part as follows:

> "The clerks of the county courts shall receive ten cents per hundred words and figures for all words and figures extended by him in making out the tax books, one half thereof to be paid by the state and other half by the counties respectively, etc."

The above section as reenacted is made a part of Article 7, Chapter 59, Revised Statutes of Missouri, 1929, said Chapter being entitled "Taxation and Revenue". With this in mind, we now consider section 9978, Article 11, Chapter 59, R. S. Missouri, 1929, which provides as follows:

> "Sec. 9978. ABBREVIATIONS, WHEN ALLOWED.-- In all advertisements, notices, lists, records, certificates, deeds or other papers, required to be made by or under any of the provisions of this chapter, it shall be lawful to use letters, figures and characters, as follows: Letters may be used to denote township, range, boundaries, parts of section, parts of lots or blocks, or other subdivisions of real estate, in the following manner: T for township, R for range, L for lot, B for block, N for north, E for east, S for south and W for west, or any combination or combinations of the four last mentioned letters to denote parts of sections, lots, blocks or other subdivisions of real property. Figures may be used as may be requisite to state any number required, whether it be of township, range, survey, section, block, lot or part thereof, acres or fractions thereof, date of any kind, amount of taxes, interest or costs, or any other matter or thing which may be stated or given in figures. Characters, such as "〃", or the words 'do', or 'ditto', or 'same', may be used to denote continuation of township, range, years, tax due or other dates, and when either shall be so used, shall be deemed and held to denote the same as shall stand next above in the column in which any such character or word shall be so placed; any and all descriptions of real estate made under the provisions of this chapter by the use of letters, figures and characters, as provided in this section, when so made that the land or lot may be identified and located, shall be deemed and held to be good, valid and complete, as though the same had been written out in full. Dates of valuation and taxation, taxes, interest, costs, acres, blocks or lots, or any fractions thereof, or any other number or amount, when stated in figures, letters or characters, as herein provided, shall be deemed and held to be fully and fairly stated, as though the same had been written out in full."

Since both of the above quoted sections are part of the same chapter, that is, Chapter 59, the latter by its wording must be taken to refer to the former. The use of ditto marks is to be given the same effect as though the matter had been written out in full and since the legislature did not qualify this provision, it must be taken to be true for all purposes, including the counting

of ditto marks as words or figures for the purpose of measuring the amount of the fees of the county clerk. The clerk if he or she so chose could write all words and figures out in full and the mere fact that ditto marks are used thereby saving the time of both clerk and county, should not penalize the user thereof by a commensurate reduction of fees.

The courts of Missouri have never passed on this identical question but have often upheld the use of well understood and common abbreviations in the making up of tax books and assessment rolls. See State ex rel Wyatt vs. Vaile, 122 Mo. 33, l.c. 49. This, however, is beside the point as we feel our opinion in this matter to be clearly supported both by statute and good conscience.

II.

As to the second question contained in your letter quoted above, it is the opinion of this office that the county clerk is not entitled to make any charge for writing the minutes of the County Court Record from which the record of the court is written.

Section 11781, Revised Statutes of Missouri, 1929, sets out with particularity all the services of the county clerk for which fees shall be allowed, and no provision for a fee thereunder can be construed to include the mere writing the minutes of the County Court Record. Compensation by fee is provided for copying and filing various papers and records and such provisions are very broad in scope. No where in the statutes, however, can any provision be found providing fees for the original writing of such papers as the minutes referred to above.

The general rule on the subject is stated in the case of State ex rel. Wedeking vs. McCracken, 60 Mo. App., l.c. 656, and is adverted to in the case of King vs. Riverland Levee Dist., 279 S.W. 195, at page 196, in the following language:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12, loc. cit. 27, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656,

> to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra."

Further, the language of the court in the case of State ex rel. Linn County vs. Adams, 172 Mo. 1, at page 7, is illuminating on this point:

> "In order to maintain this proposition, some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law that a right to compensation for the discharge of official duties is purely a creature of statute and that the statute which is claimed to confer such right must be strictly construed. (Jackson County vs. Stone, 168 Mo. 577; State ex rel. vs. Walbridge, 153 Mo. 194; State ex rel. vs. Brown, 146 Mo. 401; State ex rel. vs. Wofford, 116 Mo. 220; etc."

With the above in mind, it is clear that the county clerk cannot be allowed to make any charge for writing the minutes of the County Court Record.

Very truly yours,

CHARLES M. HOWELL, Jr.,
Assistant Attorney-General.

APPROVED:

_____
Attorney-General.

SCHOOLS:
SCHOOL DISTRICTS: **Under Section 9217, R. S. Mo. 1929, school districts must accept colored students and then collect the tuition quarterly from the school district sending them.**

12-11

November 26, 1934.

FILED

62

Mr. Homer Rinehart,
Prosecuting Attorney,
West Plains, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Under Section 9217 of the R. S. 1929 when a number of colored children enumerated in a school district is less than eight, they have the privilege and are entitled to attend school in the nearest district in the county wherein a school is maintained for colored children, and transportation and tuition charges shall be paid by said district in which the colored children live.
>
> Has a school district, which maintains a school for colored children, the right and authority to stop said colored children, who live in another district and who have no colored school in their district, from attending school when the School Board of the district in which the colored children live refuse to pay the tuition? Or, is it mandatory that said school district receive said colored children and take legal action to force the collection of their tuition from the other district?"

Section 9217, R. S. Mo. 1929, among other things, provides as follows:

> "When there are within any district in this state eight or more colored children of school age, as shown by the last enumeration, the board of directors of such school district shall be and they are hereby authorized and required to establish and maintain within such school district a separate free school for said colored children or in lieu thereof shall pay the transportation charges to any district in the county wherein a school is maintained for colored children. Provided if the number of colored children enumerated is less than eight they shall have the

> privilege and are entitled to attend school in the nearest district in the county wherein a school is maintained for colored children and the transportation and tuition charged incurred shall be paid; said transportation shall not exceed five dollars per month and tuition charges shall not exceed the pro rata cost of instruction. The amount due the school district which the colored children attend shall be paid quarterly upon receipt of an account from the district wherein the colored children attend showing the amount due for said colored children. Provided further that the said school board in making the estimate for the ensuing year shall take into consideration the expenses for carrying out the provisions of this section. * * * Provided further, that should any board of directors neglect or refuse to comply with the provisions of this section, such school district shall be deprived of any part of the public school funds so long as the provisions of this section are not complied with."

It appears from your inquiry that there are less than eight colored children in the district and that they are being sent to your district. You inquire whether or not you have a right to refuse admittance of these children without the tuition fees being paid, or whether you should first admit them and then collect the tuition from the district wherein they reside.

The foregoing section gives to the colored children, where there are less than eight enumerated in the district, the privilege of attending school in the nearest district in the county wherein a colored school is maintained, and the transportation and tuition so incurred shall be paid by the district wherein they reside. The statute expressly provides that "The amount due the school district which the colored children attend shall be paid quarterly upon receipt of an account from the district wherein the colored children attend showing the amount due for said colored children." It appears from the foregoing sentence that it was the intention of the Legislature that the children should be admitted without any tender of tuition from the district, or without the tuition being paid in advance. Said sentence provides that the amount due the school district shall be paid quarterly upon a receipt from the district where the children attend school. That indicates that the children are to be admitted without any tender or payment of tuition, and at the end of each quarter the district wherein the children attend school shall render an account to the district sending the children for the tuition due. The school district then is required to pay the tuition due.

If the school district refuses to pay the tuition

due upon the rendering of the quarterly account, as provided in the statute, then you will have to bring an action against them to collect it. However, you might also call their attention to the proviso in the latter part of said Section which provides that should the Board of Directors refuse to comply with Section 9217, that such school district shall be deprived of any part of the public school funds so long as they refuse to comply with said Section.

It is therefore the opinion of this Department that where there are less than eight colored children enumerated in a district, that those children are entitled to attend school in the nearest district in the county where a colored school is maintained, and that the district where they attend is not entitled to refuse admittance to them because the tuition is not paid in advance; that at the end of each quarter the district where they attend school shall render an account to the district which sends the students, and then the school district sending the children should pay such tuition. As we construe the above section the district must accept these students and then collect the tuition from the district sending them.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

HAS THE CITY OF THE THIRD CLASS (EXCELSIOR SPRINGS) THE RIGHT TO DEED TO THE STATE HIGHWAY COMMISSION RIGHT OF WAY THROUGH PUBLIC PARKS FOR HIGHWAY ROAD PURPOSES?

ANSWER: IT HAS.

February 24, 1933

FILED
78

Hon. James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

Answering your letter of February 20, 1933, relative to the inquiry of Dr. C. C. Thomas as to whether the City Council could give a deed to the right-of-way through their public parks to the State Highway Commission (I take it for a highway through same):

In the ordinance you enclosed (and herewith returned to you, as per request) when this park was established, it says "An Ordinance to provide for establishing a public park in the City of Excelsior Springs and for taking private property therefor", and I assume from Article 3 that the said park was legally and properly established through suitable proceedings in the Circuit Court.

1. Under Section 6719, R.S. 1929, cities of the third class may become bodies corporate under the provisions of this article * * * and may receive and hold property, both real and personal, within such city * * * and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal it now owns or may hereafter acquire. The city having acquired this property for park purposes under the ordinance you refer to has undoubtedly the right to dispose of such portions as may seem proper (within reasonable limits) under the foregoing section.

See also Sections 8131 and 8132.

Section 8131 says:

> "* * *and convey such rights-of-way or any other land, to the state of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges."

2. Under Section 8111 the State Highway Commission shall have power to purchase, lease or condemn lands * * * acquire the right of way for the location, construction, reconstruction, widening, improvement or maintenance of any state highway or

any part thereof * * * acquire the right-of-way for the location, construction, reconstruction, widening, improvement or maintenance of any highway ordered to be built by the Bureau of Public Roads of the Department of Agriculture of the United States Government * * * acquiring lands for any other purpose necessary for the proper and economical construction of the State Highway system * * * and if necessary said Commission shall have power to condemn such lands in the name of the State of Missouri.

1. It will be seen under the first three sections, namely, 6710, 8131 and 8132, the City of Excelsior Springs has the right to dispose to the State the right-of-way through this public park.

2. Under Section 8111 the State has the power to acquire and use for highway purposes the right-of-way through the city park.

Therefore, it would seem that the City Council of Excelsior Springs has a right to deed to the State the right-of-way and the State, under the sections referred to, has a right to accept and use same.

Hoping this will answer the purposes and furnish the information to you that Dr. Thomas and others wish, I am,

Yours very respectfully,

Geo. B. Strother

GEO. B. STROTHER,
Assistant Attorney General

GBS...iac

Approved:

_____
Attorney General.

COMMON SCHOOL DISTRICTS cannot employ member of school board as teacher and should not employ member for other work. (~~Not~~, Sec. 9360 R. S. 1929, does not apply)

April 13, 1933.

FILED
78

Hon. James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Rooney:

Your letter of April 8th, received and noted, in which you say you have a common school district in the west part of your county, known as Munger School District, which has three directors. It appears that one of the directors has on several occasions done repair work on the school building and has received compensation for his work, which compensation has been by some folks living in the district considered excessive in amount. You also refer to Section 9360, R. S. 1929, stating this is forbidden in cities, town and consolidated school districts and asking whether same applies in case of common school districts.

Section 9360, R. S. Mo. 1929, says,

"No member of any public school board of any city, town or village of this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: * * * * * that it shall be the duty of each of said boards, and of the board of directors in other school DISTRICTS in this state having graded schools, to make and publish, annually, on or before the 15th day of July in each year, * * * * * written statements * * *, a detailed statement of all receipts of school moneys, when and from what source derived, and of all expenditures, and on what account; * * * * *, and the secretary shall forward a copy of said report to the State superintendent of public schools at Jefferson City. * * * * * (failure to do so) shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars."

Relative to your first question, Section 9209, R. S. Mo. 1929, expressly states,

> "The board shall not employ one of its members as teacher, nor shall the teacher serve as clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk."

Section 9324, R. S. 1929, states that boards of education must enforce the laws.

Section 9234, R. S. 1929, states that no teacher shall be employed without a certificate etc.

Section 9235, R. S. 1929, says (about teaching without a certificate):

> "Any director who shall endorse or encourage such teacher in such unlawful conduct shall be deemed guilty of a misdemeanor and punishable by a like fine."

Answering your first question, it is our opinion that Section 9360 does not apply to common school districts, but the spirit of same should be observed in the matter of directors working for the school board as Section 9209 expressly says that a director cannot be employed as a teacher, and Section 9235 provides the penalty for violations, and a school director cannot, naturally, make a contract with himself to do work (See Sec. 2962, R. S. 1929) and a contract made with himself would not be legal or binding and he could not recover for same; it would be improper for the school board to employ one of their members for compensation; or near relative, Art. 14, Sec. 13, Const.

In regard to your second question, as to whether under Section 9360, would common school districts be compelled to publish statement as required therein, it is our opinion that common school districts are not required to publish or forward to the state superintendent at Jefferson City, copies of their reports, but are governed by Sections 9289, 9291, 9209, R. S. 1929, and kindred sections.

Very respectfully,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

PROSECUTING ATTORNEY CLAY COUNTY: CHATTEL MORTGAGES: Can a contract for a crop mortgage be filed as a chattel mortgage; priority question.

May 25th, 1933. 6-14

FILED
78

Mr. James S. Rooney,
Prosecuting Attorney Clay County,
Liberty, Missouri.

Dear Mr. Rooney:-

We acknowledge receipt of your letter of May 10, 1933, enclosing a letter from Nicholas Mosby, Recorder of Deeds for Clay County, as follows:

"I am enclosing a copy of a Contract for Crop Mortgage marked 'Exhibit A', which has been presented to me for filing.

Will you kindly inform me whether or not such a contract is eligible for filing as a chattel mortgate is filed; and if so, if this contract would take priority over a chattel mortgage filed at a later date.

I will appreciate your prompt reply in regard to this matter as I think it probable that more of these contracts will be presented to me for filing. I would also appreciate having the opinion of the Attorney General of Missouri, if you will be kind enough to write him."

"Exhibit A", referred to above:-

"CONTRACT FOR CROP MORTGAGE
given to

_____
Kansas City, Mo.

WHEREAS I, the undersigned of _____County, _____, am indebted to _____, in the sum of _____ Dollars, ($_____), and said indebtedness being evidenced by _____certain promissory notes, one for $_____ dated the _____day of _____, 1932, and payable the _____day of _____, 1932, and one for $_____, dated the _____day of _____, 1932, and payable on the

_____day of _____, 1932, and

WHEREAS, _____ of said notes becoming due on _____, 1932, still remains unpaid:

NOW, THEREFORE, in consideration of a renewal or extension of the time of payment of said note I hereby agree to execute a chattel mortgage in favor of the said _____, their heirs, successors or assigns, on certain crops to be planted by me in the spring of 1933, to wit:

The above chattel mortgage is to be given as additional security, and I agree to execute said mortgage as soon as the above crops have been sown and a mortgage thereon can validly be made; and I hereby expressly agree that the mortgage so given shall be a valid first lien upon the aforesaid crops.

PROVIDED, that if the undersigned shall pay the indebtedness evidenced by the certain promissory notes mentioned above, on or before the _____day of June, 1933, then this contract shall be void; otherwise to be in full force and effect.

WITNESS my hand and seal, this 28th day of February, 1933.

_____, Witness _____(Seal)

_____, Witness _____(Seal)"

Article 3 Chapter 22, Revised Statutes of Missouri, 1929, sections 3097 to 3102, inclusive, same being the statutory article on Chattel Mortgages, makes no provision for the filing of such an instrument as "Exhibit A". The instrument purports to convey nothing and is not a mortgage but a mere agreement to execute a mortgage at a future time, hence it could not be filed as a chattel mortgage is filed.

Section 11543, Revised Statutes of Missouri, 1929, however, provides as follows:

"Sec. 11543. What shall be recorded.--It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of

> writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

We are of the opinion that the last mentioned section would provide for the recording of such an instrument as "Exhibit A" if it were properly acknowledged according to law.

As to the further question, whether such recorded contract would take priority over a chattel mortgage filed at a later date, we have, after an exhaustive perusal of the authorities, been unable to find any Missouri case construing the particular type of transaction involved herein. The validity of a chattel mortgage is governed by the laws of the state in which the mortgaged property is located. Steckel vs. Swift & Co., 56 S. W. (2d) 806. The absence, therefore, of any authority on this precise question makes it impossible for us to say definitely just what the decision would be should the matter come before the courts of this state. In this connection, however, it seems plausible to advert to the case of Brunswick & Balke Co. vs. E. L. Martin & Co., 20 Mo. Appeals, 158. This case, though different in many ways from our present situation, was a case where in a contract of sale the purchaser agreed to execute a chattel mortgage on the property to secure certain notes given as part of the purchase price, the seller, through his agent, to hold possession of the property until said chattel mortgage was duly executed. Through some mistake the purchaser obtained possession and mortgaged the property to a third party; subsequently, the same purchaser executed the agreed mortgage to the seller. In a contest between the seller and the third party as to their rights the seller prevailed.

As said above, the Brunswick Case does not involve the same legal factors as would a case involving an instrument such as

"Exhibit A", but in view of the fact that the courts of Missouri have never passed on your exact question, the similarity of the two situations may be indicative as to how our courts would regard it.

Very truly yours,

CHARLES M. HOWELL, Jr.
Assistant Attorney General.

Approved:

_____
Attorney General

CMHJr:LC

When marriage license becomes a public record.

May 29th, 1933

FILED
78

Hon. James S. Rooney,
Prosecuting Attorney,
Clay County,
Liberty, Missouri.

Dear Sir:

We have your request of May 13th, 1933 for an opinion upon the following state of facts submitted to you by the recorder of deeds of your county:

" I feel that I am imposing on you by bothering you with so many questions, but I have one more question that I would appreciate having your opinion on, and I will be very thankful to you if you will also get an opinion from the office of Attorney General in regard to this matter.

It has been the custom in Clay County, for many years, to have applicants for a marriage license sign an application, or an affidavit, in regard to their addresses, ages, etc.

I am contemplating doing away with the system of having the applicants sign this affidavit, as I understand this old procedure is merely for the convenience of the officer issuing the license, and that a marriage license is not considered a public record until it is returned to the officer who issued it.

Now my idea is this, - get the information from the applicant and place it directly on the marriage license I am issuing, and save the time and formality of bothering with the application for marriage. Of course, you understand, I will keep a record of the names and addresses, to be used in checking up on the unreturned ones, so that I may be able to comply with the Statutes of Missouri in such cases.

It is my understanding that the officer issuing a marriage license has no authority to administer an oath to an applicant, and even though he did, the applicant would not be committing perjury if he swore falsely.

It appears to me to simmer down to this, - when does the issuing of a marriage license become a public record? If it is considered a public record from the time it is issued, then I suppose the system we have in force at this time is the proper way, but if it is not a public record until it is used and returned for record, then I think the application blanks are unnecessary.

I will certainly appreciate having an opinion in regard to this matter, as I thought perhaps I had better be sure before I made the change."

Under Section 2979 R. S. 1929, it is made the duty of the recorder of deeds to keep all marriage licenses issued in a well-bound book kept for that purpose. We call your attention to Section 2978, R. S. 1929 which provides two separate forms,one to be used in authorizing the marriage, and the other to be used by the person officiating at the marriage. Each of these constitutes a separate document by itself. A marriage license becomes a public record as soon as it is issued. In State ex rel. v. Moore, 96 Mo. App. 431, l.c. 434, the Court said,

" While none of the statutory provisions to which we have called attention in express terms require that the marriage license shall be recorded at the time it is issued, still, is not this requirement as clearly implied as if it had been expressed? May not this duty be fairly deduced from the general scope of these provisions? It will be observed that the statute requires the recorder to record all marriage licenses in a well-bound book kept for that purpose, and this is the only record of such licenses he is authorized to make. No memorial of such licenses is anywhere required to be made and recorded. If he is not required to record such licenses when issued, how can he tell from any record in his office that any one or more of them have not been returned? If he has not recorded them when issued by him, how is he to certify to the grand jury, as is his duty under said section 4319, a list of such of them as have not been returned to him by the person solemnizing the marriage under them within ninety days after the issue thereof? From what record authorized by law does he make out and certify this list? Is it to be made out from a

private memorandum or list kept by him, or from memory? A construction lending countenance to this would be intolerable. Suppose the recorder die, resign or his term of office expire, while one or more licenses issued by him have not been returned by the person solemnizing the marriage within the ninety days required by the statute, how can his successor certify the list required by said section 4319? To what record or memorial of his office can he have access to ascertain what licenses have not been timely returned? Suppose some person who has solemnized a marriage under a license has not made return thereon to the recorder, as required by the statutes, is indicted by the grand jury under section 4318 for his failure to return such license, how is the State at the trial on the indictment to establish its prima facie case? The license itself would be the best evidence but that would be in the possession of the defendant; and the record of such license would be the next best evidence, but since there would be no such record the State's case would probably fail at that point.

The manifest purpose of the marriage-license statute was to make such license returns thereto and certificates of marriage, public records so as to give notice to all the world of the occurrence to which they severally relate. Their contents thereby become matters of public knowledge because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, that knowledge of them may be public. It would therefore seem that a construction of the marriage license statute that requires the recording of all licenses when issued would obviate and clear away the difficulties which present themselves under the contrary construction for which respondent contends. After a rather full examination of the entire marriage-license statute in all its length and breadth, we have been unable to escape the conviction that the Legislature intended that the licenses authorized by it should be placed on record by the recorder issuing them when issued, and in accordance with that conviction we must so rule. This construction, it seems to us, will best subserve the purpose of the statute."

It will be noted that under Section 2960 R. S. 1929, that the Legislature itself has treated the marriage license and the return thereon as two separate and distinct documents. This intent has been written into Section 2964 R. S. 1929 by requiring the person who solemnizes the marriage to keep a record of such return.

It is therefore the opinion of this office that marriage licenses when issued, must be properly recorded, and then and there become a public record.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney-General

FER/mh

APPROVED:

ROY McKITTRICK
Attorney-General

SCHOOL DISTRICTS:

Directors of school district cannot be compelled to draw warrants where funds are not available, but such fact is not decisive as to district's liability for debt.

FILED
78

June 12, 1933.

Mr. Nat B. Rieger,
Prosecuting Attorney,
Kirksville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of May 29, 1933, in which you inquire as follows:

> "I respectfully request official opinion upon the following state of facts: The Novinger Consolidated district contracted with its teachers for a definite salary for each teacher with the expectation of receiving enough funds from taxation and state aid to meet the amount contracted for. But the amount of delinquent taxes and the greatly reduced amount of state aid made it impossible for them to pay the teachers in full. Does the Missouri law require the school board to issue warrants on the money provided for in the above statement or has the board the power to withhold warrants? Can the full state guarantee be considered as money provided for?
>
> Thanking you for this favor and ever assuring you of my cooperation, I am."

It is the opinion of this Department that the directors of the district cannot legally be compelled to issue a warrant under the facts stated in your letter, when, at that time, they know there are not any funds available to pay the warrant.

In Jacquemin & Shenker v. Andrews, 40 M. A. 507, a suit was brought by a teacher against the directors individually for issuing a warrant when there were no funds in the treasury to pay the warrant, and the directors knew such fact. The court at page 510 says:

> "We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said warrant on the treasury, unless there was money on hand of that fund, out of which it could be paid, still this prohibition must not be construed so as to preclude the directors from anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury

for that school year, from either or all of the three sources from which that fund, by law, is derieved."

Although that suit was against the directors individually, and not against the district, the court above indicated that the statute prohibited the drawing of warrants when they knew there were no funds in the treasury. The court, however, relieved the directors from individual liability on the theory that they had a right to anticipate that the revenue provided for would be sufficient to pay the warrants.

35 Cyc. 980, provides as follows:

Section d. "A school-district warrant, order, or certificate of indebtedness is merely a mode of reaching money in the treasury of the school-district, to be disbursed under authority of law; and is ordinarily issued for the payment of general school debts and expenses, and under some statutes may be issued for money borrowed to meet such expenses. Such a warrant, order, or certificate, is neither a bill, note, check, nor contract, nor a liquidated and settled account, nor a satisfaction of the indebtedness for which it is given, and, standing alone, it creates no liability against the school district or township."

Under the above rule laid down in Cyc., it is apparent that the legal indebtedness is not created against the district by the mere issue of the warrant. In Tate v. School District No. 11, 23 S. W. (2d), 1013, it is held that the pecuniary liability of the district is created from month to month as the services of the teachers are performed. The warrant is a mere order upon the treasurer which by mandamus he may be compelled to obey, if there are such funds on hand, but we do not believe that the board could be compelled to draw warrants in favor of the teachers when there is no money in the teacher's fund with which to pay the warrants.

However, the fact that the board might not be compelled under such circumstances, to issue a warrant, should not be construed to mean that the teachers might not obtain a judgment against the district for the debt created by reason of the execution of the contract and the performance of services by them.

In Rudy v. School District, 30 M. A. 113, a suit was brought by a school teacher against a school district for the balance of salary due under the contract. The school was closed by reason of the fact that the levy made for school purposes was not sufficient to complete the term of school The court, at page 119, says:

> "In support of this defense the defendant invokes the provision of section twelve, article ten, of the constitution of the state. This, so far as material, reads as follows: 'No county, city, town, township, school district, or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' But the defence here set up fails to show that the revenue "provided for" for the school year in question was not sufficient to pay all the teachers; it merely shows that there was a failure to pay into the school district treasury enough for that purpose. If this is a sound view, then the rights of the teacher, under his contract with the district, may be displaced by the negligence or fraud of the tax collector. If the collector negligently fails to collect the school taxes which are levied, or collects them and fails to turn them over, the directors for this reason may, even upon the brief nofice of five days, cancel the contract with the teacher. We are of opinion that this is not the law. Undoubtedly the constitutional provision above quoted is self-enforcing. (Citations omitted). But, in order to make it appear that the contract with the teacher was ultra vires on the part of the directors, it must appear that not enough revenue was "provided" longer to continue the school and not merely that not enough was collected and turned over to the treasurer or the school board."

The rule seems to be that the teacher may recover under his contract for services performed, unless the contract be ultra vires, and to make the contract ultra vires under the aforesaid constitutional provision, it must appear that enough revenue was not "provided for." If sufficient revenue was provided for but not collected, as in the Rudy case above, such fact does not make the contract ultra vires, and the teacher may resort to a suit against the district. We have discussed this question because it seems involved in the inquiry which you made.

According to your inquiry it appears that sufficient revenue was provided for by the directors of the district, and it is our opinion that the portion coming from state aid, as well as other sources, may be considered in arriving as to the amount "provided for."

It is, therefore, the opinion of this Department that the teachers may not compel the board to issue them warrants. The fact, however, that they may not compel the issue of warrants

does not mean that they may not recover under their contract for services performed in a proper proceedings against the district. In other words, whether or not they may have the right to demand the issuance of a warrant, which we do not believe they can do, under the facts stated in your letter, yet, such fact is not relevant in determining whether or not the said teachers may obtain a judgment against the district for the debt created. The debt exists regardless of whether the warrant is issued or not, the warrant being only a method used in discharging the debt.

We have discussed the question of ultimate liability of the district for the reason that it seems to be the ultimate question involved in your inquiry.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

COUNTY DEPOSITORY: Liability of County Treasurer on official bond where no depositary bond given.

August 14, 1933.

FILED
78
38

Hon. L. D. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Rice:

This Department is in receipt of your letter of August 4th, 1933, with request for opinion, which letter is as follows:

> "Mr. John W. Franks, County Treasurer of Newton County, Missouri, has asked me to obtain from you an opinion on certain matters relative to his office.
>
> Attached hereto you will find Exhibit "A" which is an order of the County Court of Newton County, Missouri accepting bids for depositories for county funds, made on the 3rd day of May, 1933. After this order was made and entered of record depository bonds were made by the Granby Miners Bank of Granby, Missouri covering one-tenth of the funds, and by the State Bank of Granby of Granby, Missouri, covering one-tenth.
>
> The First National Bank of Neosho, Missouri, which received four-tenths of the deposits, and the Bank of Neosho of Neosho, Missouri which received four-tenths of the deposits have failed to make depository bonds as provided in this court order, and also as provided by the statutes. The two banks in Neosho give as their reason for not making this bond that the members of their Board of Directors will not sign the bond and they cannot afford to get a surety company's bond covering these deposits.

The New York Casualty Company with offices in Kansas City, Missouri, made the bond for Mr. John W. Franks, County Treasurer. This bonding company is now insisting that Mr. Franks compel the County Court of Newton County to require the two banks in Neosho to furnish bond. The County Court refuses to take any action in the matter for the reason that they say they could not get a depository in any part of southwest Missouri that would agree to furnish bond, and for that reason and for the reason that they regard the two banks here as being absolutely solvent they refuse to do anything in the matter.

The County Treasurer wants an opinion as to whether he or his surety would be liable if he follows instructions of the County Court and deposits the money in the two banks in Neosho as ordered, and the banks should fail and the deposits be lost.

Also, what steps can be taken to require the County Court to secure bonds from these two depositories.

He has been advised that the surety company is only liable for his personal integrity, and if he deposits the money in the banks designated by the County Court, it relieves him and his surety from any liability for loss by reason of the banks' failure. The surety company seems to take a different view of the matter."

You do not state in your letter but we assume that the county court proceeded regularly under Sections 12184, 12185 and 12186, R. S. 1929, in regard to the advertising for bids for the county funds and the opening of the bids, and the court followed the statutes in every particular up to the giving of the depository bond by the bank as provided by Section 12187.

We set out Sections 12187 and 12198, R. S. 1929, for the reason that said sections are directly involved in your particular question, that is, the liability of the county treasurer, or his sureties, in the event no depository bond is given by the bank

and the treasurer follows the instructions of the county court and deposits the money in the two banks in Neosho, and the banks should fail and the deposits be lost.

Section 12187 R. S. 1929, provides as follows:

"BOND OF DEPOSITARY.--Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court, and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety; Provided, that the court may accept in lieu of real estate as security bonds of the United States or of the state of Missouri, which said bonds shall be deposited as the court may direct; the penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court, and said bond shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon said depositary and for the payment upon presentation of all checks drawn upon said depositary by the proper officers of said county or any township whenever any funds shall be in said depositary, and that all interest will be paid promptly, and that all said funds shall be faithfully kept and accounted for according to law; and for a breach of said bond the county or any school district or township of said county or any person injured may maintain an action in the name of the county, to the use of the complainant."

Section 12198 R. S. 1929, provides as follows:

> "COUNTY TREASURER EXEMPT FROM LIABILITY, WHEN.--The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

In the case of Glaze v. Shumard, 54 S. W. (2d) 726 l. c. 728, it is said:

> "It is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise."

As was said by the Supreme Court in the case of City of Fayette v. Silvey, 290 S. W. 1019 l. c. 1021:

> "* * * The general rule, which is the rule in this state, is that one of the duties of a public officer instrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.
>
> In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this

> general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22 l. c. 24, 66 A. L. R. 1053, the Missouri Supreme Court in this leading case said:

> "The ruling in the University City Case was made in recognition of the rule followed in this State, and generally followed that the liability of the treasurer of a public corporation for its funds coming into his hands is absolute. State ex rel. v. Powell, 67 Mo. 395; 29 Am. Rep. 512; State ex rel. v. Moore 74 Mo. 413; 41 Am. Rep. 322; County of Mecklenburg v. Beales, 111 Va. 691, 69 S. E. 1032, L. R. A., (N. S.) 285. The rule is one founded upon considerations of public policy."

In the case of Everton Special Road District v. Bank of Everton, 55 S. W. 335 l. c. 336, the Supreme Court stated:

> "In selecting a county depository the steps may be all regular up to the execution of a bond by the depository and then if the bond given does not substantially comply with the requirements of the statute, the depository selected is not the legal depository."

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751 l. c. 754, the Supreme Court said:

> "As heretofore stated, all county funds are required by law to be deposited in a county

> depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augumented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them."

The Springfield Court of Appeals followed the Huntsville Trust Company case in the case of Consolidated School District v. Citizens Savings Bank, 21 S. W.(2d) l. c. 788, and the Huntsville case is cited with approval in the case of White, County Treasurer, v. Greenlee, 49 S. W. (2d) 132.

Also, in the case of Boone County v. Cantley, Commissioner, 51 S. W. (2d) 56 l. c. 58, the Supreme Court further said:

> "A bank which has given a bond that does not comply with the provisions of Section 12187 R. S. 1929, regardless of the action taken by the county court with respect to it, is not a county depositary either in law or in fact. And upon the receipt of county funds by such a bank, under color of being a county depositary, a trust as to funds so deposited arises in favor of the county. Huntsville Trust Co., v. Noel, 321 Mo. 749 l. c. 757; 12 S. W. (2d) 751."

In the case of State ex rel. Cravens, to Use of Consolidated School District No. 2 v. Thompson, 22 S. W. (2d) l. c. 198, the court made the following statement which is appropriate to the question here involved:

> "It is plaintiff's position, as reflected in the first assignment of error, that the recital in the said minute, 'Bond of D. W. Thompson as treasurer approved. Money to be kept in Farmers Trust Co.,' was not sufficient in law to designate a depository for the moneys of the district and to authorize Thompson to place the money there, because not in conformity with the provisions of sections 9582-9586, Rev. St. 1919, governing procedure in respect to county funds; and that, when the power of an inferior body to do a thing depends upon a condition precedent prescribed by statute, all the world must take notice of that limitation of its power and authority, and determine at their own peril whether or not the condition has been complied with and the authority granted; and that the act of the board of education in directing by minute entry only that the funds of said district be kept in the Farmers' Trust Company of Grant City, without first advertising for bids, and without requiring a bond of the depository selected, was void and of no effect, and not binding on the district; and that it was the duty of the treasurer before depositing the funds with the Farmers' Trust Company to see and know that said depository had been properly and legally selected and designated, and that a bond of said trust company had been properly approved and filed, and his failure to do so renders him and his sureties liable."

From the above cases we find that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise; that the bank or trust company does not become a county depository merely by being designated as such in an order of the county court. It must qualify as a depository by giving the security prescribed by

Section 12187 R. S. 1929, and where the statutory procedure in the selection of the county depository has not been followed, as in your case, by the giving of the bond and the approval by the county court, the banks in question are not the legal depositories of your county.

It is, therefore, the opinion of this Office that since the banks in your county, mentioned in your letter, have not given the depository bonds as required by statute, the county treasurer depositing moneys in said banks, belonging to said county, does so at his own peril, and in the event of the failure of said banks and the loss of county funds thereby he and his sureties become liable on his official bond.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

IN RE: HOURS OF WORK FOR GROCERS.

V

I-24

August 22, 1933.

FILED
78
40

Mr. E. Robertson
Robertson's Market
Mexico, Missouri

Dear Sir:

Replying to your letter of August 15 which reads in part as follows:

> "Ours is a small suburban grocery, whose volume of business does not justify hiring a clerk. We have signed and received our blue eagle, as we were advised and eager to do.
>
> "Can we be required to hire a clerk or take down our blue eagle? And must we shorten our hours to conform exactly to those set down by the local retailers' associations, when doing so really injures our business and inconveniences our customers, who are largely factory workers who wish to trade or place orders on way to work. The hours prescribed by our local grocers' organization require us to open our doors at the exact hour our customers go to work.
>
> "By opening one half hour earlier and closing one half hour later are we violating our code?
>
> "And must a small store hire a clerk where its business will not justify it- or surrender our blue eagle?"

it is the opinion of this department that, other than the general provisions of Section 13,205 R. S. Mo. 1929, making the period of eight hours a legal day's work, there is nothing in the statutes of Missouri restricting the hours of work for grocers. Of course, if the grocers of your community form a voluntary organization and fix the hours of work, it is then a question of whether or not members of such organization live up to same.

This department gathers from your letter of August 15 that the grocers of Mexico have formed an organization under the National Industrial Recovery Act. If you have joined the same, of course, you are subject to the provisions of said act unless you secure an exemption therefrom under section 3, title I. of said National Industrial Recovery Act.

It is the understanding of this department that the Federal industrial recovery act prohibits the adoption of codes by organizations such as a grocers' organization that will promote monopolies or monopolistic practices or eliminate or oppress small enterprises or will discriminate against them. Section 3 of said industrial recovery act provides as follows:

> "Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices;* * * * . The President may, as a condition of his approval of any such code, impose * * * * such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate

the policy herein declared."

Your letter states that it is your opinion, the operation of the National Industrial Recovery Act, through the grocers' organization in Mexico, is working a hardship on you because of the different conditions surrounding your business and that of the grocers in the business section of your city. This difference of conditions would be a basis for you to apply for an exemption as to hours under the industrial recovery code. The industrial recovery act is to be put into operation and carried out in this and other states through local boards and agencies as this department understands it.

This department suggests that you get in touch with the State organization appointed by the National Administration at Washington to administer the National Industrial Recovery in this State and present to them the difference in the conditions surrounding your business and that of your fellow craftsmen engaged in following their avocation in the business part of Mexico and make that the basis for the request for an order exempting you from the hours of labor accepted by the grocers' organization under the industrial recovery act for Mexico, Missouri.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney-General

ECC/AJ

TAXATION:--Operative dates of Sections 9969 and 9952 as contained in Senate Bill 94, respecting penalties.

8-25

August 24, 1933

FILED
78

Honorable Nat. B. Rieger
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion of this office, your request reading as follows:

> "Does Senate Bill No. 80, which appears at page 423 S. A. Mo. 1933, and which provides that during the months of July and August 1933, Collectors shall collect ½ of the penalties due, etc, apply to new Section 9969 S. A. Mo. 1933, or does it apply only to the old Section 9969 (R. S. Mo. 1929) only, in other words is the collectors commission on delinquent taxes paid during the month of August bases on ½ of 4% or ½ of 2%.
>
> Does Section 9952 S. A. Mo. 1933, which provides a limit of 10% on taxes more than a year in delinquency, take effect on July 25th 1933 and apply during the remainder of this year, or does it become operative on January 1, 1934."

In considering your first inquiry, we refer to Section 9969 as contained in the 1929 Revision, which provides for additional compensation to collectors for the collection of back taxes, portions of which read as follows:

> "Sec. 9969. FEES AND COMPENSATION.--Fees shall be allowed for services rendered under the provisions of this article as follows: To the collector,* * * * four per cent. on all sums collected;* * * *."

The change with which we are here concerned which was made in the foregoing section when re-enacted as a part of Senate Bill 94 was the change of "four per cent" to "two per cent.". Senate Bill 94 contained no emergency clause, and accordingly

was not effective until July 24, 1933.

Without question, Senate Bill 80 is operative as to "penalties, interest and costs" accruing under Senate Bill 94, as well as under the law prior thereto. Senate Bill 80 was passed by the General Assembly and approved by the Governor subsequent to Senate Bill 94, and by all rules of construction, would take precedence over the latter. This is conclusive in view of the statement of Judge Hays in the case of State ex rel. v. Koeln 61 S. W. (2) 750 l. c. 756, which reads as follows:

> "No. 80 is a valid and presently effective and operative temporary law and effectually, during the limited period of its operation, suspends the effectiveness and operation of Nos. 110 and 115, and also suspends, during the same period and by necessary implication, such statutory provisions contained in said chapter on taxation as are in conflict with No. 80, and particularly the provisions relating to the compensation of the respondent for any and all his services rendered and to be rendered during said period incident to back or delinquent taxes or the collection thereof.

Having concluded that both laws are subject to Senate Bill 80, we are left to determine under which Section 9969 the collector is entitled to be compensated.

Respecting the status of the 4% commission after the repeal of the sections providing therefor, we turn to article 2 of chapter 4, here we find a number of sections as to the effect to be given laws after their repeal. We quote portions of Section 661, referring to fines, <u>penalties</u>, and forfeitures;

> "Sec. 661. REPEAL OF LAW NOT TO AFFECT PUNISHMENT FOR OFFENSE COMMITTED WHILE IN FORCE.—* * * *no fine, penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the* * * *recovery of such fines, penalties and forfeitures, shall be had, in all respects, as if the provisions had remained in force."

Therefore, any penalty incurred under the old Section 9969 previous to July 24th, would be uneffected by such repeal. If the additional commission due the collector for the collection of back taxes is a penalty, and was incurred prior to July 24th, it is uneffected by the repeal of Section 9969. Under the unanimous authority in this state, the collector's commission for back tax collections has been determined to be a penalty. We quote from the opinion of Judge Hays in the case of State ex rel. v. Koeln supra, l. c. 753.

> "* * * by statutory classification the respondent's 'commission' of 2 per cent. on delinquent taxes collected is 'penalty' as against the relator, required to be added to the tax bill and collected from the party paying such tax 'as a penalty in the same manner as other penalties are collected and enforced.' Thus the penalty exacted of the relator is by the statute (section 8835) required to be accounted for by the respondent along with the interest penalty of 1 per cent. per month imposed by section 9914, supra.* * * *. It follows that as used in the chapter on taxation in the Revised Statutes the expression 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty.'."

If the commission was incurred prior to July 24, 1933, it attaches as of the date it was "incurred" within the meaning of Section 661, and accordingly is not affected by the repeal. This precise question has been decided by our Supreme Court in the case of State ex rel. v. Fendorf, 296 S. W. 787 l. c. 788 et seq. We quote from the opinion as follows:

> "there is but one question for decision in this case and that is: At what time does the collector of revenue become entitled to the fee of 4 per centum under the provisions of section 12959."

Section 12959 of the 1919 Revision is Section 9969 of the 1929 Revision. The issue, as above set out, arose when a collector demanded payment of the 4% penalty commission on delinquent taxes paid in February. As the Back Tax book had not been made

up, the taxpayer took the position that the collector was not entitled to the added compensation for the collection of the delinquent tax. We quote further from the above opinion on page 789.

> "Beginning with January 1st, the collector has the duty of collecting this penalty, which is in the nature of an additional tax, and of computing, apportioning, and accounting for the same. This section (12906) fixing this penalty of 1 per centum per month is a part of article 8, but it specifically postpones the duty of computing, collecting, and accounting of it until after January 1st, and sections 12928 and 12932 (both in article 9) fix January 1st as the date of delinquency when this penalty accrues, and places the duty on the collector to enforce the lien thereof."
>
> "It seems clear that the collection of the penalty provided for by section 12906, after January 1st, is the enforcement of the lien of the state made the duty of the collector by sections 12928 and 12932, and that this duty begins on January 1st and entails labor on the part of the collector prior to the first Monday in March, which would be a service within the meaning of section 12959."
>
> "The collector was entitled to his fee of 4 per centum in this case, as we construe the statute, which accrued to him on January 1, 1924."

Under the above ruling, there can be no doubt but that the 4% collector's commission attaches as a penalty on the date of the delinquency of the tax, to-wit: January 1st.

As the penalty commission of 4% due the collector was incurred under chapter 59 within the meaning of Section 661 prior to the 24th day of July, 1933, it is the opinion of this office, that in computing the collector's commission due upon collection made during August, Section 9969 as contained in the 1929 Revision should be used, giving due effect to Senate Bill 80.

We shall now consider your second inquiry, to-wit,

> "Does Section 9952 S. A. Mo. 1933, which provided a limit of 10% on taxes more than a year in delinquency, take effect on July 25th 1933, and apply during the remainder of this year, or does it become operative on January 1, 1934."

It has been the custom of County Collectors to charge and collect 1% per month on delinquent taxes under the provisions of Section 9914, portions of which read as follows:

> "Sec. 9914. PENALTY FOR FAILURE TO PAY TAXES.—If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector, after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, of one per cent. per month upon all taxes collected by him after the first day of January, as aforesaid; and in computing said additional tax or penalty, a fractional part of a month shall be counted as a whole month."

This 1% per month penalty is due monthly and charged monthly. It is not assessed at so much per annum, but liability attaches monthly for the 1% delinquency penalty that accrues monthly, and no more. On July 24, 1933, the total penalty incurred or accrued was seven months at 1% per month. No liability attached for the payment of any additional sum whatsoever. No obligation(on July 24, 1933) rested upon the taxpayer to pay any additional per cent. No penalty, other than the 1% above referred to, having been incurred, Section 661 hereinbefore referred to is inapplicable. Penalties not incurred by July 24, 1933 can no longer be collected under the prior law except as is consistent with Senate Bill 94. It is evident that Senate Bill 94 modified and changed the interest penalty due on delinquent taxes. Section 9949 as contained in Senate Bill 94, Laws of Missouri 1933, page 425, et seq. reads in part.

> "Sec. 9949. SHALL COLLECT BACK TAXES.— The collectors of the respective counties and the collectors of such cities,* * * * shall proceed to collect the taxes con-

> tained in such 'back tax book'* * * *, and any person interested in or the owner of any tract of land* * * *may redeem such tract of land* * * *by paying to the proper collector the amount of the original taxes,* * * * together with interest on the same from the day upon which said tax first became delinquent at the rate specified in section 9952."

This requires collectors to proceed to collect the delinquent taxes plus interest penalty "at the rate specified in Section 9952". The pertinent parts of Section 9952 reads as follows:

> "* * * *, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this act provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually.* * * **".

This section definitely limits the amount of penalty for any one year to 10%, and to that extent modified the laws as existed before the effective date of Senate Bill 94.

In view of the foregoing, it is the opinion of this office that the limitation contained in the above sections upon the maximum amount of penalty interest which may be collected for anyone year's delinquency is operative on the effective date of Senate Bill 94, and that the maximum amount of interest that may be charged during 1933 on 1932 delinquent taxes is 10%, the collection of such penalty being subject to Senate Bill 80.

Respectfully submitted

HARRY G. WALTHER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

BUS AND TRUCK LAW: When a violation of the same.

9/6

FILED
78

August 25, 1933

Honorable James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of July 31, 1933 requesting an opinion relating to a motor truck. Your letter is as follows:

"I would be pleased to have your opinion as to whether or not the driver of a motor truck, under the following facts, would be operating the truck in violation of law.

The owner of the truck does not have a certificate of convenience and necessity from the Public Service Commission, but he carried a tractor on the truck from a point within the city limits of Liberty to a point near Excelsior Springs, Missouri, but to a farm home which was not within the city limits. He, also, picked up another tractor and carried it on his truck from a point approximately four miles north of Liberty, Missouri, to the same farm home near Excelsior Springs. He was not operating between terminals.

As I understand it, he undoubtedly would be guilty if he were carrying freight for hire between terminals, but I would appreciate an expression of your opinion on this question where he is not operating between terminals.

Thanking you in advance, I am."

The question presented in your letter is not a new one as most every lawyer in private practice has had the same question presented to him, since the passage of the Motor Bus and Truck Law in 1931.

Section 5265, Laws of Missouri 1931, page 306, is as follows:

> "The provisions of this act shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof."

Construing the facts as outlined in your letter, there is no provision in the exemption statute which would exempt the operator of the truck in question. The term "motor carrier" is defined as follows under Section 5264, Laws of Missouri 1931, page 304:

> "(b) The term 'motor carrier,' when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such

> transportation service, for hire as a common carrier. Provided, however, this act shall not be so construed as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of transportation system within such municipal corporation or such municipal corporation and the adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation."

Section 5268, Laws of Missouri 1931, page 307, quoting the part which applies to the question, is as follows:

> "It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the Commission a certificate declaring that public convenience and necessity will be promoted by such operation*****."

Under paragraph c of Section 5272, Laws of Missouri 1931, page 312,

> "In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued. For each motor vehicle operating under a certificate of

convenience and necessity or interstate permit as a freight carrying vehicle, the annual license fee shall be as follows:

More than 1½ and not more than 2 tons. .	$25.00
More than 2 and not more than 3 tons . .	65.00
More than 3 and not more than 4 tons . .	100.00
More than 4 and not more than 5 tons . .	135.00
More than 5 and not more than 6 tons . .	175.00
More than 6 and not more than 7 tons . .	225.00
More than 7 and not more than 8 tons . .	275.00
More than 8 and not more than 9 tons . .	350.00
More than 9 tons.	500.00,"

we find that if the truck operator in question had a rated load capacity of more than one and one-half tons, he would be subject to the tax and would be subject to the provisions of the Bus and Truck Law. He was hauling freight, the character of which is not exempted and we assume that he was doing it for hire.

It is therefore the opinion of this Department that he would be guilty of violation of the Bus and Truck Laws of the State of Missouri.

As stated herein the interpretation of the Bus and Truck Law has always been difficult for lawyers and we do not know what interpretation, if any, the Public Service Commission has made in a case as your letter presents, but interpreting the statutes in the cold language we are forced to the above conclusion.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

BLIND PENSIONS: Fees of Probate Judges for taking applications for blind pensions.

August 29, 1933

9/9 FILED 78 44

Mrs. Mary E. Ryder,
3858 Westminster Place,
St. Louis, Missouri

Dear Mrs. Ryder:

This department acknowledges your letter under date of August 23, 1933, as follows, to-wit:

> "Several inquiries have been directed to this office regarding fees by the probate judges for taking applications for blind pensions.
>
> From the pension law it is understood that 'Any person who desires the benefits of the blind pension shall apply to the judge of the probate court within his or her county or city or to the Commission for the Blind.' However, there is no mention of whether a charge is to be made by the probate judge for this service. Of course when an application is taken at this office it is without any expense to the applicant.
>
> In order that there may be a uniform manner for the handling of applications for blind pensions taken by the probate judges I am seeking your advice. If they are entitled to a fee, please state the amount, for while we want to be considerate of the probate judges, we are deeply concerned about the applicants, who usually are entirely without funds and in the hope of securing the blind pension are willing to volunteer payment of a fee far in excess of their economic status, just to be assured of the pension."

Mrs. Mary E. Ryder #2.

In Sanderson v. Pike County, 185 Mo. l. c. 605, the Supreme Court said:

> "It is a well settled law in this state that the right to compensation for the discharge of official duties is purely a creature of statute, and that the statute that is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer unless the statute gives it."

In the case of State Ex Rel v. Adams, 172 Mo. l. c. 7, the Supreme Court in passing upon a claim for services rendered by the Secretary of the Board of Equalization of Linn County, the court said:

> "In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provided such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that statute which is claimed to confer such right must be stricly construed. A mere application of these principals to the statute determines the question in hand. No provision is therein to be found giving any such compensation to the Secretary of the Board of Equalization."

Mrs. Mary E. Ryder # 3.

In the Case of Jackson County v. Stone, 168 Mo. 1. c. 581, the Supreme Court had this to say:

> "It is well settled law that all statutes in reference to costs must be construed strictly and that an officer cannot legally claim any remuneration unless the State has expressly confered the right."

Also in the case of Givens v. Davies County, 107 Mo. 1. c. 608, the Supreme Court said:

> "A public officer is not entitled to compensation by virtue of a contract expressed or implied. The right to compensation exists, when it exists at all, as a creation of law, and as incident to the office. In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed or his duties enlarged without the impairment of any vested right."

The statute in question, Section 8896, R. S. 1929 reads thus:

> "Any person who desires the benefit of this article shall apply to the judge of the Probate Court within his or her county or city or to the Commission for the Blind, who, if satisfied that the applicant comes within the provisions of this article, shall grant to the applicant a certificate of such fact, and the certificates granted by the Probate Judges, shall be certified to the Missouri Commission for the Blind, etc."

Mrs. Mary E. Ryder #4.

It would seem that the presentation of the application to and the hearing before the Probate Judge is in the nature of a mere preliminary matter for the convenience of the blind person who is permitted to make his application there first, if he chooses, for the Commission is the body which is to pass on the merits of the application. There is no provision, either in this section or any other section in said article, which provides any fee for any service that may be required of a Probate Judge in the matter of an application by one desiring benefits under said article.

In view of the decisions heretofore referred to this department holds that the compensation to a Probate Judge, who is a public officer, is purely a matter of statute and not one of contract, either expressed or implied, and that compensation to him exists, if it exists at all, solely as the creation of the law and in this case no provision appears in the statute for compensating Probate Judges for whatever services they may render in matters of this nature and therefore no fee can be legally charged, taxed or collected. We further hold, in view of the law as announced herein, that fees are only legally collectible when expressly authorized by the law, and an officer demanding fees, either from the public who deals with him or from the state, must point to the particular statute which authorizes them.

Mrs. Mary E. Ryder #5.

We are sorry that you could not have received this opinion sooner, however the delay has been unavoidable on our part we assure you.

Very truly yours,

APPROVED

Assistant Attorney General.

Attorney General.

COUNTY DEPOSITORIES: Five questions submitted; County funds preferred claims in National Banks; where no bids submitted for county funds; county authority to buy U. S. Bonds; power of county treasurer to select depository; Construction of Federal Banking Act on insured deposits.

September 6, 1933.

9/9

FILED
78
42

Hon. Nat. B. Rieger
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Rieger:

This Department is in receipt of your letter of recent date in which you request the opinion of this office on five questions, which letter is hereafter set forth and is as follows:

"A situation has arisen in Adair County, as perhaps in many other counties, in regard to the deposit of county funds and the establishment of county depositaries, which has created a number of legal questions to confound the County Court, and questions on which we would appreciate your opinion.

1. Is the claim of a county for its deposits, made without a compliance with Sec. 12187 R. S. Mo. 1929, a preferred claim as against a National Bank the same as it is against a State Bank, in the event of liquidation?

2. In the event that no bids are received as provided in Sec. 12184 R. S. Mo. 1929, and no bank or banks in this or adjoining counties desire to comply with Sec. 12189 R. S. Mo. 1929, is the County Court privileged to deposit the county funds in any other bank that will comply with Sec. 12187 R. S. Mo. 1929?

3. Is the County Court privileged to treat money not needed for immediate use as a sinking fund and to purchase bonds of the U. S. and the State of Missouri, and sell them as money is needed, as provided in Sec. 12123 R. S. Mo. 1929?

4. In the event that no bond to secure the county funds is obtainable would the County Treasurer be privileged to deposit funds not needed for immediate use in a time deposit, thereby earning a rate of interest not obtainable if the funds were deposited in a checking account?

5. When the Federal Banking Act becomes effective on July 1, 1934, providing for a guarantee of all deposits of $10,000.00 or less, might public funds, such as the Contingent Fund, Pauper Fund, Road and Bridge Fund, etc., be deposited in separate accounts and thereby gain the anticipated security and still satisfy Sec. 12187 R.S. Mo. 1929? "

We take it that these are hypothetical questions and not based on facts existing in your County and without a more complete statement of facts we are unable to give you as full an opinion as we should like to. However, we shall undertake to answer each query as best we can under the circumstances. We will take up each question in the order submitted by you.

Referring back to the first question in your letter, the question as to whether the deposit made in a National Bank, under the circumstances therein mentioned, that the question of preference will be determined by the Federal courts and not by the State courts and different rules will therein apply than in our own courts.

We recognize the rule in this State that if the county funds are deposited in a county depository without compliance with the statute in regard to the selection of the depository that such deposits create a trust fund and the assets of the failing bank or trust company in liquidation are impressed with the trust in the county's favor to the extent of the county's funds wrongfully obtained which augmented the bank's assets as a whole. In other words, the county's claim is preferred.

Huntsville Trust Co., v. Noel, 12 S. W (2d) 751.

The distribution of the assets by a receiver of an insolvent National Bank is governed by United States Revised Statutes, Section 5236, U. S. Comp. Section 9823, Section 194 Vol. 12 U. S. C. A., which prevail over the states' statutes and we are herewith setting out said section for ready reference:

"DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision

> has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

As was said by Mr. Justice White of the Supreme Court of the United States in the case of Davis v. Elmira Savings Bank, 161 U. S. 275-278:

> "National Banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

In Poweshiek County v. Merchants National Bank of Grenall et al, 220 N. W. 63, l. c. 65, it was said:

> "We have settled the proposition that where the assets of a National bank are involved and it has been sued in the state courts, the Federal law as to the distribution of assets and preferences controls the disposition of the case (in the state court), regardless of what the state law may be with reference to it. We so held in the case of Palo Alto County v. Eldredge, 199 Iowa 1, 201 N. W. 132. This was the exact holding of the United States Supreme Court in the

case of Davis v. Elmira Savings Bank, 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700."

So it will be seen that as to the distribution of the assets of a failed National Bank, the Federal Courts have jurisdiction.

In R. C. L. Section 182, p. 555, it is said:

"The correct rule is announced that where public funds are wrongfully deposited in a bank which has knowledge of the character of the funds, they are impressed with a trust and if such funds can be traced into the hands of the receiver of a bank, or if the assets in his hands have been increased by such deposit, such assets will be subject to such trust and the claim therefor will be entitled to a preference of the assets." (Many cases are cited in this work to support this statement.)

This principle is supported by numerous authorities: That the unauthorized or unlawful deposit of public funds in a bank which subsequently becomes insolvent creates a trust relationship in such funds between the bank and the community to which they belong. The following cases support this theory and several of them are cases where public funds have been deposited in National banks and preferred claims have been allowed by the Federal courts; which cases we cite as follows:

San Diego County v. California National Bank, 52 Fed. 59;
Beard v. Independent Dist., 33 C. C. A. 562, 88 Fed. 375;
Crawford County v. Patterson, 149 Fed. 222;
Crawford County v. Stawn, 15 L. R. A. (n.s.) 1100, 157 Fed. 49;
Centralia v. United States Bank, 221 Fed. 755;
Allen v. United States, 285 Fed. 678;
Page County v. Rose et al, 130 Iowa 296, 8 Ann. Cases 114, 5 L. R. A. (N. S.) 886, 06 N. W. 744;
State v. Midland State Bank, 52 Neb. 1, 66 Am. State Reps. 484.

Although your first question is a hypothetical question we see no reason for a different rule and the Federal courts seem to be just as liberal in allowing preferred claims where a trust has been established as the State courts. However, every case must stand upon the particular facts and circumstances of that case. It is, therefore,

our opinion that,as to your first question, a preferred claim would be allowed by the Federal courts against a National bank the same as it is against a State bank in the event of liquidation under the same state of facts.

Answering your second question, will say that Section 12184 R. S. 1929, provides:

> "It shall be the duty of the county court of each county in this state, at the May Term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county."

And said section further provides how the county court shall proceed and the letting of said county money and how they will advertise that said letting will be had.

Section 12185, R. S. Mo. 1929, provides as follows:

> "Any banking corporation, association or individual banker in said county desiring to bid shall deliver to the clerk of said court, on or before the first day of the term of said court at which the selection of depositaries is to be made, a sealed proposal, stating the rate of interest that said banking corporation, association or individual banker offers to pay on the funds of the county for the term of two years next ensuing the date of said bid, etc. * * * * * * * * *."

Section 12186, R. S. 1929, provides how the county court shall proceed in the opening of the bids and what moneys shall be let to the successful bidder etc.

Section 12187 R. S. 1929, provides:

> "Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety;"

And said section further provides:

> "that the court may accept in lieu of real estate as security bonds of the United States or of the State of Missouri, etc."

All of the foregoing sections provide for the selection of a depositary within the county advertising for bids, and no other.

Section 12189 R. S. 1929, provides as follows:

> "If for any reason the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositaries as provided in section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, in such sums or amounts, and for such period of time, as the court may deem advisable, at such rate of interest, not less than one and one-half per centum, as may be agreed upon by the court and the banker or banking concern receiving the deposit; said interest to be computed upon the daily balances due the county, as provided in section 12186, and any bank or banking concern agreeing to accept deposits under the provisions of this section shall execute a bond in manner and form as prescribed in section 12187, with all the conditions therein mentioned, the penalty of such bond or bonds to be not less than the total amount of the county funds to be deposited with such bank or banking concern."

If we understand the question correctly it is that after all of the statutory requirements have been complied with by the county court in submitting bids by advertisement etc., and no bids submitted by the banks of its own county and no bank in the county court's own county or adjoining county desires to comply with the requirements of Section 12189 R. S. 1929, where no bids have been received by the county court, may the county court then deposit the county funds in any other bank that will comply with Section 12187 R. S. 1929, which, as we would interpret your question, would be to comply with all of the provisions of said section. The procedure under said section 12187 is followed only in connection with the proceedings outlined in Sections 12184, 12185 and 12186, where the county court has advertised for bids, and the bidders have followed a particular course of procedure and the county court opening

the bids in the May term in the odd years therein mentioned and selecting the depositories of the funds in a particular manner.

The county court is a court of statutory origin and its powers must be circumscribed within the confines of the statute and has no powers other than those set out in the statute. The Supreme Court in the case of Saline County v. Wilson, 61 Mo. 237, l. c. 239, had this to say:

> "County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond, their acts are void."

In the case of Bayless v. Gibbs, 251 Mo. 492, l. c. 506, the court said:

> "This court, in numerous cases has repeatedly held, that the county courts of the respective counties of the state are not the general agents of the counties of the state. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the state; as has been well said, the statutes of the state constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

The Supreme Court in the case of Meade v. Jasper County, 305 Mo. 476, l. c. 485, reaffirms the doctrines in the case of Bayless v. Gibbs, supra, and Saline County v. Wilson, supra, and quoted approvingly from both cases. It is the opinion of this office that there is no statutory or other authority for the county court to act under such circumstances as you mentioned in your second question and, therefore, the county depository selected in that manner would not be a lawful despository of said county.

Answering your third question will say that Section 12123 R. S. 1929, provides as follows:

> "In case the county court of any county, having such money as is referred to in the foregoing sections of this article, shall deem it best, such court, instead of loaning such money in the manner hereinbefore provided for, may invest the same either in purchasing, on the best terms

> obtainable, bonds of the United States or of the state of Missouri, said bonds to be held in trust for the fund or funds to which the money applied to their purchase belonged, and shall be so expressed in the public records of the county."

Now the "such money" mentioned in the above section refers to the money mentioned in Section 12117 R. S. 1929, which gives the several counties of this state authority to loan out any money in the hands of the treasurer of such county collected for the purpose of constituting a sinking fund for paying the principal of any indebtedness incurred, for which bonds are outstanding, or collected to pay interest on the bonds of such county issued etc. Section 12118 provides what security the county court shall require. Section 12119 provides for the bond and rate of interest of said loans, and Section 12120 provides for the foreclosure in the event of default in the payment.

The sections above enumerated provide only for the loaning out of the money therein provided for sinking funds and no other. The words "sinking fund" have a well defined meaning.

> "A fund created for extinguishing or paying a funded debt; a fund arising from particular taxes, imposts or duties which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal." 58 Corpus Juris p. 738.

So it would be our opinion that your county court would not be "privileged to treat money not needed for immediate use as a sinking fund and to purchase bonds of the U. S. and of the State of Missouri and sell them as money is needed," because these sections have no application to anything other than the sinking fund money.

In reply to your fourth question will say that it is the duty of the county court and it has the power to select a county depository and not the duty of the county treasurer to do so. It is, therefore, the opinion of this Office that the county treasurer of your county has no statutory authority and is not privileged to deposit funds not needed for immediate use in a time deposit.

In the selecting of county depositories by the county court we find no place in the statutes where the county court can deposit the county moneys on time deposit and the county court should follow the statutes in depositing county moneys. The county treasurer has

no power or authority to loan the county funds under such conditions, as that is what a time deposit is - merely a loan to the bank for a stipulated time at a stipulated rate of interest and does not contemplate that the bank would give a depository bond.

Answering the fifth question propounded in your letter will say that we presume that you refer to Section 12B, Seventh Division (L), of the Federal Banking Act of 1933, which pertains to the Federal Deposit Insurance Corporation and insures bank deposits of certain banks that are able to qualify under this act, and we think your question will be answered by reading the following portions of said act relating to insured deposits:

> "* * * * * For the purposes of this sub-section the term 'insured deposit liability' shall mean with respect to the owner of any claim arising out of a deposit liability of such closed bank the following percentages of the net amount due to such owner by such closed bank on account of deposit liabilities: 100 per centum of such net amount not exceeding $10,000.00; and 75 per centum of the amount, if any, by which such net amount exceeds $10,000.00 but does not exceed $50,000.00; and 50 per centum of the amount, if any, by which such net amount exceeds $50,000.00: Provided that in determining the amount due to <u>such owner</u> for the purpose of fixing such percentage, there shall be added together all <u>net amounts</u> due to such owner in the same capacity or the same right, on account of deposits, regardless of whether such deposits be maintained in his name or in the names of others for his benefit. For the purposes of this sub-section, the term 'insured deposit liabilities' shall mean the aggregate amount of all such insured deposit liabilities of such closed bank.
> * * * * * * * * * * * * * "

However, we might add that as this act, so far as insured deposit liabilities are concerned, does not become effective until July 1st, 1934, unless the President shall by Proclamation fix an earlier date, and we anticipate some changes and rulings promulgated by the Comptroller of Currency and the Federal Reserve Board on this Banking Act, and an opinion rendered by this Department at this time without the benefit of those rulings would be of no particular use to your court at this time.

At some future time when this law becomes effective or immediately before it becomes effective when we will have the benefit of the rulings and regulations made by the Comptroller of Currency and others, we shall be glad to give you our views on any questions submitted. Our present idea about the matter, after reading the above section, would be that all of the county funds deposited in one bank would be treated as one deposit and could not be subdivided into four or five funds, which you suggest in your letter, keeping each fund under the $10,000.00 limit, for the purpose of securing 100 per cent claim liability arising out of such deposit in the event that the bank fails, because said section of the Banking Act of 1933, as we interpret it, provides against this very thing and its purpose is to give the smaller depositor 100 per cent protection.

We have answered all of your questions and have given you our views and opinions on the matter submitted, notwithstanding the limited facts set forth in each question.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

MERCHANT'S LICENSE - Authority of City to levy on Wholesale and retail business

September 20, 1933

9-25

FILED
78
45

Rolla Creamery & Ice Company,
Rolla, Missouri

Gentlemen:

We acknowledge receipt of your letter as follows:

"We are a Missouri corporation manufacturing and selling butter, ice cream and ice, both wholesale and retail. After twelve years business without a Merchant's License, the City Council now expects to collect a Merchants' License from us. We maintain we should not be obliged to pay a license for the sale of products we manufacture. Please give us your opinion on this and oblige."

Section 7012 Revised Statutes of Missouri, 1929, reads as follows:

"All license tax shall be regulated by ordinance and no license shall be issued until the amount prescribed therefor shall be paid to the City Collector and no license shall in any case be assigned transferred, etc."

Section 7046 Revised Statutes of Missouri, 1929, reads in part as follows:

"The mayor and board of aldermen shall have power and authority to regulate and to license and to levy and collect a license tax on manufacturing and other corporations or institutions, etc."

In American Express Company v. City of St. Joseph, 66 Mo. 1. c. 680 the court said:

"It may be conceded that if it appeared that the power conferred was simply to license

> and regulate the occupation or pursuit of express companies, it would not authorize the levying of a tax on the occupation unless it clearly appeared that such was the legislative intent in conferring it. But here the power to tax is expressly given . . . . . a provision in the constitution of Louisiana declaring that all taxation 'shall be equal and uniform throughout the State,' even if it extends to municipal taxation, is not violated by a legislative provision authorizing the taxation by municipalities of callings, trades and professions, exercised within their limits."

In Franklin v. The National Insurance Company, 43 Mo. l. c. 491, the court said:

> "A license is imposed on shows, peddlers, auctioneers, dram-shops, etc., all of which taxes are in violation of the ad valorem principal, but not therefore unconstitutional. The taxes imposed are uniform as to the particular classes, but not in proportion to the taxes assessed on other property.
>
> The constitution enjoins a uniform rule as to the imposition of taxes on all property, but does not abridge the power of the Legislature to provide for a revenue from other sources."

In City of St. Louis v. Bowler, 94 Mo. l. c. 634, in discussing whether an ordinance taxing trades, callings, etc., the court said:

> "The only prohibition of the Section (Section 3, Article X of the Constitution) being discussed is that which forbids inequality, favoritism, to be exercised in imposing taxes upon the same class of subjects. So long as this is not done, the constitution is not infringed, nor the rules of uniformity and equality violated."

Therefore in view of the decisions of the courts, upon constructions of statutes of the same import as the sections herein mentioned, this department holds that the Mayor and Board

Rolla Creamery & Ice Company #3.

of Aldermen, by ordinance, have the power and authority in cities of the third class to license and levy a tax upon a business such as yours, so long as they maintain uniformity and equality in doing so.

Yours very truly,

H. H. Bonney

Assistant Attorney General

APPROVED

Attorney General.

COUNTY DEPOSITORY-- Liability of County Treasurer in event no selection by County Court.

September 23, 1933.

FILED 78

10-2

Hon. Leslie D. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Rice:

This Department is in receipt of your letter of September 8th, 1933, in which you make further inquiries and request for an opinion relative to the depositing of the county funds of Newton County, which letter is as follows:

"Under date of August 14, 1933, I received an opinion from you which had been asked for by Mr. John W. Franks, County Treasurer of Newton County, Missouri. As you will remember, the situation was as follows:

The two banks in Neosho bid for eight-tenths of the deposit but refused to give a depository bond. You held that the bond of the County Treasurer covered not only the fidelity of the County Treasurer but the funds in the bank.

Upon receipt of that opinion the County Court thereupon re-advertised for bids for eight-tenths of the county deposit. No banking corporation or individual banker in Newton County or any adjoining counties made a bid for such deposits. Neither is there a bank in Newton County or any adjoining counties that will take the deposit under the provision of the statute authorizing the selecting of a depository where no bids are received.

> They will not furnish the depository bond nor will they pay the one and one-half per cent interest required under this section.
>
> The County Treasurer would now like to have an opinion from your office as to where he shall keep the money. The vault and safe in his office is neither fire proof nor burglary proof. The New York Casualty Company that made his bond is threatening to cancel the bond unless he complies with the law and keeps the money where designated. Perhaps you can give me some information on this question so I can advise him.
>
> Is there any provision where the money may be deposited with the State Treasurer and thereby comply with the law?"

In your letter you refer to the opinion of this Office under date of August 14th, 1933, in which we reviewed the statutes and the cases on the subject in an eight-page opinion, and held that where the county depository had not been selected in the manner provided by the statutes of Missouri and no depository bond had been given by the bank as provided by statute, in the event of the failure of the bank and consequent loss of the county funds, the county treasurer was liable on his official bond for the loss. In that opinion we think our conclusions were, and are, correct.

In this letter you ask two questions; the first being:

> "The county treasurer would now like to have an opinion from your office as to where he shall keep the money."

This question is really asking for our advice rather than a question of law and anything we might say would be an attempt to usurp the powers of the county court and the county treasurer as to where they should deposit the county funds. The statutes point out the methods for the selection of the county depositories.

Your second question is as follows:

> "Is there any provision where the money may be deposited with the state treasurer and thereby comply with the law?"

We have searched the statutes and do not find where the county treasurer has any authority to deposit the county funds with the state treasurer, under the conditions as set forth, and neither do we find where the state treasurer has any authority to accept said funds for deposit.

We realize that the present financial and banking situation has created some vexatious problems for county officials in regard to the safeguarding of county funds, but it would be imappropriate for this Department to advise on matters that are purely local and the county officials of your county are in a better position than we are to determine the proper course to pursue. We are sure that we fully covered the subject in our former opinion to you of August 14th.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

TAXATION AND REVENUE:--Laws of Missouri 1933, pages 255-267 of the Beer Act does not exempt beer from general property taxes. The prohibition contained in Section 13139z10 only forbids cities and counties from levying license and occupation taxes against holders of permits.

FILED

78

October 19, 1933.

10-23

58

Copy to Assessor of Phelps Co.

Rolla Creamery and Ice Company,
Rolla, Missouri.

Gentlemen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "The County Assessor has called on us for advalorem tax covering beer on hand. We cited him to Section 13139z10 which states no additional tax should be levied. Please advise your opinion as to whether we should be subject to merchants advalorem tax on beer."

Section 13139z10, R. S. Mo. 1929, provides as follows:

> "No county or municipality in this state shall impose any tax on the holder of any permit authorized by this article, for the sale of non-intoxicating beer within its borders. No municipal corporation shall increase any occupation tax which it now levies, upon any holder of such permit over the amount of such tax imposed upon merchants and dealers in the same or similar lines of business, and not holding any such permit."

Prior to the passage of the Beer Act, Laws of Missouri, 1933, pages 255-267, every municipal corporation, under the general statutes, authorized to license merchants would have had a right to have exacted a license tax on any person engaged in the business of selling beer, either as a distributor, wholesaler or retailer. The Legislature, under Section 13139z10, has plainly expressed its intention that no county or city shall exact a license tax from any holder of a permit, nor should any such county or city increase any occupation tax upon any holder of such permit over the amount of such tax imposed upon merchants in the same or similar lines of business. By the Act the Legislature has reserved to itself the right to issue or withhold the permit to sell non-intoxicating beer, and has provided for fees and licenses in connection therewith. It is apparent, however, that all the Legislature sought to do by said Section was to restrict to itself the complete authority in the licensing of people in selling non-intoxicating beer. This tax is by no means a property tax, nor does the Legislature any place in the

Act seek to exempt from property tax any tangible property, beer or otherwise, owned by a holder of a beer permit.

Section 6 of Article X of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Section 7 of Article X of the Constitution of Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Section 6 above provides what property shall be exempt from taxation, and Section 7 provides that no property other than that enumerated in Section 6 shall be exempted from taxation, and that any attempt to exempt any other property shall be void. Under the foregoing constitutional provisions, we believe that an attempt by the Legislature to exempt from taxation the tangible property owned by a holder of a beer permit would have been unconstitutional.

Section 9742, R. S. Mo. 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Under that section the Legislature has provided that all personal property shall be subject to taxes, except property enumerated in the succeeding section, which section makes no exemption in favor of non-intoxicating beer. The Beer Act itself does not exempt from general property taxes beer owned by a holder of a permit any more than it exempts trucks or other personal property owned by the beer dealer. Such trucks and other personal property may be an absolute necessity in carrying on the business authorized under the beer permit. So, also may be the building in which the holder operates. No one would contend, however, that the truck of the holder of a beer permit should be exempt from registration fees because he hauls beer any more than

trucks used by persons in other lines of business. It would be an unjust discrimination to exempt from property taxes trucks and other tangible property owned by the holder of a beer permit because he is engaged in the business of selling beer, and at the same time to tax trucks and other tangible property owned by the person engaged in selling gasoline.

The merchants advalorem tax is a property tax and is assessed according to the value of the property. As a merchant you are required to pay the merchants advalorem tax, even though your stock of goods may include some beer we believe that the value of that beer should be included in the valuation made for the purpose of arriving at the merchants advalorem tax.

It is therefore our opinion that while the Legislature in Section 13139z10 did withdraw from the counties and cities the right to impose upon the holder of any non-intoxicating beer permit a license or occupation tax for the privilege of conducting such business, yet the Legislature did not attempt to exempt such holder from taxation on real or personal property held by him which is assessable under the Constitution and general laws of this state. Beer is personal property. We think, therefore, that the holder of a beer permit should not be permitted to eliminate beer on hand from his stock of goods in arriving at the valuation of said stock of merchandise for the purpose of the merchants advalorem tax. We are of the opinion that beer on hand at the time when assessments are made is subject to a property tax for general taxation purposes. As we interpret the Constitution and the Beer act, the Legislature only prohibited the exaction of a license or occupation tax from the holder for the purpose of doing business.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

FROM: Grain stored in elevators is subject to taxation against
REVENUE: the individual owner or corporation owner, according to the general laws regulating other property.

11-23

November 16, 1933.

FILED
7
39

Mr. James S. Rooney,
Prosecuting Attorney,
Liberty, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "We have several grain elevators in this county which are owned by Railroad companies and are leased out to individuals or corporations. The railroads pay taxes on the elevators, but we have not been receiving any taxes on the contents. The grain in the elevators is owned by individuals and corporations, and I should be pleased to have an expression of your opinion as to whether or not this grain may be taxed."

Section 9742, R. S. Mo. 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Neither the next section nor any constitutional provision exempts grain stored in an elevator from taxation. Not being exempt, it is subject to taxation.

In Mullins v. Cemetery Association, 239 Mo. 681, 689, it is said:

> "It is settled law that statutes creating exemptions from taxes, whether general or special, are strictly construed, and the right of exemption exists only when expressed in explicit terms and must be established beyond a reasonable doubt."

Grain stored in an elevator being personal property located within the state is therefore subject to taxation. The question then arises to whom should the property be assessed.

Section 9746, R. S. Mo. 1929, provides as follows:

> "Every person owning or holding property on the first

> day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

In State ex rel. v. Haphe, 31 S. W. (2d) 788, 791, the court says:

> "Both the person 'owning' and the person 'holding' personal property are liable for taxes thereon, and such taxes may be assessed against either or both. But with respect to each they do not become a debt unless and until they are duly assessed against him in the manner prescribed by law."

In view of the foregoing it is apparent that the grain may be assessed against the "holder" who would be the individual or corporation leasing and in possession of the elevator, or against the "owner" of the grain. It can only be assessed against the owner, if an individual in your county, if the individual lives in your county. If the owner lives in another county then it shall be assessed under Section 9745, R. S. Mo. 1929, which is as follows:

> "All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held."

If the grain is owned by a business and manufacturing corporation and such corporation is located in your county, then the grain may be assessed in your county. If the corporation is not located in your county, then it is to be assessed as provided in Section 9764, R. S. Mo. 1929, which is as follows:

> "All personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the 1st day of June of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning personal property on the 1st day of June in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county where situated, in the same manner as other personal property is required by law to be returned. This section shall not apply to railroad or banking corporations."

We believe that the foregoing citations are decisive of the questions contained in your letter. Grain stored in elevators is not exempt from taxation, and the same rule of taxation applies to the assessment of grain as applies to the assessment of other personal property. The mere fact that the grain is commingled in one mass will not prevent its taxation. Each individual or corporation owns a certain number of bushels of grain of a definite value. Their warehouse receipt gives them the right to receive so much grain. They are all the time the owner of an undivided interest in the total mass of grain stored by the elevator company. They are in much the same situation as the owner of a one-sixteenth undivided interest in 1,000 acres of land. Such owner cannot point out any particular acres that belong exclusively to him, but his interest is a portion of the entire tract. No one would contend that such property owner would have an interest in the land which might not be assessed in his name.

The situation is also similar to the person who has a bank deposit on the first day of June. He has a taxable wealth equal to the value of his deposit, yet the $1,000 upon which he is taxed is not set aside to him and held separately, but it is all commingled in the vaults of the bank and loses its identity as his specific property. The banker issues him a credit just as the elevator company issues to his customer the warehouse or store receipt.

It is therefore the opinion of this department that grain owned by individuals and corporations and stored in elevators is subject to taxation. It may be assessed under Section 9746, against the holder, being the elevator company, or the owner. If assessed against the holder it may be assessed in your county, and if assessed against the owner, it may be assessed in your county if the owned is an individual and is a resident of your county, and it may be assessed against the corporation owner in your county if the corporation is located in your county. If either the invididual or corporation owner is a non-resident of the county, then it must be assessed against the owner in the county where the individual resides or where the corporation is located.

Very truly yours,

Frank W. Lynch

Assistant Attorney General.

APPROVED:

_____

Attorney General.

Motor Vehicles, Trucks used in State work exempted from regulation by Public Service Commission

March 11, 1933

FILED
79

Honorable Dewey A. Routh
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

We wish to acknowledge your inquiry of March 9th, 1933, concerning the following:

"I have a question confronting me, growing out of the arrest by our State Patrolman of the driver of a truck belonging to the Leaverton Transfer Company of Independence, Missouri.

The truck was engaged, at the time the State Trooper tied it up in Nevada, in carrying structural steel from Kansas City to Bates County to be used in the construction of the State Highway by the contractor, who is constructing that particular piece of highway.

The transfer company was hired by, and will be paid by the contractor and not by the State Highway Department. Their case is set for trial on Thursday, March 16th.

The Session Acts of 1931 at page 306, section 5365 and the last sentence in said section reads as follows;- "This act shall not apply to trucks used in work for the State or any civil subdivision thereof."

The transfer company contends that the truck in question was being used in work for the State and that therefore they were exempt from the Public Service Commission Act and not required to obtain a Public Service Commission license in order to operate trucks upon the highway of the State in carrying freight for other persons.

I have been unable to find an adjudicated case in reports of the Appellate courts of Missouri. I would like therefore to have an opinion by the Attorney General as to his interpretation of the above quoted

sentence out of section 5285, Session Acts of 1931.

Does this sentence apply only to trucks which are hired by and are to be paid by the State, or any civil subdivision thereof, or are any trucks exempt which are hauling material in the construction of a State Highway in order to fulfill his the contractor's contract in the State Highway Department?"

Section 5285 of Article 8, Chapter 33, Laws 1931 p. 304, reads as follows:

"The provisions of this act shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof."

Your inquiry concerns the interpretation of the last sentence of the above section, to wit;

"*****Shall not apply to trucks used in work for the State etc******"

The language used in above sentence is unambiguous and we see no need or reason to depart from its natural and ordinary meaning.

Effect is to be given, if possible, to every word, clause, and sentence in the construction of statutes. Words in common use must be given their natural, plain, and ordinary signification and meaning in statutory consideration.

Laucks v. Reis, 374 S. W. 827.

The act passed (Article 8, Chapter 33 Laws 1931 p. 304 et seq) conferred broad powers upon the Public Service Commission to supervise, regulate and license transportation of persons and property for hire over the public highways. Such was the intention of the Legislature. However, Section 5265 supra, specifically exempts classes in which the Public Service Commission cannot regulate. Thus the classes coming under the exemptions have the sole right and power to regulate their motor vehicles.

The act does not deprive the right of police control over the highway.

The act further exempts trucks used in work for the State.

Giving the words in the sentence herein considered their natural, plain and ordinary meaning they must be interpreted in the light of the facts and applied accordingly. It reduces the inquiry then to the application of the sentence to the facts. Was this truck used in work for the State? We think not. It was used only for hauling materials for a contractor and the materials, thus transported, later being used in the construction of a highway by the contractor. The contractor in this case was doing work under a contract with the State and perhaps true the work he does will be accepted by the State under the contract yet it is his work and not the work of the State, and he does the work as a contractor only.

Therefore, it being the contractor's work it must follow that the truck was used in work for the contractor. Ownership; right to use; payment for use; right of control; character of work it is put to; and many other circumstances would also be factors in determining if a truck was in the exemption.

Every case must stand on its own merits, and it is necessarily true that in many instances it is difficult to draw lines of distinction. However, we pass on your inquiry as presented by the facts.

We are of the opinion that the truck hauling materials as set out in your letter is not such a truck as contemplated to be exempt by Section 5365. That it is not a truck used in work for the State.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

JLH:MN

GAME AND FISH DEPARTMENT: Right to prosecute for possession of more than twenty-five game fish.

Filed 6-19-33 in record of letters.

FILED
79

March 17, 1933

Mr. John H. Ross, Commissioner
Game and Fish Department
Jefferson City, Missouri

Dear Mr. Ross:

This Department acknowledges receipt of your letter dated March 8, 1933, as follows:

> "I wish you would please give me your interpretation of that part of Section 8275, R. S. Missouri 1929, which reads as follows:
>
> ******No person shall take, capture or kill, when taken from the waters of this state, in any one day, more than twenty rock bass (goggle-eye), ten bass of all other specie, ten trout, fifteen crappie, five jack salmon or pike, fifteen white perch, ten channel cat, or a total of twenty-five game fish, the possession of more than the number of the fish herein stated shall be prima facie evidence of the violation of this section. *****
>
> I desire your opinion as to just what is the possession limit on game fish.
>
> Please inform me in your opinion whether or not a person, who has in his possession forty-five crappie and who furnishes affidavit that he has been fishing for a period of three or more days, is guilty of violating this section of the law."

Section 8224 Revised Statutes Missouri, 1929, declares that the ownership of fish not held by private ownership is in the State of Missouri and that no fish shall be caught or taken in any manner, at any time, or had in possession except the person so catching and taking same in possession shall consent title of such

fish be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of same after the same are caught or taken. The section further providing that the catching or taking of fish at any time or in any manner, shall be deemed a consent of the person taking or catching same that the title to the fish shall be and remain in the State, for the purpose of regulating the use and disposition of same and the possession thereof shall be consent to such title in the State.

Section 8247 prohibits the possession by any person of fish during the closed season thereon prescribed by law and making such possession a misdemeanor.

Section 8248 provides it shall be unlawful for any person after the passage of the section, to fish in this state without first obtaining a license permitting him or her to do so and such license shall authorize the person named thereon to fish during the calendar year of its issue and subject to the regulations and restrictions as provided by law. Fishing in privately owned lakes or ponds where a fee is charged for the privilege of fishing, is exempted and likewise certain exemptions are made in Section 8254.

Sections 8249 to 8253, inclusive, cover the application for and issuance of licenses to non residents of the State.

Section 8254 provides for the issuance of county and state fishing licenses. County resident licenses shall entitle the holder to fish in the county wherein such license is issued and also in any county adjoining the issuing county. State resident licenses entitle the holders thereof to fish in all counties in the State of Missouri. Any person who has been a bona fide resident of this state for six months last past may secure a license for himself or herself, by filing an affidavit with the county clerk or the license collector of the City of St. Louis, making certain statements and giving certain information, whereupon a license to fish in the county where the applicant resides and any county adjoining the same, shall be issued, it being provided that the section shall not apply to owners and tenants of farm lands used exclusively for agricultural purposes and members of their families under the age of twenty-one years who are entitled to fish on their own and leased lands without obtaining a license so to do, it being further provided in the section that no female or minor who are resident citizens or this state shall be required to take out a fishing license and it being further provided that no person shall be required to take out a fishing license to fish in the water in the boundaries of the county in which he resides,

it being further provided that the section shall not be so construed as to permit a person to fish in any county other than that in which he resides without first taking out fishing license.

Section 8257 requires every person holding a fishing license in this state to present the same for inspection by the fish and game commissioner or any of his deputies or any sheriff, marshal or constable, making a refusal so to do a misdemeanor.

Section 8253 provides a penalty for fishing in this state without at the time being in possession of a license duly issued to such person and covering the period of time in which such fishing is done.

You have correctly set out in your letter the material part so far as your inquiry is concerned, of Section 8275 Revised Statutes Missouri, 1929.

Section 8224 first quoted from is only declaratory of the common law as to the ownership of fish in the waters of the state. The ownership being in the State, the right to fish becomes a privilege which the State may withhold from its citizens or grant upon such terms and conditions as to the State, acting through its Legislature, may seem proper and wise in the protection of the wild life of the state. That the Legislature has undertaken to do, so far as fish are concerned by means of sections of the statutes above referred to in this opinion.

The protection ordinarily afforded by the Constitution of the State against unreasonable search and seizure, as well as that a defendant in a criminal case is entitled to be confronted with the witnesses against him, do not apply in the enforcement of the laws, rules and regulations with reference to the protection of birds, fish and game. In other words, upon the acceptance of a license from the State to take and keep its property the license agrees to become amenable to the rules and regulations laid down by the State. Without investigation it would ordinarily occur to one with knowledge of the Constitution of the State and rules of evidence, that that part of Section 8275 making the possession of fish prima facie evidence of the violation of the Section would violate the constitutional rights of the defendant in that he is in a way producing evidence against himself and may be in a way convicted without being confronted with the witnesses against him. However, if the person being prosecuted is the holder of a license issued by the State and we assume you refer to that character of case in your letter, then such constitutional privileges have been waived by the acceptance of the license. The law of this State in

the above regard is stated by the Supreme Court of Missouri, en banc, in State v. Bennett, 285 S. W. 50, and on page 53, where the court quoted with approval the following:

> "Rights in private property must, to a reasonable extent, yield to the public welfare. The protection of game is a public advantage, to which private interests may be made to yield to some extent. The Legislature may enact a reasonable regulation to prevent an easy evasion of the law and a defeat of its purpose to protect and preserve game, and in doing that it may make it unlawful for any person to have in his possession the carcass of a deer, which does not have on it the natural evidences of its sex, whether the deer was a wild or a domesticated one, and the game and fish law of 1905 does that and is valid in that respect".
>
> And further on the same page and on page 43 said:
>
> "The defendant cannot play fast and loose, that by accepting a hunter's license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case.
> In Diaz v. United States, 223 U. S. 442, 452, 32 S. Ct. 250, 252 (56 L. Ed. 500, Ann. Cas. 1913C, 1138), in considering the question of the right of the accused to be confronted by a witness against him, the court said:
> The view that this right may be waived also was recognized by this court in Reynolds v. United States, 98 U. S. 145, 148, (25 L. Ed. 244), where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused."

Under Section 8275 any person entitled to fish may for instance catch 20 rock bass and 5 jack salmon in one day, or for instance he is entitled to catch 15 white perch and 10 channel cat in one day, but in no event can such person catch more than a total of 25 game fish in any one day, that is a person might catch 5 rock bass, 5 trout, 5 crappie, 5 jack salmon and

5 white perch.

If a person is apprehended and has in his possession more than 25 of the fish designated as game fish by Section 8275. then a charge should be filed against such person before an officer having jurisdiction thereof and proof that such person was in possession of 25 game fish at a time certain is sufficient evidence upon which a conviction may be sustained. The defendant, however, would have the right to make proof that he did not catch all of the 25 fish in one day, then it would become a question for the jury to pass on. If the jury thought he did catch all the fish on the same day they would find him guilty, if they did not they would find him not guilty.

Under no circumstances should your Department accept such an affidavit as you refer to in your letter, as that permits the person in possession of the fish without a hearing and without the State having a right to present its evidence, to acquit himself of any wrongdoing. In such a case as you refer to an affidavit should have been filed before a Justice of the Peace of the proper district, charging the person with a violation of the law and the person should have been arrested and brought into court and tried, but in no event should any deputy of yours or other officer have a right to pass upon the guilt or innocence of the party and upon an affidavit furnished by the person suspected of violating the law.

In what we have thus far said we have had in mind persons who were required to have and who were in possession of fishing licences, however, we do not want to be understood as implying that a person not required to procure a license to fish could violate the provisions of Section 8275.

Very truly yours,

W. C. BUFORD,
Assistant Attorney General

APPROVED:

_____
Attorney General.

WCB:LC

PUBLIC SERVICE COMMISSION: What constitutes "suburban territory" in Sec. 5264, 1931 Laws, p. 305

April 26th, 1933

FILED
79

Hon. Harry P. Rosecan,
Prosecuting Attorney,
City of St. Louis, Mo.

Dear Mr. Rosecan:-

I acknowledge receipt of your letter of April 11th, addressed to the Attorney General, wherein you request an opinion respecting the use of the term "suburban territory" as it might apply to the territory East of the City of St. Louis, said territory being in the State of Illinois, your request being as follows:

> "We have an inquiry concerning the transportation of products from the State of Illinois to residents of St. Louis, and I would like to have your interpretation concerning the use of the term 'suburban territory' as it appears in the 1931 Session Acts, pp. 304, and 305, section 5264, subdivision E., especially regarding its extension eastward into Illinois territory."

The applicable part of subdivision E, section 5264 as contained in the 1931 Session Acts, p. 304 reads as follows:

> "(E) The term 'suburban territory' when used in this act, means that territory extending one mile beyond the corporate limits of any municipality in this State, and one mile additional for each 50,000 population or portion thereof."

While there is nothing in the definition to exclude territory in another state, it was undoubtedly not the intention of the legislature to include territory in another state. So long as they operated in Illinois, they are not subject to the regulation of the Public Service Commission. When they cross the state line they may, under certain circumstances, become subject to regulation. However, your inquiry indicates that they come directly to the City of St. Louis from Illinois. They would, therefore be immune to regulation while in the City of St. Louis under the provisions of subdivision (b) of section 5264 as found in the Laws of 1931, which reads as follows:

> "* * * Provided however this act shall not be construed as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within a municipal corporation. * * *".

It is accordingly the opinion of this office that such shippers would be excluded from the terms of the 1931 Session Acts, pp. 304, to 316.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW/mh

X

BLIND PERSONS--Maintained in public, private or endowed institutions.

May 9,1933

FILED
79
20

Mrs. Mary E. Ryder
Executive Director
Mo. Commission for the Blind
1722 Olive Street
St.Louis, Missouri

Dear Mrs. Ryder:

This is to acknowledge your letter of April 26th, 1933, which is as follows:

"The question has been raised as to the right of pensioners to select their homes after they have been pensioned by us. One of our former pensioners, a Mr. Dunton of Iron County, was stricken from the roll on March 13, 1935, because he entered the Missouri Home for Aged Baptists, Ironton, Missouri.

It seems that this home has some endowments and the wording of the law is such that if pensioners are being maintained by institutions of this sort that they are not eligible for the pension. However, in such cases when pensioners select homes asthe best place to live in on their limited incomes, the question arises does the nature of the home disqualify the pensioner.

We are now faced with another inquiry from another pensioner who wants to enter a home if he would not have to give up his pension. It is the Home of Forsaken Members of the Baptist Church at Ironton, Missouri. He wants to know if this would annul his pension. He said he is alone and very desolate and this home would offer to him comforts that he cannot manage for himself.

The management of the home has written for an opinion for they are not anxious to acquire another resident of this kind and have

> him forfeit his pension, as they are in financial difficulties.
>
> It is true that this question might raise a very vexatious problem for us in view of the fact that many who are not being supported in homes of this kind might see fit to seek the pension. These are questions that make it difficult to decide these points. I would appreciate your strict interpretation of the matter."

Section 8893 R. S. Mo. 1929, defines persons eligible to receive pensions, and said section has this provision:

> "* * *and provided further, that blind persons who are maintained in either public, private, or endowed institutions, or by private persons who would otherwise be entitled to a pension under this article, shall not be entitled to the benefits of this article; and provided further, that no blind person shall be entitled to the benefits of this article while confined in any jail or penitentiary under conviction of any offense etc.," * * *

You will observe that the above section provides specifically that blind persons <u>who are maintained in</u> either public, private or endowed institutions should not be entitled to a pension.

We are of the opinion the words "who are maintained in", as used in the above provision, when read with the entire act, applies to a blind person living in a public, private or endowed institution, and his or her support or upkeep in same is gratuitous or paid by some one other than pensioner.

Webster's International Dictionary defines "maintain" to mean to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; to bear the expense of.

In the case of State ex rel. Palmer v. Thompson, State Auditor, 297 S. W. 62, the court used the following language after citing the provision supra from Section 8893.

> "Under the 1933 act, the fact that the relator <u>is and was being maintained</u> in a publicly supported institution, automatically

deprives her of the right to receive
a pension. * * **

Your attention is directed to the underscored words.

The relator in the above case was on the pension roll, and due to lack of funds appropriated, she did not receive her pension and was forced to enter an alms house. In reading the case, it will be seen that the court had in mind the fact as to who was paying for the support.

It is our opinion that the provision herein considered is simply to protect the State from giving support to pensioners already cared for by other persons or institutions. The pension is nothing more than a gratuity granted by the State for the actual support and maintenance of the deserving blind, hence, if such person is being provided for he or she would not be entitled to the pension. This intent is gathered from other provisions of the act, namely, if a blind person lives with a sighted husband or wife who has an income or is the recipient of six hundred dollars per annum; or if a person is confined in a penitentiary; or maintained in an institution.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MH

RECIPROCITY LICENSE LAW: Applies to persons operating under Kansas license tags.

May 20, 1933.

FILED
79

Mr. Dewey A. Routh,
Prosecuting Attorney,
Nevada, Missouri.

Dear Mr. Routh:

This Department acknowledges receipt of your letter dated May 15, 1933, as follows:

> "We have been bothered in Vernon County with the following situation:
>
> A considerable number of Kansas cars bearing the 1932 license plates are found upon the roads of this county. The Kansas Legislature has modified their law so that their citizens may operate their automobiles upon the highways of Kansas with the 1932 tags, provided, however, that when they do buy their new 1933 tags, they must pay a penalty of fifty cents a month for each month they have operated their car from the time the 1932 tags became invalid until the time of the purchase of the 1933 tags.
>
> We have arrested and fined several Kansas citizens for operating their cars on the highways of Missouri with 1932 tags and have met with considerable criticism in each case. I would like your opinion as to whether a Kansas citizen may operate his automobile in Missouri under the reciprocity law and not be subject to fine in Missouri under the Missouri Statutes, or whether he would be subject to fine in Missouri."

In answer to the above inquiry, we are assuming that the State of Kansas now has a reciprocity automobile license law.

Section 7768, R. S. Mo. 1929, provides as follows:

"A nonresident owner, except as otherwise herein

> provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this Section shall be operative as to a vehicle owned by a non-resident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The purpose of the reciprocity automobile license laws is, of course, that legally licensed operators of motor vehicles in Kansas may operate their automobiles within the State of Missouri without acquiring a Missouri license, and persons duly licensed to operate motor vehicles in Missouri may operate them in the State of Kansas without the acquiring of the Kansas license. The above Section provides "that a non-resident, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year, in the state, etc." We do not believe that the term, "current year" necessarily means that the operators of Kansas must have a 1933 license tag upon their automobile. The Legislature of Kansas has permitted persons to operate in 1933, by the use of 1932 license plates, plus a penalty of 50¢ permonth, as set out in your letter. Persons conforming to those provisions are duly licensed operators within the State of Kansas, and are duly registered for the "current year" in Kansas.

All that is contemplated by the reciprocity laws is that a person be duly licensed under the laws of the state where he resides. It is not necessary, in order to take advantage of the reciprocity law, that the state of Kansas exact any license fee. It may charge none or it may charge more or less than the fee charged by this state; that being a matter of purely state concern. These laws do not contemplate that the requirements in the various states s all be uniform or that one state shall have any control over the terms or provisions of the laws of sister states.

According to the modified law of Kansas, persons operating under the 1932 license tags are legally operating, according to the requirements of the Statutes of Kansas. If they have complied with the requirements of the laws of Kansas regarding the licensing of their automobiles, then under Section

7768 they are entitled to operate for certain purposes their automobiles within the State of Missouri without subjecting themselves to arrest or fine.

Very truly yours,

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

(1)

BLUE SKY DEPARTMENT: CORPORATIONS: Corporation can not act beyond the corporate powers and Blue Sky Commissioner can not supervise securities unlawfully issued.

May 22, 1933. #79

Honorable Neal J. Ross
Commissioner of Securities
Jefferson City, Missouri

Dear Mr. Ross:

This Department acknowledges receipt of your letter dated May 16, 1933, with inclosures with reference to the American Assurance Association.

It appears from your letter, which is of too great length to set out, that the American Assurance Association was incorporated under the provisions of Article X, Chapter 32 Revised Statutes Missouri for the year 1929; that it proposed to issue burial certificates under Section 5014 of said article and chapter; that the incorporation papers were not filed in your office until more than a year after the incorporation of the association; that the original incorporators have sold the association to a new concern. The questions you ask fairly set out the activities of the association and about which you inquire. Your questions are as follows:

> "1. Was the American Assurance Association lawfully incorporated by pro forma decree, in absence of 3,000 paid members, and may it lawfully exist by means of pro forma decree which was granted?
>
> 2. Has said Association exceeded its powers as a benevolent association: -

(a) by establishing its reinsurance arrangement;

(b) by creating its building fund and buying option on building;

(c) by its issuance of assignments of interest in trust fund in amount $330,000 in payment of building, equipment and repairs amounting to $110,000;

(d) by obligating membership of Association and trust fund to pay such debt out of the trust fund earnings?

3. Are assignments of interest in trust fund, sold to persons not members of American Assurance Association, nor not holders of burial certificates of the Association, nor not members of V.F.W. exempt under Missouri Securities Act?

4. Is the issucance of assignments of interest in trust fund an exempted security, or does the statute contemplate the burial certificate as the only exempted security of such Associations?

5. Are the acts and powers which have been assumed by this Association in violation of the Constitution of Missouri and the laws thereunder?"

From the articles of agreement attached to your letter, or I assume it is a copy as it is not certified, it appears that the incorporators intended to incorporate under and have the benefits provided for in Section 5014 of Article X of Chapter 32 of the Revised Statutes of Missouri for the year 1929, and amendments thereto.

Section 5014 provides in part as follows:

> "Associations may be incorporated under the provisions of article 10, chapter 32, R. S. 1929, for the purpose of furnishing funeral or burial benefits for their members; Provided, that no such benefits shall exceed the sum of three hundred dollars for the funeral or burial of any one member. Such association when formed shall be exempt from the provisions of the general insurance laws of this state, to wit: Chapter 37, R. S. 1929: Provided, that any such association now in existence may incorporate as provided in this law within ninety days after it shall take effect, and thereafter no such association shall be incorporated, as in this law authorized, until it shall have application for at least three thousand memberships, with at least one month's dues paid on each application: "

Section 5001 provides that dues of members of corporations organized under such Article X may be provided for by charter or by-laws and that no member shall be liable except for such dues and such donations or subscriptions as the members may obligate themselves to pay.

Section 5003 makes provision for the formation of a company for the purpose of erecting a building for the exclusive use of the society within the purview of Article X Chapter 32, which would seem to imply that a corporation organized for the purposes set forth in Section 5014 could not erect or own a building.

Section 5005 provides that the by-laws of such corporationshall be conformable to its charter and shall not enlarge the scope of the charter.

Section 5007 authorizes any corporation organized under Article X Chapter 32, to acquire stock in any company incorporated under the laws of this state for the purpose of erecting or purchasing a hall or building to the use and benefit of one or more of the corporations permitted to be organized under Article X of Chapter 32, which again implies that a corporation organized under Section 5014 could not

erect or purchase a hall or building for its use or benefit, but it is further provided in Section 5007 that any corporation authorized under Section 4999 may acquire and hold in its own name such real estate and buildings as may be necessary for assembly, library, laboratory and other rooms requisite for its purposes. On account of the peculiar wording of the last proviso it is extremely doubtful whether or not the legislature intended that corporations organized under Section 5014 would have authority to acquire and hold in its own name real estate and buildings, but that need not be passed on

Section 5014 permits the incorporation of associations,

> "For the purpose of furnishing funeral or burial benefits for their members".

A corporation shall have no greater powers than the statute under which it was authorized gave it.

In Railway dnd Navigation Company v. Railway Company, 130 U.S. page 1, the Supreme Court of the United States said:

> "The manner in which these powers (corporate powers) shall be exercised and the subjection to the general laws of the state and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom".

Section 7 of Article XII of the Constitution of Missouri provides:

> "No corporation shall engage in business other than that expressly authorized in its charter or the law which it may have been or hereafter may be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business."

We think there is no question but what the operations of the American Assurance Association as detailed in your letter, are beyond the charter powers of a corporation or ultra vires and the transactions have no validity.

The supervision of your office over certain securities is withheld by Section 7726 Laws of Missouri 1931, page 353. Subdivision E of Section 7726 reads as follows:

> "Any security issued by a corporation organized and operated exclusively for educational, benevolent, fraternal, charitable or reformatory purposes, and no part of the net earnings of which inures to the benefit of any private stockholder or individual",
>
> Can not be supervised by you.

While we think the business, except that provided for in its charter, in which the association is engaging is beyond its charter powers and we think it is the law that you would only have supervision over such securities as may be lawfully issued, to say that you had supervision over the ultra vires securities issued by the association would be to say that the transactions of the association were legal.

Section 5008 makes provision for the institution of proceedings by information in the nature of a quo warranto, to inquire into any alleged unlawful acts of or misuser or nonuser of its franchise by any corporation organized under Article X of Chapter 32, We think that that is the procedure, if any, in this case

that should be followed and we suggest that you make a statement of facts to this office and upon that statement we will take such action as we deem advisable in the premises.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

_____
Attorney General.

GL:LC

COUNTY DEPOSITORY BOND: Does not cover funds deposited by County Collector under Section 9885, Laws of 1933, page 464.

9/25

August 23, 1933.

FILED
79

Senator J. H. Russell, Jr.,
Chilhowee, Missouri

Dear Senator:

This Office acknowledges receipt of your letter of August 12th, 1933, in which you request an opinion as to the construction of Section 9885 R. S. 1929, as amended by Laws of 1933, shown at pages 464 and 465, of the Session Acts of 1933. For convenience we are setting forth your letter of inquiry in full, which letter is as follows:

> "S. B. 254, found on page 464 session acts of 1933, amended section 9885, making it optional with County Courts to permit County Collector to give bond in the same manner and amount as heretofore, or could require him to 'deposit daily all collections of money in such depository or depositories as may have been selected by such County Court pursuant to the provisions of Section 12184, R. S. Mo., 1929, to the credit of a fund to be known as "County Collectors Fund".
>
> There are also other changes provided by S. B. 254 such as permitting the Collector's bond to be reduced if the above provision is complied with, providing he shall check on said County Collectors fund only to make distribution monthly as provided by law etc., but the question I would like to have your opinion on is this; - If the County Court requires the County Collector to make daily deposits as provided by this bill, in a depository which 'may have been selected by such County Court pursuant to the provisions of Section 12184', will the bond provided by Section 12187, Article 9, cover the money placed in a 'County Collectors Fund' as provided by Section

12184 of the same Article as amended by S. B. 254.

I am sure it was the intention of the legislature in passing this bill that the bond given by the depositary should cover the money placed in the 'County Collectors Fund', just the same as it now covers the same money after distribution is made. It was the opinion of lawyer members of the Senate that such would be the case. However, there seems to be some doubt in this county in regard to the matter.

I do not know the custom followed by your office in regard to giving opinions. I am not sure that I am within my rights in asking you for an opinion. You will please advise me if I am not and I will have our County Attorney make the request.

With highest personal regards and best wishes, I am,"

We note what you say relative to "the intention of the legislature in passing this bill that the bond given by the depositary should cover the money placed in the 'County Collectors Fund', just the same as it now covers the same money after distribution is made. It was the opinion of lawyer members of the Senate that such would be the case."

The construction of a law put upon same, the intention of the Legislature and the opinions of its members are very persuasive as to the construction that should be put upon it. However, we must look to the statutes for the proper construction thereof.

We are setting out in full Section 9885 R. S. 1929, as amended at pages 464 and 465, Acts of 1933, because this is the particular section that you asked us to construe. Said section reads as follows:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the

mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties. Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund;' provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars ($100.00); and provided further the collector shall not check on such 'County Collector's Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

The new Section 9885, as amended by Acts 1933, at pages 464-465, is the same as old Section 9885 down to the word "Provided" in the 17th line thereof, except the word "two" of the old section, in the 12th line, is changed to "one" in the new section, and the

year "1909" in the 21st line of the old section is left out of the new section entirely; both of which minor changes, as to the question involved, are immaterial.

Beginning with the word "Provided" in the 17th line, to the end of the section, was added by the Legislature of 1933. This amendment applies to Johnson County for the reason that it is a county which has a population of less than 75,000 inhabitants according to the last preceding federal decennial census. This amendment makes it optional with the county court by using the term, "may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statues of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund;'" And the statute further provides, "that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount;"

The amended portion of said section has to do with the bond to be given by the county collector and does not in any way refer to the bond of the county depository.

Section 12184, R. S. 1929, provides how the depository for county funds should be selected. Section 12185, R. S. 1929, provides what procedure the bidders for the county funds shall take, and in said section it provides:

> "* * * * *, that if his bid (referring to the successful bidder) should be the highest he will enter into the bond hereinafter provided. * * *

> kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, the banking corporations, associations or individual bankers whose bids respectively made for one or more of said parts of said funds shall in the aggregate constitute the largest offer for the payment of interest per annum for said funds: Provided, that the court shall have the right to reject any and all bids. The interest upon each fund shall be computed upon the daily balances with the depositary, and shall be payable to the county treasurer monthly, who shall place theinterest on the school funds to the credit of those funds respectively, and the interest on all other funds to the credit of the road and bridge fund. The county clerk shall, in opening the bids, return the certified checks deposited with him to the banks whose bids were rejected, and on approval of the bonds of the successful bidder or bidders return the certified check or checks respectively to the bank or banks whose bid or bids are accepted."

Now, your County (Johnson) is, by referring to the Blue Book of 1931 and 1932, not under township organization and, therefore, the county court of your county only selects the depositories of all the funds of every kind and description going into the hands of the county treasurer.

In the case of Deal v. Bank of Smithville, 52 S. W. (2d) 201, l. c. 204, the Kansas City Court of Appeals said:

> "* * * * * The law does not appear to require the collector to deposit funds in his possession or to which he is entitled in any designated depositary. No provision of that character has been called to our attention. Article 9, chapter 85, R. S. 1929 (section 12184 et seq. (Mo. St. Ann. section 12184 et seq.)), deals with the subject of county depositaries, and section 12186, R. S. 1929 (Mo. St. Ann. section 12186), provides for specified depositaries of all public funds coming into the hands of the county treasurer or into the hands of the ex officio collector in

counties under township organization. There is no such provision applicable to a county collector. It appears that he is personally invested with the care and custody of funds in his hands until such time as he is required to deliver them to the county treasurer, and he is required to give a bond to the state, satisfactory to the county court, conditioned that he will faithfully collect and pay over the county and state revenue and perform the duties of his office according to law. Section 9885, R. S. 1929 (Mo. St. Ann. Section 9885).
* *"

It is, therefore, the opinion of this Department that the depository bond given by the county depository, selected by your county court, in accordance with the provisions of Sections 12184, 12185, 12186 and 12187, R. S. 1929, does not cover the funds deposited by your county collector under the provisions of Section 9885, as amended at pages 464-465, Acts of 1933, which the county court in your County (Johnson) may require the county collector to deposit to the credit of a fund to be known as "County Collector's Fund", before distribution by the county collector.

We hope that the above answers your inquiry, but should there be any other question we shall be glad to serve you. We remain,

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

SECURITIES DEALER'S BOND:

Under Section 7744 R. S. Mo. 1929, the total aggregate liability of surety on Securities Dealer's Bond is limited to $5,000.00.

9/12

August 26, 1933.

FILED
79

Mr. Neal J. Ross,
Commissioner of Securities,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Sec. 22 of Missouri Securities Act provides for a dealer in securities to file with this Department 'a bond in the sum of five thousand dollars ($5,000) running to the people of the state of Missouri in such form as the commissioner may designate, such bond to be conditioned upon the faithful compliance with the provisions of this act by said dealer and by all salesmen registered by him while acting for him. Such bond shall be executed as surety by a surety company having a net worth of not less than $1,000.00 and authorized to do business in this state.'

Florida enacted a similar provision. The Attorney General of that state ruled Sept. 10, 1931 as follows: 'It is my opinion that the total maximum liability for all purposes is $5,000.00. In other words when liability is created under this bond, whether it is by the dealer or by one or more of his agents, and a total judgment of liability of $5,000.00 is reached, that this is the full liability of the principal and sureties on this bond.'

The question of total liability seems to be moot in this state. This Department has issued opinion that the total aggregate liability is $5,000 but certain surety companies are not satisfied with such ruling, stating that the statute itself is questionable. Such companies, cannot,of course, write bonds with indeterminate liability, and as result, many asking for such bonds are flatly refused and informed that the company is 'not writing dealers bonds.'

It is requested that you rule as to the total aggregate liability under Sec. 22 of Missouri Securities Act. Also, am attaching form of bond adopted by previous administration, with insertion of the aggregate clause which they permitted in the bond. Some surety companies prefer a cancellation clause allowing them to withdraw upon 30 days' notice. I

see no objection to such clause. Will you please submit a change of form in the bond of dealers in securities, to remove any ambiguities that may exist?"

You inquire as to the total aggregate liability of the bond under Section 22 of the Missouri Securities Act, now found as Section 7744, R. S. Mo. 1929, and request a form of bond to remove any ambiguities of the one which you enclose.

The pertinent part of Section 7744, R. S. Mo. 1929, is as follows:

"* * * If the commissioner shall find that the applicant is of good repute and has complied with the provisions of this section including the payment of the fee hereinafter provided he shall register such applicant as a dealer upon his filing a bond in the sum of five thousand dollars ($5,000) running to the people of the state of Missouri in such form as the commissioner may designate, such bond to be conditioned upon the faithful compliance with the provisions of this chapter by said dealer and by all salesmen registered by him while acting for him. Such bond shall be executed as surety by a surety company having a net worth of not less than $1,000,000 and authorized to do business in this state. * * *"

The bond is conditioned upon the faithful compliance with the conditions of this chapter by "said dealer and by all salesmen registered by him while acting for him." Such dealer shall be registered "upon his filing a bond in the sum of five thousand dollars ($5,000)." We believe it is apparent from the reading of the Section that the $5,000.00 bond required was to cover the defalcations of the dealer, or his agents while acting for him, and that the sum of $5,000.00 is the maximum penalty that can be exacted under the bond. We do not believe that the Section can be so read as to make the surety liable for a sum in excess of the sum of $5,000.00, even though the total defalcations by the dealer, or his various salesmen, would actually exceed the penal sum of $5,000.00. If the surety should be compelled to pay $1,000.00 because of the default of one salesman of the dealer, we believe that the surety's liability automatically is reduced to $4,000.00 so far as additional defalcations are concerned. We do not believe it was the intention of the Act that the Surety's liability should be to the extent of $5,000.00 on each of the dealer's salesmen, making the total aggregate liability dependent upon the number of salesmen employed.

It is well settled that a statutory bond includes the statutory provisions regulating the bond. The view we take of it, however, is that there is no ambiguity in the statute, and that the sum of $5,000.00 is the total maximum liability in all events. We do not believe there is any ambiguity in the

bond which you enclose, but we have rewritten the bond so that no ambiguities can arise in the future. We are enclosing the bond.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

SECURITIES: Credit union to pay examination fees.

September 21, 1933

9.25

FILED

79

15

Honorable Neal J. Ross
Commissioner of Securities
Secretary of State's Office
Jefferson City, Missouri

Dear Mr. Ross:

We hereby acknowledge your letter of August 23, 1933 whereby you request an opinion from this department. Your request is as follows:

> "Sec. 5084 R. S. 1929 places credit unions under the exclusive supervision of the Commissioner of Securities, and requires me to cause annual examinations to be made, as follows: 'Each credit union shall be examined at least annually by the said commissioner of securities or his duly authorized deputy or agent.....The credit union shall pay to the said commissioner of securities the actual cost of the examination herein provided, except that said cost shall not exceed in any case seven dollars per diem for each examiner.'
>
> The statute does not specify that examination fees shall be paid into the state treasury.
>
> The Securities Division does not have sufficient appropriation to pay the salary and expenses of an examiner. There are some 130 credit unions to be examined. The last examination was in April, 1932, and the law is mandatory that we must make annual examinations. The credit unions are scattered all over the state of Missouri, and it will take months to examine all of them.

> It is proposed to handle the situation by appointing an examiner to go to each credit union and conduct examination. The examination fee which the credit union will pay to him will not be transmitted to the state treasurer, but will be retained by the examiner as compensation.
>
> Please favor me with your ruling, as to whether this plan can be carried out within the powers of the statutes. Unless such plan can be placed in effect, I do not see just how we are going to be in position to comply with the annual examination requirement of the statute."

Paragraph 1 of your letter is a proper literal exposition of Section 5085 R. S. M. 1929, and for the purpose of this opinion I will not repeat it.

The law provides that the Securities Department is under the office of the Secretary of State, and Section 7724 R. S. Mo. 1929 relating to the powers and duties of the Commissioner of Securities read as follows:

> "The term 'commissioner' means supervisor of corporation registration, who shall act under the direction of the Secretary of State. * * * *"

Article 15 of chapter 32 dealing with the organization and supervision of Credit Unions in Missouri places the exclusive supervision of said corporations in the hands of the Commissioner of Securities by virtue of Sec. 5084 R. S. Mo. 1929 as quoted above, but even so, the general law as it affects and controls the office of the Secretary of State, also carries its limitations and requisites to the subservient agents under the control of the Secretary of State, and hence the Securities Commissioner must be limited and guided by said general law in his exclusive supervision of Credit Union Corporations.

Under the chapter dealing with the powers and duties of the Secretary of State, Sec. 11379 R. S. Mo. 1929 provides as follows:

> "It shall be the duty of the secretary of state, within the first three days of every month, to file with the state auditor a written statement, verified by his affidavit, showing the amount of all fees received by him in the past

> month, for services rendered as now provided by law, other than his annual salary; such statement shall show the amount of each item, from whom received, and for what services; and within the first five days of every month he shall pay into the treasury the aggregate amount of such statement, less the twelfth part of five hundred dollars, and it shall become a part of the general revenue fund of the state. He shall take from the treasurer duplicate receipts therefor, one of which he shall, within said five days, deposit with the state auditor, who shall immediately charge the treasurer with the amount thereof on the books of his office: Provided, that all fees chargeable by law shall be paid in advance; and in case of failure of the secretary of state to collect any fee, he shall be chargeable for the same, in like manner as if the same had been actually paid in advance; and provided further, that no fee shall be charged and collected for affixing the 'great seal' to pardons of convicts in the Missouri penitentiary."

Then too, our Missouri Constitution provides in article 4, section 43 as follows:

> "All revenues collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance to legal appropriations made by law * * * *."

Article 10, Section 19 of the Missouri Constitution provides as follows:

> "No moneys shall ever be paid out of the treasury of this state, or any other funds under its management, except in pursuance of an appropriation by law; * * * *. A regular statement and account of receipts and expenditures

> of all public money shall be published from time to time."

The question involved in your query is answered when it is determined whether the money paid to the Securities Commissioner for an annual examination is State funds or is private funds. If said money be State funds it must go into the State Treasury, if it be private funds, then your plan could be adopted. In the case of State v. Board of Regeants, 264 S. W. 689 l. c. 700-305 Mo. 57 where mandamus was sought to compell the payment of money in the hands of the Board of Regents of a state teachers college into the State Treasury, our Supreme Court en banc said:

> "This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. With this limitation--and the Constitution itself is but an instrument of limitations --it should be strictly construed.* * * *"

Then again in State v. Bradshaw, 281 S. W. 946 l. c. 948; 313 Mo. 334, our Supreme Court en banc, in determining the right of the warehouse Commissioner to certain sums which it was alleged he collected and failed to pay into the treasury of the State, they said:

"The purpose of having the fees collected and paid into the state treasury is apparent. Section 43, article 4, of the Constitution, requires that all revenues collected and 'moneys received by the state from any source whatsoever' shall go into the state treasury and must be paid out on appropriations by the General Assembly. When the charges for inspecting grain are paid to the commissioner, the inspector, his deputy, or assistants, they must be paid, of course, to the state of Missouri. The money must go into the state treasury. This is done so that the proper authorities may keep a check upon all the operations of every department of state. To allow a department of state, which is self-supporting from charges paid for services rendered, to have charge of the money received without accounting to the state in any way, would probably lead to abuses. The requirement that all money shall go into the state treasury, with statements accounting for how it was received, would prevent exorbitant charges which might weigh down the grain trade with undue burdens. From the fact that the money was to be paid into the state treasury and go into the general revenue fund, it does not follow that the state should have any money from that source to appropriate for other purposes. The amount received from that department should be exactly, or approximately, balanced against the expense of the department."

In the case of State v. Hackmann, 304 Mo. 453, 264 S. W. 366, our Supreme Court said on page 367:

"The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the state 'from any source whatsoever.' The money collected by the board is received by the state; it goes into the state treasury. To make it

more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the state, it is applied, not only to state funds, but to 'any of the funds under its management.'"

It is the opinion of this department that under the provisions of Section 5084 R. S. Mo. 1929 the Commissioner of Securities of the State of Missouri has the power to appoint and deputize an assistant or assistants, whose duties would be to examine and audit the affairs of each Credit Union operating in the State of Missouri; and that said Commissioner is empowered to receive from said corporation an examination fee not to exceed $7.00 per day for each examiner; but that this money in the Commissioner's hands is State funds, or to say the least, this money is a fund under the management of the State, and the Legislature has provided for the disposition of money coming under the control of the Secretary of State by virtue of Section 11379 above set out, and hence this money must go into the State Treasury. The salary of an assistant appointed to examine Credit Unions can only be paid from money appropriated by the Legislature as provided by law.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

Roy McKITTRICK
Attorney General

ABSENTEE VOTING --Authority and method in City Election.

September 22, 1933

FILED
79

Mr. Alfred L. Rottman, Chief Assistant
Board of Election Commissioners for the
City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri

Dear Sir:

Your request for an opinion of the Attorney General under date of September 6, 1933, has been received, such request being as follows:

"There are several matters pertaining to the absentee voting law passed by the 1933 Legislature(Pages 218 to 225 Laws of Missouri) concerning which we would like to have your opinion:

First. The Board of Aldermen of this City is now contemplating the passage of ordinances providing for a special election at which there will be submitted to the voters a bond issue proposition, and a proposition concerning the method of street widening assessments. We believe that under the authority of Section 10181 absentee voting will be permitted at such local election. Is this correct?

Second. Section 10181 provides that: 'Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business, or duties, to be absent from the County* *' Sections 10183 and 10184 set forth the forms of affidavit in which the voter is required to state: 'My business or duties are. . . . . employer. . . . . .' Section 10188c. 'Purpose of act.- This act shall be deemed to provide a method of voting by voters absent from their county on the day of election * *' Our understanding of these sections is that an elector absent from the city for any reason whatsoever, is entitled to cast a ballot. Is this correct?

Third. Section 10182 provides that a voter must make application for a ballot in person. May he make his request by mail, using the proper form of application, or must he appear in person at this office to do so, not more than thirty days, nor less than five days prior to the election?

Fourth. Becuase of the form of affidavit as set forth

in Section 10184 and the provisions of Section 10185, we believe that a voter must be within the State of Missouri to cast his ballot. Is this correct?

Fifth. Who is 'an officer authorized by law to administer oaths' as provided by Section 10185?"

Answering Paragraph First of your inquiry, Laws of Missouri 1933, page 219, Section 10181 provides as follows:

"Sec. 10181. Who may cast absentee ballot. - Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such elections as hereinafter provided."

It is the opinion of the Attorney General that "a bond issue proposition, and a proposition concerning the method of street widening assessments" are propositions a vote on which would be an "election * * * at which questions of public policy are submitted" within the meaning of this statute, and that absentee voting would be allowed under this statute for such election.

Answering Paragraph Second of your inquiry, it is the opinion of the Attorney General that your understanding that "an elector absent from the city for any reason whatsoever, is entitled to cast a ballot" is not correct for the following reasons:

Section 10181 above quoted allows an elector "who expects in the course of his business or duties to be absent from the County" to vote by absentee ballot. Section 10183 of Laws of Missouri 1933, page 218, requires the applicant for an absentee ballot to make an affidavit as a part of which affiant must fill in the following blanks:

"That my business or duties are _____ for _____ (employer) _____ of _____ street, in the City of _____, state of _____"

and Section 10184 of the same Act provides that an affidavit is to be made by each absentee voter on the envelope in which the absentee ballot is to be mailed to the polls, as a part of which affiant must fill in the following blanks:

"That my business and (employer) of _____ Street, in the City of _____ and state of _____, and that in the course

of my business or duties I expect to be absent from the said county of my residence, on the date of said election."

The above statutory references to an absentee voter's employer, business and duties show a clear intention of the Legislature not to allow a person to vote by absentee ballot who has not some legitimate business or duty which is responsible for his being outside of the county on election day. Thus, if a voter would refuse to fill in the blanks of the affidavits as above set out, or if such blanks should be filled in in such a way as to indicate that the prospective absentee voter had no legitimate business or duties which would call him or had called him out of the county for election day, or if such blanks were filled out with statements which the judges of election should know to be untrue, then the ballot should not be issued or the vote counted, as the case might be.

Section 10181 of Revised Statutes Missouri 1929 enacted as Laws of Missouri 1913, page 323 and repealed by Laws of Missouri 1933, page 218 provided as follows:

"Sec. 10181. Qualified voters - absent - may vote- when.- It shall be lawful for any employe of any railroad company, traveling salesmen, student in any college of the state, state officer, or other person, being a qualified elector of the state of Missouri, who may, on the occurrence of any general or primary election be unavoidably absent from the county in which he resides and is a qualified elector therein, because his duties, occupation or business requires him to be elsewhere within the state on the day of such general or primary election, to vote for county, district and state officers, members of the legislature, members of congress and electors for the president and vice-president of the United States at any voting precinct within the state of Missouri where he may present himself for that purpose, on the day of said general or primary election, under the conditions and regulations hereinafter prescribed."

Admittedly, the omission in the new corresponding Section 10181 enacted in 1933 of the words "unavoidably absent"and "requires" which were contained in the repealed Section 10181 is significant, but it will be observed that the words "duties" and "business" are present in the new section, and unless the construction above submitted is correct these words, as well as the provisions of the affidavits above set out are meaningless.

Therefore, it is the opinion of the Attorney General, as to Paragraph Second of your inquiry, that a ballot should be furnished to and the vote counted of any person who can make out a prima-facie case for his legitimate absence from the county in the course of his business or duties on the day of election. The word "prima-facie" is used because the words "business" and "duties" are rather vague and would not seem to demand a thorough investigation by the judges of election as to the exact type of business or duty which would qualify an elector as a proper absentee voter,

but unless the construction herein adopted is adopted they are wholly meaningless.

Answering Paragraph Third of your inquiry, Section 10182 of Laws of Missouri 1933, page 218, provides as follows:

> "Sec. 10182. May apply for official ballot. - - Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, to the county clerk, or where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

It is the opinion of the Attorney General that the phrase "make application in person" in such section would not be complied with by a request by mail for an absentee ballot.

Answering Paragraph Fourth of your inquiry, it is believed that an absentee voter must be within the state of Missouri to participate in an election held therein.

There has been much judicial doubt as to the right of a legislature to allow absentee voting in any form, and absentee voting laws have been declared invalid in the following cases:

> Re Right of Electors, 41 R. I. 118, 102 Atl. 913 (1918);
> Re Opinion of Justices, 113 Atl. 293 (N. H. 1921);
> Bourland v. Hildreth, 26 Cal. 161 (1864);
> Chase v. Miller, 41 Pa. 403 (1862);
> Opinion of Judges, 37 Vt. 665 (1865);
> Re Contested Election in Fifth Ward, 126 Atl. 199 (Pa) (1924);
> Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921).

The general right of the legislature to provide for absentee voting within the state was upheld in Straughan v. Meyers, 268 Mo. 580, 187 S. W. 1159 (1916) in which case the Supreme Court of Missouri upheld the election law of 1913 (R. S. Mo. 1929, Sections 10181-10188) which was repealed in 1933. In that case, the court said:

> "It is next urged by respondent that the act violates that part of section 2, article 8, of the State Constitution, which reads as follows:
>
> 'Every male citizen * * * possessing the following qualifications shall be entitled to vote at all elections by the people * * * He shall have resided in the county, city or town where he shall offer to vote at least sixty days imme-

diately preceding the election.'

It is clear that this section does not undertake the prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited or counted; but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote. The word 'vote' means suffrage, voice or choice of a person for or against a measure or the election of any person to office. It is not synonymous with 'ballot', which is merely the means or instrument by which the person votes, or rather expresses his choice or exercises his right of suffrage. (Clary v. Hurst, 138 S. W. 566; State ex rel. v. Blaisdell, 119 N. W. 360; State v. Custer, 66 Atl. 306; Gillespie v. Palmer, 20 Wis. 544; Davis v. Brown, 34 S. E. 839).

Had this measure provided that such absent voter could vote, that is, could exercise a right of choice for or against matters relating to the place where he did not reside, for instance, candidates of a county or district other than that of his residence, there would be no doubt of its invalidity; but it does not so undertake. The act specifically provides that the ballot shall not be deposited in the ballot box, nor entered upon the poll books, but that same shall, under certain safeguards and regulations, be transmitted to the clerk of the county where the voter resides, and be there counted. The act of legally voting, as the term is understood in law, embodies theright to have the vote counted. This act does not undertake to authorize a person to vote in a place other than that of his residence, but merely provides a system or method through which he may vote in the place of his residence."

In the case just quoted, the language seems applicable equally to an absentee voting law which might allow voting by one outside the state, but such a law was not before the court for the absentee voters' law of 1913 did not provide for votes to be cast at any other place than a "voting precinct within the state of Missouri." (R. S. Mo. 1929, Sec. 10181).

However, in 1924 an amendment to the Constitution of Missouri was adopted such amendment being Section 9 of Article VIII, which provides as follows:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

No cases have been decided construing this constitutional provision, but it

is the opinion of the Attorney General that the use of the phrase "within the state" by implication, especially in view of the case of Straughan v. Meyers above cited would put it beyond the power of the Legislature to allow voters outside of the state on election day or at the time of executing their ballots to vote, and that therefore the forms of affidavit provided for in Laws of 1933, page 218, Sections 10184 and 10185 would not be material, and that a voter must be within the state of Missouri on the day of election to vote.

Answering Paragraph Fifth of your inquiry the phrase "an officer authorized by law to administer oaths in this state" contained in Section 10185 of Laws of Missouri 1933, page 218 is referable to R. S. Mo. 1929, Section 1720, which provides as follows:

> "Sec. 1720. Officers authorized to administer oaths.- Every court and judge, justice and clerk thereof, and all justices of the peace, shall respectively have power to administer oaths and affirmations to witnesses and others concerning any thing or proceeding depending before them, respectively, and to administer oaths and take affidavits and depositions within their respective jurisdictions, in all cases where oaths and affirmations are required by law to be taken."

and also that such oath could be administered by a Notary Public under Revised Statutes of Missouri 1929, Section 11738.

Very truly yours,

ASSISTANT ATTORNEY GENERAL

APPROVED:

ATTORNEY GENERAL.

NEPOTISM:

Public officer receiving personal service from wife does not violate Section 13 of Article XIV, where wife is not appointed to an official position.

October 4, 1933. 10/7

FILED 79 49

Mr. W. D. Ross,
Circuit Clerk,
Buffalo, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "As Circuit Clerk of Dallas County, I have a deputy--Mr. C. W. Smithpeter--who executed and signs all official documents for the office, when I am 'out of pocket,' which is very rare. I pay him out of my own pocket for said services.
>
> And, in order to save the tax payers of Dallas County the cost of deputy hire, I have my wife to write record for this office. This, of course, is done without cost to the tax payers. If I did not handle the work of this office as above outlined, I would be obliged to have much more deputy service, which would be a further burden on the tax payers of the county.
>
> As you are aware, mine is a salaried office; so, the plan above outlined is not to save me a dollar, but to save the county some burden--and the county is deeply in debt. You are aware, further, that I am entitled to deputy hire.
>
> Your predecessor in office gave his written opinion that the plan above outlined was no violation of the anti-nepotism law. Is that your opinion, Mr. McKittrick?"

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above section of the constitution, any public officer who names or appoints any person within the fourth degree, either by consanguinity or affinity, to render service to the State makes himself liable to forfeiture of office. We believe, however, that the proper construction to be placed upon the constitutional provision is that such persons must be appointed to hold an official position existing under the laws or constitution of this State. We can see a distinction between a person rendering service to the State in an official capacity and rendering service to an individual official because of their relationship. The test, as we understand it, is whether or not the person is appointed to fill an official position and as such to render service to the State. Where a public officer has in his office a member of his family who does not occupy an official position, nor as such render service to the State, but whose services are rendered personally, without expense to the State, to the officer by reason of the family relationship, we do not believe that such situation comes within the provision of Section 13 of Article XIV.

You state that your wife is not a Deputy and does not render service to the State as such, but that she writes records for your office without cost to the tax payers. The service she renders is a personal service to you by reason of your relationship.

It is therefore the opinion of this Department that under such circumstances you are not violating the constitution by permitting your wife to render to you such personal service as you outlined in your letter.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

CORPORATIONS,
EXTENSION OF FRANCHISE:-Building and loan associations are required to pay the fees required under the general corporation laws, Section 4556, and may not extend corporate existence by merely paying the $5.00 provided for in Section 5613, Laws 1931, page 158.

10-23

FILED
79
53

October 18, 1933.

Mr. Neal J. Ross,
Corporation Supervisor,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"This Department is requesting an opinion from you on a proposition which has heretofore been passed upon but in a different connection.

The Webster Groves Building and Loan Association has consulted the Department on the question of extension of its corporate existence. The charter of this association is about to expire. There are three or four other building and loan associations in the state whose charters are about to expire. They desire an extension under Section 5613, page 158, Session Acts 1931. This section provides that the charter may be extended upon the payment into the State Treasury of a fee of $5.00. You have heretofore under date of June 27th, handed us an opinion on Section 1, laws 1931, page 297, a very similar statute to the one now in question but which deals with private corporations, while the one now in question has reference only to building and loan associations. It has been the policy of this Department for several years to refuse to follow these sections or similar statutes on the broad ground that the Legislature cannot, under our Constitution, favor one corporation over another in respect to the fees that it must pay, or the taxes to be collected by the state.

The opinions rendered by your Department absolutely coincide with the practices and opinions held by the Department and especially with the holding of the Supreme Court in the case of State ex rel. v. Roach, 269 Mo. l. c. 443, and that seems to be the law upheld by the Supreme Court as declared in State ex rel. Richey v. McGrath, 95 Mo. 193.

If Section 5613, Laws of 1931, permits building and loan corporations to extend their charters which are about to expire by limitation for a fee of $5.00, and receive therefor a certificate for a perpetual charter, or for

an extended period of fifty years, the state will lose a large amount of fees in each of the cases now pending; we could safely say that the fees will amount to $1500 or more, in each case.

Under date of April 1, 1932, G. C. Weatherby, special counsel for the then Attorney General, Stratton Shartel, in discussing the same matter, made this statement:

> 'Of course, should the Association see fit to withdraw the present extension and through the procedure required by said Section 5613, provide for an extension of corporate existence for a period the same or less than that provided for in its charter, I think you could properly receive and file such extension upon the payment only of the $5.00 fee in said section provided.'

If that is the law, then the purpose of the Legislature in passing that statute has been accomplished and our contention is lost, for these corporations may provide for an extension of fifty years and relieve themselves of paying the full fees for the privilege of conducting their business for a limitation period of fifty years.

We expect mandamus in at least one case, in order that they may get the Supreme Court to interpret this law, and we shall be very glad to have your opinion in the matter so that we may follow the same in our future actions."

You inquire whether a building and loan association may extend its corporate existence by the payment of the $5.00 fee authorized under Laws of 1931, page 158, or whether it should be required to pay the fees under Section 4556, R. S. Mo. 1929.

Section 5613, Laws of Missouri 1931, page 158, provides as follows:

> "Every such corporation, whether heretofore or hereafter organized, may extend the time of its duration for such period as may be stated in its resolution of extension, as adopted by a vote of three-fourths of its stockholders present at any regular or special meeting called for that purpose, and of which meeting public notice of the time, place and general purpose of such meeting shall be given in manner as provided in Section 5588 of this chapter. A copy of said resolution, certified by its president and secretary, shall be filed with the secretary of state, who, upon payment into the state treasury of a fee of five dollars, shall issue a certificate for such extension, a copy of which shall be filed for record in the office of the recorder of deeds in the county wherein the original articles of incorporation have been recorded."

Section 4556 of the General Corporation Laws, chapter 32, Laws of Missouri 1929, among other things, provides as follows:

> "* * *Provided, further, that the duration of such corporation shall not be continued as aforesaid, until such corporation shall pay into the state treasury fifty dollars for the first fifty thousand dollars or less of the capital stock of the corporation, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law: Provided, that nothing in this section contained shall be construed to authorize the renewal, continuance or extension of the charter of any company engaged in the manufacture or sale of illuminating gas."

Section 21 of Article X of the Constitution of Missouri provides as follows:

> "No corporation, company or association, other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as corporators shall, at or before the filing of the articles of association or incorporation, pay into the State treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock. And no such corporation, company or association shall increase its capital stock without first paying into the treasury five dollars for every ten thousand dollars of increase: Provided, That nothing contained in this section shall be construed to prohibit the General Assembly from levying a further tax on the franchises of such corporation."

In State ex rel. Telephone Company v. Roach, 190 S. W. 862, the relator sought to amend its charter and extend its corporate existence, but refused to pay the fees required under what is now Section 4556. The court, however, held that it was necessary to pay the tax required under said Section. The court at page 863 says:

> "It was then written into the Constitution that corporations, except municipal, should hereafter be formed, if at all, only in pursuance of general laws, and in 1866 the General Assembly accordingly provided general laws therefor. The Constitution of 1875 extended the inhibition against the creation of corporations by special acts to municipal corporations. The manifest intention of those framing and adopting these constitutional provisions was to place the franchises and

> privileges of corporations on a basis of equality and uniformity and give to all for future operations a fair field with no favor.
>
> If the phrase found in the proviso that 'the duration of such corporation shall not be continued as aforesaid' applies only to corporations organized prior to 1875, as relator contends, the segregation thus accomplished results in discrimination and does violence to the policy of equality. A corporation, having spent the life which the law gave it, can assett no inherent rights to further existence. Natural, not artificial, resuscitation is its relief, and this comes only through the law and as it decrees. Having provided equality in all other respects, it is not strange that the law would exact the same conditions of all when it comes to the matter of renewing the life."

In State ex rel. v. McGrath, 95 Mo. 193, the court held that the Legislature could not exempt incorporators of building associations from paying the incorporation tax required by the Constitution, and held that it was not a benevolent institution, as came within the exception. The court says at page 198:

> "It is clear, we think, from the sections above quoted as well as from the articles of association, that the leading purpose of this corporation is not to promote benevolence or charity, but to better the pecuniary condition of its members or share-holders alone, and we are unable to see how the fact that such an association may tend to promote frugality and economy, and open up a way 'whereby the share-holders, cut of their savings, may be enabled to secure houses, or loan their savings to others at high rates of interest, to be fixed by the directors,' can be said to impress or characterize the association as one formed for benevolent purposes, when the chief incentive to each stockholder is that he may benefit himself."

It, therefore, has been held that a building and loan association is not created for benevolent purposes within the exceptions contained in Section 21 of Article X of the Constitution. The constitutional provision, therefore, must be held to apply, to for ; in its original incorporation it was bound to pay the fees required by the Constitution from all corporations. When the term of its charter expires, it ceased to be a corporation and if it did desire to renew its corporate existence it must be held to pay the same fees for such privilege as all other corporations. Section 4556 above, requires the payment of fifty dollars for the first fifty thousand dollars of capital stock and an additional sum of five dollars for every additional ten thousand dollars of capital stock. Under the Roach case above, it was held that that section, when read in connection with the section authorizing the amending of its char-

ter, required the payment of those fees when the corporate existence was extended. The court announced that any other interpretation would result in inequality and favoritism, and that all corporations must be treated upon the same basis.

It is therefore our opinion that Section 5613, Laws of Missouri 1931, page 158, and Section 4556, R. S. Mo. 1929, must be read together in determining the right of this association to extend its corporate existence, and that the fees for said extension must be paid according to Section 4556. In view of the foregoing statutes and decisions we conclude that that part of Section 5613 which authorizes building and loan companies to extend their corporate existence upon the payment of a fee of five dollars is of no effect, and that you may rightfully require said association to pay the fees required under the General Corporation Law, as provided in Section 4556, before permitting an extension of their corporate existence.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

INVESTMENT CERTIFICATES: Investment certificates used by corporations making loans on automobiles are under the supervision of the Securities Dep't. of the State of Mo.

~~September~~ October 20, 1933.

10-28

FILED
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54.

Hon. Neal J. Ross,
Commissioner of Securities,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter in which you request an opinion from this department as to the following state of facts:

> "'The Missouri Securities Act embodies a concise definition of the word 'security' as intended by the Act.
>
> During the past several years, various chattel loan corporations making loans on automobiles have used a so-called 'investment certificate' in connection with such loans. That is, instead of operating under the small loan act supervised by the Commissioner of Finance, they have qualified their 'investment certificates' under the Securities Act, thus placing their operations under the supervision of this Department.
>
> * * * * * * * * * *
>
> On July 24, 1933 the new amendment to the Loan and Investment Company Act became effective. On page 2 of the House Bill, lines 20 and 21, the legislature has added the words 'nor to constitute a violation of any other law', and added provisions following this clause. It is contended that the legislature intended this to mean that the issuance of investment certificates will not constitute a violation of the Securities Act. It is argued that there are only two acts of the statutes that could be violated by the issuance of these certificates: one is the usury act, and the other the Securities Act.
>
> It is further argued that the withdrawal charges which might have been permitted under the old law are now prohibited by the addition of the section

starting with line 40 and ending with line 48 on page. 3. The new section provides for a cash surrender value or off-set of any amounts paid under the certificate. It is said that there can never be a situation where the company owes the borrower more money than the borrower owes the loaning company, therefore there could never be any fraud upon the borrower in the issuance of these certificates.

It is stated that these 'certificates issued in connection with a loan' are not the same type of certificate as would be used for savings purposes. They are not an investment, but are solely used when a loan is made. It is argued that, while the Securities Act calls for the registration of certificates of indebtedness or evidence of indebtedness, yet it does not call for 'an evidence or certificate of indebtedness or of investment issued in connection with or used as security for such note or loan.'

* * * * * * * *

A considerable number of such loan companies, in the past few years, have registered their certificates in this Department. Such registration provides revenue for the State, and also insures supervision by the State. In a recent case, we cancelled registration of Southern Loan & Investment Co., and have put them out of business, at least temporarily while their mandamus suit is pending. If the newly amended Loan and Investment Company Act takes these certificates away from registration in this Department, it eliminates all State supervision of these chattel loans on automobiles.

The Securities Act defines a 'security', and in my opinion covers these certificates of indebtedness. However, the language 'nor to constitute a violation of any other law' is contended eliminates by implication, at least, the necessity for registration under the Securities Act. Will you kindly favor me with your opinion in the premises?'"

I.

Chapter 40, R.S. Mo. 1929, known as the "Securities Department", provides for the registration of all securities.

Section 7725, R.S. Mo. 1929, provides as follows:

> "No person, either acting personally or through an agent, or as the agent of another, shall on and after the date when this chapter goes into effect sell any security to any person in the State of Missouri contrary to the provisions of this chapter."

A "security" is defined under the Act in Sec. 7724, R.S. Mo. 1929, sub-section (c) as follows:

> "'The term 'security' or 'securities' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, interim certificates or receipts, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate or any transferable share, investment contract, or beneficial interest in or title to property or profits, pre-organization certificate or receipts, or any other instrument commonly known as a security.'"

II.

Section 4982, Laws of Mo. 1933, p. 200 provides for the powers of loan companies relative to charges on loans.

Section 4982, Laws of Mo. p. 200, provides in part as follows:

> "In addition to the general powers conferred upon corporations by articles 1 and 7 of said chapter 32, R.S. 1929, as amended, every loan and investment company organized under the provisions of this article shall have the following powers:
>
> First: To lend money to any person, firm or corporation, secured by the obligation of such person, firm or corporation, or otherwise.
>
> Second: To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness or of investment and to receive from investors therein or purchasers

> thereof payments therefor in installments or otherwise with or without allowance of interest on such installments, whether such evidences or certificates of indebtedness or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with said investors or purchasers with regard to said evidences or certificates of indebtedness or of investment securing any loan, and no such transaction shall in any way be construed to effect the rate of interest on such loan, nor to constitute a violation of any other law, conditioned that there be compliance with the limitations thereon in this section contained. ****"

III.

Section 4982, Laws of Mo. 1933, p. 200 does not take from the jurisdiction of the Securities Department investment certificates in connection with loans on automobiles.

It will be noted in referring to Section 4982, Laws of Mo. 1933 that this Act merely confers additional powers to loan and investment companies and does not in any manner attempt to remove from the jurisdiction of the Securities Department the supervision of the certificates of indebtedness. It merely provides that a loan and investment company may sell or offer for sale its secured or unsecured evidences or certificates of indebtedness or of investment. It gives to such corporation the power to issue certificates, but nowhere in the Act can there be found any provision exempting such company from the provisions of the Securities Act, as found in Chap. 40, R.S. Mo. 1929.

The argument that the words "nor to constitute a violation of any other law" are sufficient to remove the certificates from the jurisdiction of the Securities Department is without merit for the reason that the words "nor to constitute a violation of any other law" merely signify an intention on the part of the Legislature that no law shall interfere with the power of such loan and investment company to issue such certificates. However, Section 4982, supra, does not destroy the conditions precedent to the actual sale of these certificates as set up in the Securities Act in Chapter 40, R.S. Mo. 1929. The plan whereby loan and investment companies may issue certificates of indebtedness is explained

in your letter as follows:

> "'For each $100 loan, the company took a note for $100 payable within a year without interest. At the same time it 'sold' the borrower for $100 an investment certificate having a face value of $100. The price of the certificate was to be paid for by the borrower in installments within a year, on terms complying with the Loan and Investment Company Act as amended in 1929. The investment certificate was to mature and is payable to the borrower five years after its date, and with interest. If the borrower paid the loan in installments within a year in accordance with the terms of the Amended Loan and Investment Company Act and also paid the certificate, he would receive his $100 with interest at 6% for four years, upon expiration of the five year maturity date. If he did not care to continue with the investment certificate he could surrender the certificate for the amount paid in less a withdrawal charge. Such withdrawal charge was indeterminate, and depended upon the whim and demand of the loaning company.'"

If the Amended Loan and Investment Company Act, Sec. 4982, supra, takes these certificates away from registration in the Securities Department, it eliminates all state supervision of these chattel loans on automobiles. It certainly cannot be said to have been the intention of the Legislature to produce this result. Sec. 7753, R.S. Mo. 1929, under the Securities Act, provides as follows:

> "Nothing in this chapter shall be construed to relieve corporations from making reports now or hereafter required by law to be made to the Secretary of State, or paying the fees now or hereafter to be paid by corporations. This chapter shall not be construed to repeal any law now in force regulating the organization of corporations in this state or the admission of any foreign corporation, <u>but the provisions of this chapter shall be construed to be additional to any provision relating to the organization of a corporation under the laws of the State of Missouri or the admission of a foreign corporation to do business in this state</u>."

This section clearly shows that the Securities Act is <u>in addition</u> to any provision relating to the organization of corporations.

Section 4982, supra, has to do with additional powers conferred upon loan and investment companies and relates to the organization of corporations. The Securities Act is in addition to any provision relating to the organization or powers of corporations.

It is therefore the opinion of this department that the investment certificates used by chattel loan companies in making loans on automobiles, as set out in your letter to us, are such securities as are contemplated by the Securities Act as found in Chapter 40, R.S. Mo. 1929; and the Amended Loan and Investment Company Act, Section 4982, supra, does not in any way exempt or remove the securities from the jurisdiction of the Securities Department of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

X

(COMMISSION FOR THE BLIND - Scope of, powers and duties of.)

V

October 27, 1933.

10-28

FILED
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Mrs. M[illegible] E. Ryder,
Executive Director,
Missouri Commission for the Blind,
[illegible] Westminster Place,
St. Louis, Missouri.

Dear Mrs. Ryder:

A request for an opinion has been received from you under date of October 5, 1933 in the following terms:

"I am in receipt of a letter dated October 3, 1933, from Mr. S. M. Green, Superintendent of the Missouri School for the Blind, 3815 Magnolia Avenue, this city, which reads as follows:

'Robert D. Ray, age 11 years, of 1209 Chambers Street, St. Louis, Missouri, has been attending the Michael School for Crippled Children for the past two years. He is unable to walk alone, and within the past year has become blind so that he is unable to progress any further in this school. He is in such physical condition that we cannot receive him here as he requires a wheeled chair and special help all of the time. Would you consider it within your province to have a home teacher visit him for the purpose of teaching him braille? If so, I have a letter from Dr. J. H. Humphrey of the Board of Education concerning his disabilities which may be helpful to the home teacher designated.'

I have answered Mr. Green's letter in the following manner:

"'I am in receipt of your letter of October 3rd regarding the education of Robert D. Ray, who is crippled and blind.

May I ask for a little time before giving a definite answer about a home teacher of the Missouri Commission for the Blind accepting him as a pupil. I have studied the law outlining the duties of the Commission very carefully and seem to find no intimation that the education of blind children, regardless of other handicaps, are our problem.

I am still pondering the justness of the money taken from our appropriation for Leonard Dowdy's education at Perkins Institution, and would like to go into this subject a little deeper before giving an opinion.

I appreciate the problem you are facing in connection with Robert

Ray and assure you that I am anxious at all times to work in hearty cooperation with you, however, I hesitate to deviate from the duties assigned under the law, especially in the face of our limited appropriation for this biennium.'

This question of the Missouri Commission for the Blind undertaking the education of blind children, who because of an additional handicap, seem not to be eligible to the Missouri School for the Blind, is an old one and in order that we may have a correct interpretation I am placing the question before you.

Up to the present we have felt that our duty in relation to blind children was to seek them out, secure complete census data, including an eye examination to determine whether they were blind, and if their eyes would respond to treatment. After such information was received then all preschool and children of school age whose vision comes within the category of blindness were referred to the Missouri School for the Blind for elementary education.

The rehabilitation and training (including the teaching of braille) of persons who were blinded in adult life, seem to be clearly the duty of the Missouri Commission for the Blind and form a definite part of our program, as well as the other duties as outlined in the law creating the Missouri Commission for the Blind.

The other matter I place before you is the justness of the appropriation of $2400.00 made by the last legislature (Section A-1, page 138, Laws of Missouri 1933) for the education of a deaf-blind child at Perkins Institution, Watertown, Massachusetts, from funds derived from a special tax levy apparently for prevention of blindness and for the adult blind.

Your opinion on these two questions is respectfully requested."

I. CASE OF ROBERT D. RAY

(A) There is nothing in the Constitution of Missouri to prohibit the granting of educational assistance to Robert D. Ray along the lines set out in your inquiry. The Constitution of Missouri, Article IV, Section 47, contains the following proviso: "PROVIDED FURTHER, That nothing in this Constitution contained shall be construed as prohibiting the General Assembly from granting, or authorizing the granting of, pensions to the deserving blind, as may be provided and regulated by law: PROVIDED FURTHER, That the General Assembly of the State of Missouri shall cause an annual tax of not less than one-half of one cent nor more than three cents on the hundred dollars valuation of the taxable property of the State to be levied for the purpose of providing a fund to be devoted in the manner provided by law to the pensioning of the deserving blind. If any balance shall exist in such fund after the deserving blind have been pensioned, then the same, or so much thereof as may be necessary, may be used for the support of the commission for the blind."

In the case of Shelley v. Missouri Commission for the Blind, 309 Mo. 612, 274 S. W. 688 (1925) the Supreme Court declared that the General Assembly has the right to define the term "deserving blind" such part of the opinion of the court being as follows:

> "The Constitution, Article IV, Section 47, authorized the General Assembly to grant 'pensions to deserving blind, as may be provided and regulated by law.'
>
> Under that provision of the Constitution the Legislature no doubt had a right to define 'deserving blind,' to determine who and by what tests one should come within the provisions of any law it might enact to pension blind persons." (309 Mo. 620.)

Furthermore, the last sentence quoted above of the constitutional section allows any balance to go to the Commission for the Blind and does not contain any limitation on the use to which such balance may be put by the Commission for the Blind in the event the Legislature appropriates any of such balance to such Commission (except the implied limitation that it must be used for some sort of relief or education of blind persons) so that nothing in the Constitution would prohibit the relief in question for Robert D. Ray.

(B) Nothing in the statutes of Missouri would prohibit such relief, so that the only question would be whether or not Revised Statutes of Missouri 1929, Section 8889, which fixes the powers of the Commission for the Blind, would authorize the use of any of the funds appropriated to such Commission for the purpose in question. By Laws of 1933, page 190, the Commission for the Blind is declared to consist of the members of the Board of Managers of the State Eleemosynary Institutions, and it is declared that "wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of this act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind."

Section 8889 above referred to provides in part as follows:

> "The duties of said commission shall be * * * to investigate and report to the General Assembly from time to time the condition of the blind within this state, with its recommendations concerning the best method of relief for the blind; * * * to act as a bureau of information for the purpose of securing employment for the blind of this state elsewhere than in the shops and workrooms of the commission, and to this end the commission is authorized to procure and furnish materials and tools and to furnish aid and assistance to blind persons engaged in home industries * * *; to ameliorate the condition of the blind by such means consistent with the provisions of this article as the commission may deem expedient; * * * the object and purpose of this article being to encourage capable blind persons in the pursuit of useful labor * * *."

From the above excerpts taken from Section 8889, especially the under-

lined portions, it can be observed that in this section as well as in the constitutional provision above quoted there is no attempt to differentiate between blind persons of different ages and, in fact, there is nothing in Chapter 50 of the Revised Statutes being Sections 8888-8892, which indicates a purpose to differentiate between blind persons who are children and those who are adults. Furthermore, one of the chief purposes of the commission as set out in the excerpts above from Section 8889 seems to be to train and educate blind persons in such a way as to make them capable of useful labor, and there is no reason to believe that such labor is confined to manual labor as opposed to intellectual labor, and, in fact, the whole public school system of this state would seem to indicate that the state is more interested in requiring an education intellectually than it is in requiring an education in manual training. Furthermore, all of the provisions of Section 8889 above quoted are of a rather general nature, and read together seem to indicate an intention on the part of the General Assembly to allow the Commission for the Blind some latitude in choosing its methods for educating blind persons and training them. No construction which would throw any light on the present inquiry has been made by any of the courts of Missouri regarding Section 8889, so that the only judicial authority which might bear on the question is found in cases dealing with the general attitude of the courts of this state toward the right of all persons to receive a free education. Such an attitude is enunciated in the case of State ex rel Halbert v. Clymer, 164 Mo. App. 671, 147 S. W. 1119 (1912) wherein the court said:

> "The policy of this state is to educate, and to furnish free of charge, good schools for all children of school age, and even to compel the attendance of children thereto. Section 1 of article 11, of the state Constitution, reads: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years.' It is therefore the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the state." (164 Mo. App. 676.)

Likewise, in Northern v. McCaw, 189 Mo. App. 362, 175 S. W. 317 (1915) the court said:

> "Bearing in mind the duty to liberally construe the school laws (State ex rel. Halbert v. Clymer, 164 Mo. App. 1. c. 676, 147 S. W. 1119) so that the advantage of securing an education can be made as free as possible to the girls and boys of Missouri, we have no hesitancy in reversing this judgment * * * *" (189 Mo. App. 370).

Various indications of legislative policy show that the attitude of

the General Assembly is also very liberal in dealing with free education and especially the education of the blind. The following manifestations of such legislative policy might be cited:

(1) Revised Statutes of Missouri 1929, Sections 9218-9221. In these sections the Legislature has provided for special classes for the instruction of children who are blind, deaf, crippled or feeble-minded, and especially Section 9221 provides that the state board of charities and corrections (which was abolished by Laws of 1933 page 400 with many of its duties now imposed upon the Board of Managers of State Eleemosynary Institutions, as, for example, by Laws of 1933, page 189 imposing such duties with respect to the "care, importation, supervision and placing of children,") is authorized to provide special educational training for children under the age of sixteen years who are defective in the sense above set out. In cases where the county in which such children live has not enough of any of the above classes of defectives either in such county or in conjunction with neighboring counties to make up a sufficient number for class instruction under the three preceding sections, in such cases the board of charities and corrections was authorized to charge the expenses involved to the county of residence.

(2) Article 23 of Chapter 57 of the Revised Statutes of Missouri of 1929, such article consisting of Sections 9688-9711 establishes a school for the blind and a school for the deaf and it is a further manifestation of legislative generosity toward these classes of defectives.

(3) Revised Statutes of Missouri 1929, Section 9700 providing a reader for any blind person in attendance at any higher educational institution in this state authorized to grant degrees.

(4) The appropriation for the tuition of Leonard Dowdy, Jr. being found at Laws of 1933, page 138, shows a clear legislative intent that persons who are blind but unable to attend because of an additional defect one of the regular institutions of this state are intended to be within the legislative generosity.

(5) Revised Statutes Missouri 1929 Section 8565 provides in part as follows:

> "The board of each institution shall have authority to make all necessary rules, regulations and by-laws for the government, discipline and management of such institution not inconsistent with the laws of this state,* * * *"

This Board, which now acts as the Commission for the Blind is, as shall be observed from this statute, given rather comprehensive powers (Board of Managers of State Eleemosynary Institutions.)

For the above reasons it is our opinion that the Commission for the Blind is not prohibited by law from providing home teaching for such blind persons as have additional defects which prevent them from attending regular

classes or schools for the blind, and that under the law of Missouri such Commission would have the right, in its discretion, to provide such home instruction.

II. APPROPRIATION FOR LEONARD DOWDY, JR.

The arguments and conclusions set out above would apply with equal force to the payment of the tuition of Leonard Dowdy, Jr., as provided for in the appropriation found at Laws of Missouri, 1933, page 138, because if individualized instruction for a child who is blind and crippled is authorized by law the same arguments would apply to individualized instruction for a child who is blind and deaf. The appropriation act just mentioned provides funds for "tuition and expenses". If this child were not blind and deaf that part of the appropriation providing for his expenses would probably be unconstitutional under the authority of State ex rel Garth v. Switzler, 143 Mo. 287, 45 S. W. 245 (1898) which holds that the expenses of a student in attendance at a school of this state cannot be paid by the state but where a student is blind such decision would not apply because the Constitution specifically in Article IV, Section 47, above quoted, allows grants to blind persons and for the work of the Commission for the Blind.

Since there is no constitutional prohibition to such an appropriation the matter is entirely in the hands of the Legislature, and the Legislature has manifested its will by the Appropriation Act and such manifestation is not subject to review by a court.

> "We shall not discuss the fundamentals in statutory construction, when the validity of a statute is at stake. It goes without saying that there is a legal presumption of validity; that if there is doubt as to the constitutionality of the law the doubt shall be resolved in favor of the validity of the legislative act; that the expediency or inexpediency of the act is not for the courts; that in Missouri the power of the Legislature to enact laws has no limitation, except the express limitations in the State and Federal Constitutions;" (State ex rel Barker v. Merchants Exchange of St. Louis, 269 Mo. 346, 356, 190 S. W. 903 (1916).

As to the right of the General Assembly to appropriate for one purpose funds which were collected for another purpose, it was stated by the court in State ex rel Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093 (1901):

> "That although this tax is set apart into a special fund, it still belongs to the state, and may be appropriated to another and different use." (160 Mo. 214)

This problem is really not in issue in the present situation because by Constitution of Missouri Article IV, Section 47, the General Assembly can appropriate funds collected for pensioning the deserving blind to the work of the Commission for the Blind, and it is in the discretion of the General Assembly to fix the

scope of the work of the Commission for the Blind and it has declared by the Appropriation Act in question that it considers the education of Leonard Dowdy, Jr. within such scope.

Thus, in answer to the second question it is our opinion that the appropriation for Leonard Dowdy, Jr. is not subject to judicial review.

Very truly yours,

ASSISTANT ATTORNEY GENERAL.

APPROVED:

ATTORNEY GENERAL.

SCHOOLS: -
SCHOOL DISTRICTS: -
Distance of pupil from school house calculated, How.

12-2

November 27, 1933

FILED
79
61

Honorable Dewey A. Routh
Prosecuting Attorney
Nevada, Missouri

Dear Mr. Routh:

This Department acknowledges receipt of your letter dated November 18, 1933, which is as follows:

"It may not be unusual to have an apparently non-essential point of law to arise and trouble you, but I have one that seems to be causing considerable dissension in one of the school districts in Vernon County.

One of the parents in this school district has a farm so situated that the gate entering into the farm is slightly under three and a half miles from the nearest school. However the house on the farm stands back from the road quite a bit and the door of the house itself is approximately three and three-fourths miles from the nearest school.

The new transportation law as set forth in Section 9453 and found on page 388 of the Session Acts of 1933, which reads as follows: 'Provided however, no transportation shall be furnished if there be any school within three and a half miles of such pupil* * *.' My interpretation of this law would be that distance would start from the home as that is where the pupil would be, and the law says 'three and a half miles of such pupil.' However, when the State School Inspector was here, this question was put to him and he said that he would not know, but presumed

it would mean from the home.

We will appreciate your sending us your opinion in this matter and if it would not be too much trouble, send a copy of this opinion to the President of the Board of Directors of Bronaugh School District of Bronaugh, Missouri."

The statute for construction is Section 9354 Laws 1933 page 388, the same reads in part as follows:

"The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 18 of an act of the 56th General Assembly, found on page 344, Laws of Missouri, 1931.*********".

Sections 9351 to section 9358, both inclusive, provide a scheme for the organization of consolidated school districts for the purpose of maintaining both elementary and high schools. Section 9353 makes provision for the holding of a special meeting for the purpose of effecting the consolidation or organization of such districts.

Section 9354 as amended by Laws 1933, page 388, provides that the question of transportation of pupils to and from school may be voted upon at the special meeting whereat the district is consolidated or organized, if notice is given that a vote on the question of transportation will be taken. If transportation is not provided for in such a district the board of directors thereof is required to maintain an elementary school within three and one-half miles from the home of every child of school age within the district, the distance to be calculated by the nearest traveled road between the two points. However, the maintenance of such elementary schools nor the transportation of pupils within such a district is not required where such consolidation has not placed children in the district further in distance from an elementary school than they were prior to the consolidation or organization. If there is a school in a district, other than the district in which the pupil lives, within three and one-half miles of such pupil then the district in which the pupil lives is not obliged to furnish such pupil transportation to the school in the district in which the pupil lives, but the county Superintendent of Schools shall have the power and it shall be his duty to assign such pupil to such adjoining district and the pupil is required to attend the school in the latter district.

The question at hand is to determine in what manner the distance shall be calculated in order to ascertain whether or not there is a school in an adjoining district to that in which the pupil lives, and within three and one-half miles of such pupil.

We think it is clear from the authorities that in determining the question of distance the distance is to be calculated along and by way of the nearest traveled road. We think the words "of such pupil," mean within three and one-half miles of the home of such pupil, so that properly construed Section 9354 means as if it read,

> 'No transportation shall be furnished if there be any school within three and one-half miles of the home of such pupil and such distance shall be calculated along and by the nearest traveled road.'

The case of Board of Education v. Board of Education 20 Ohio N.P.N.S. 698, the court had under consideration a statute, in some respects, similar to ours and which provided that when pupils lived more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in some other district and the district in which the pupil lives shall pay the tuition to the other district. In the Ohio statute the words "nearest traveled road"

are not used. On the question of how to calculate distance in order to determine whether a pupil lived more than one and one-half miles from a school, the court at page 699 of the opinion said:

> "It would not be proper to measure the distance on a straight line, 'as the crow flies', across the fields, as the children, without the consent of the owners of the fields, would thereby become trespassers. Besides, under the provisions of the statutes of Ohio, children who reside in school districts in the country, living more than one half mile from the school, and residing at not a greater distance than one half mile from a public highway, are entitled to be carried to school in a public conveyance, at the expense of the school fund in the district. Necessarily they would be carried thus along the highway. And, whether the children go by public or private conveyance, or whether they walk to and from school, they are expected to go by the most direct and convenient highway, and the length of that course determines the distance from home to school.
>
> Therefore, the fuling of the court is that, in estimating the distance from the home to the school, the measurement beging at the exit from the curtilage - ordinarily the front gate - from which, if it is not on the highway, thence along the most direct established route, by lane or path to the nearest highway, thence following the center line of the most direct course in the highway to the door of the school building."

The holding is that the distance is to be measured from what is commonly known as the outside line of the yard surrounding the house, to the door of the school building. The opinion does not seem to take into account the yard ordinarily surrounding the school building.

In Eastgate v. Osage School District 171 N. W. 96, the court had under discussion a question that involved the transportation of school children; the court at page 98 of the opinion said:

> "In some of the above laws, the words 'nearest route' are used; where so used they are held to mean the nearest public route or one which has been duly authorized or exists by law."

In Pagel v. School District Number 1, 199 N. W. 67, the court had under consideration a statute of the State of Wisconsin with reference to transportation of school children, wherein it provided that:

> "The word 'distance' shall be interpreted to mean distance as measured by the nearest traveled highway."

It was contended that in ascertaining the distance involved in that case a private highway or roadway leading from the public road to the home should not be considered. The court with reference to such contention said:

> "It certainly was not the intent of the Legislature to exclude from the beneficent purposes of the statute children who were so unfortunate as to be located away from the public highway. The purpose of the statute defining distance was to ascertain the necessity for transportation for children, and hence to determine whether by the nearest traveled road they were located more than two miles from school."

Purkeypyle v. School District Number 101, 275 Pac. 146, involved a question of whether or not certain children lived three or more miles, by the usually traveled road, from the school they attended. On the question involved the court at page 147 of the opinion said:

> "The statute provides transportation or compensation in lieu thereof for pupils who live three or more miles from the school attended. Where do these pupils live? Certainly not in the middle of the road;neither do they attend school in the center of the road in front of the schoolhouse. Another measurement submitted was from gate to gate. It can as truthfully be stated that they do not live at the front gate, nor attend school at the gate. Children live in the house which they call their residence, and that may be in the center of a cattle ranch, or pasture, a half mile or more from the

> public highway, and there is no good reason for not measuring that distance over a private driveway, or private walk, if it is the usually traveled road from that house to the school.
>
> We have examined all the citations of the appellant on the question of reasonable construction, and agree with all of them, but think the reasonable construction of the statute here under consideration requires such measurement to be from the house where the pupils live to the school where they attend, and such entire distance to be by the usually traveled road between the two places. There is a usually traveled road from every private dwelling to the public highway, although the travel over it may be limited to the family; it is for them such a road nevertheless.
>
> No specific authorities as to points of beginning and ending such measurements have been cited by either appellant or appellee, nor have they referred to any explicit precedent; but both parties urge a determination to be based upon a reasonable construction of the statute involved. We have no hesitancy in concluding that the evident intent of the Legislature in this enactment was the actual distance from the residence to the schoolhouse by the usually traveled road, and that the language of the statute does not justify the conclusion by reference to the road that the distance was to be limited to that which was over or along some public highway."

Under the last proviso of Section 9354 if there be a school within three and one-half miles of the home of the pupil transportation shall not be furnished, but the pupil shall be assigned to another school district for the purpose of attending school. The right to transportation is based on distance. If there be a school maintained in the adjoining district within three and one-half miles of the home of the pupil, then that entire distance of three and one-half miles must be traveled by the pupil from the door of its home to the front door of the school house. The distance traveled by the child from the front door to the front yard requires the same energy as is required in taking the same number of steps along a traveled

highway. The decisions are clear that a lane or private road leading from a highway through an inclosure to a home is as much a part of the distance to be traveled, in calculating distance with reference to transportation of children to school, as is the main public and traveled highway itself.

We are not now dealing with the transportation of school children by carriers, the mileage of same nor where school children are entitled to enter or leave the transporting conveyances.

Under the particular section of the statute under consideration we are of the opinion that the distance involved, is to be measured from the door of the home of the pupil nearest the school house along a private lane or roadway, if any, to the main traveled highway, thence along such main traveled highway to the front door of the school house in question.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

RECORDER OF DEEDS)
CHATTEL MORTGAGES)

Duty of recorder with reference to filing and recording. Sections 11543, 11544 and 11545. R. S. Mo. 1929.

February 14, 1933.

FILED
80

Law Department
City of St. Louis
City Hall
St. Louis, Missouri

Attention: Mr. Oliver Senti

Dear Mr. Senti:

Your letter of February 8th, addressed to the Attorney-General enclosing copy of request for opinion, has been handed the undersigned for attention. In connection with the matter you submit the following facts and inquiry:

> "Under date of November 5, 1931, the Attorney General's office advised the Recorder, through this office, that a chattel mortgage on an electric refrigerator, when merely filed in the Recorder's office, did not give notice of the lien to subsequent purchasers of the real estate.
>
> Mr. Perry Post Taylor to-day presented a similar instrument to the Recorder, and requested that it be filed as a chattel mortgage, notwithstanding that it gave no notice to subsequent purchasers of the real estate. The Recorder of Deeds is under the impression that he cannot lawfully file the instrument as a chattel mortgage, and that he can only accept it for recording in the real estate records."

We will set forth a synopsis of the statutory provisions which may be pertinent to the inquiry as made.

Section 11543, R. S. Mo. 1929, is a mandatory

provision with reference to the duties of recorders in recording various instruments pertaining to real estate and chattels, which have been properly acknowledged.

Section 11544, R. S. Mo. 1929, requires certain instruments to be recorded in separate books according to their classifications.

Section 11545, R. S. Mo. 1929, regarding personal property is as follows:

> "Instruments in writing, conveying chattels or personal property alone, which by any law of this state are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

Section 11564, R. S. Mo. 1929, provides for a liability of the recorder for a neglect or refusal of official duty, and Section 11565, R. S. Mo. 1929, prescribes the penalties for such neglect and refusal.

The recorder, you say, states that a Mr. Perry Post Taylor appeared at his office with a chattel mortgage given upon an electric refrigerator, and requested that it be filed as a chattel mortgage.

This official is desirous of knowing, if upon the presentation of this mortgage and upon the request of Mr. Taylor, as aforesaid, it is his duty under the statute to follow the instruction so given him and treat the same as a chattel mortgage in accordance with the request, or should he refuse to so accept said instrument, except only upon the condition that Mr. Taylor have it recorded in the real estate record or in both the real estate and chattel mortgage record.

We assume that the instrument was in truth and in fact what it purported to be, namely, a chattel mortgage; that it was in the ordinary form of such instruments and described therein only chattel property. Unless there was

something within the description of the property designating that the personal property as described was to become affixed to a particular piece of real estate, thus and thereby becoming a part thereof, the recorder would have no reason for treating the written instrument other than as one affecting only personal property. There is no duty resting upon the recorder to make a personal investigation to ascertain whether or not the personal property might become affixed to real estate.

Under the facts you state, we are of the opinion that the recorder would have no other alternative than to file the chattel mortgage as requested and in accordance with Section 11545, R. S. Mo. 1929.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA:EG

COUNTY COURTS
SCHOOL FUND MORTGAGE -- Procedure required to foreclose
Section 9243, R. S.Mo. 1929.

February 14, 1933.

FILED
80

Hon. H. M. Saxbury
Prosecuting Attorney
Schuyler County
Queen City, Missouri

Dear Mr. Saxbury:

Your recent letter directed to the Attorney-General has been handed the undersigned for attention. In your request for an opinion from this department, you asked the following:

> "Is there any legal way in which a County Court may take over land under school mortgage fund save by a legal proceeding? Can they have the mortgage holder deed the said land to a Commissioner instead of proceeding either by judgment and execution or by a commissioner through the courts?"

The Constitution of Missouri provides, Article 11, Section 10,

> "All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto."

Article IX §7 now only invested in U.S. Bonds, + State Bonds.

This mandatory provision of the Constitution requires that in addition to the first mortgage upon unencumbered real estate, personal security shall be required by the county court before loaning the school funds of the county. The

Repealed (171.110)

personal security is usually furnished by the execution of a school fund bond, executed by the borrower and resident freeholders of the county as his sureties, as provided in Section 9251, R. S. Mo. 1929.

Section 9243 R. S. Mo. 1929, makes the County Courts of the several counties trustee for, and custodian of, the county school funds and provides, among other things, that such funds,

166.131

> "Shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

140.080 (1949)
140.100 (1949)

Section 9252 R. S. Mo. 1929, provides the form of mortgage and requires a provision for the manner of foreclosure upon default in the payment of the indebtedness secured thereby.

140.440 (1949)

Section 9256 R. S. Mo. 1929, confers upon county courts the right to acquire title to property upon which school fund loans have been made and sets forth the manner under which title may be so acquired, namely, a purchase through an agent at the sale under foreclosure.

In as much as the mandatory provisions contained in the Constitution, supra, required the county court to take a first mortgage upon lands of double the value of the loan to be made, the land then should be first subjected to the payment of the debt upon default in its payment. In the event of a deficiency from the sale under foreclosure, then an attempted recovery upon the school fund bond would be required.

By reason of the provisions of Section 9243, R. S. Mo. 1929, the court cannot properly discharge its public duty until it has exhausted its entire remedy in sacredly preserving such loaned fund. The county court cannot in the opinion of this department lawfully accept a deed for the land in satisfaction of the indebtedness owing to the school fund and by such act release the surety or sureties upon the school fund bond.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

PENAL INSTITUTIONS: Form of sentence of trial court in sentencing to Intermediate Reformatory.

Transfer of inmates to Intermediate Reformatory.

April 14, 1933

FILED
80

Honorable J. M. Sanders
Warden Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Sanders:

We acknowledge receipt of your letter dated April 12, 1933, as follows:

"In re: Harlan Johnson, #42573

The above named man was received at the Penitentiary March 13th, from Washington County to serve 2 years (2 and 2 concurrently) from January 26, 1933, for the offenses of burglary and larceny and is now incarcerated in the prison.

This morning we have received a copy of Court order commuting this young man's sentence to "Algoa Farms."(Erroneous title, of course).

From correspondence had with the Circuit Clerk it is evident that an error was committed by not delivering to the Sheriff who brought Johnson to the Penitentiary the Court order commuting the sentence to the Intermediate Reformatory.

The question is: Can this inmate be delivered to the Intermediate Reformatory now under the authority of the Court order - the same to be corrected as to title of the institution?

Herewith copy of the sentence and judgment and order of commutation referred to."

Section 8474 Revised Statutes Missouri, 1929, provides that any person being between the ages of sixteen and twenty-five and convicted of felony for the first time and if not convicted of treason or murder in the first or second degree or any offense for which capital punishment is provided, the trial court may sentence the person so convicted to the custody of the officials of the Intermediate Reformatory, which Reformatory is provided for by Article VI, Chapter 44, Revised Statutes of Missouri, 1929.

Section 8479 of the above statutes requires the officer delivering the convicted person to the Superintendent of the Intermediate Reformatory to furnish such Superintendent a certified copy of the sentence received by such offender as furnished by the clerk of the court where the trial was had and the person so delivering such convict shall take from such Superintendent a certificate of the delivery of such convict and under the further provisions of Section 8474, supra, it becomes the duty of the officials in charge of the Intermediate Reformatory to receive such convicted person, but only upon the conditions above named.

In the case at hand Harlan Johnson was delivered to the warden of and at the penitentiary on March 13, 1933, we assume under a committment to that institution. Attached to your letter is a certified copy of the original sentence and judgment of the trial court which contains no direction as to his being incarcerated in the Intermediate Reformatory. This sentence and judgment of the court was pronounced on the defendant on the 11th day of March, 1933. The order undertaking to commute the sentence seems to have been entered on the same day. The court of course had the right to sentence the defendant to the custody of the officials of the Intermediate Reformatory in the first instance, and that being true the court had the right to modify such sentence and judgment to comply with Section 8474. We think it was clearly the intention of the court to comply with said Section 8474.

Section 3811 Revised Statutes Missouri, 1929, prohibits the trial court from paroling any person after such person has been delivered to the warden of the penitentiary. If the action taken by the court had been entered of record after defendant had been delivered to the warden of the penitentiary, then the order would have had no effect and if the last order made by the court amounted to an attempt to parole

or otherwise interfere with the jurisdiction over the convict acquired by the warden upon the delivery of the prisoner to him at the penitentiary, then such order would be void.

Section 8475 Revised Statutes Missouri, 1929, provides for the transfer of inmates from the penitentiary to the Intermediate Reformatory. If there is a proper order, nunc pro tunc, correcting the sentence and judgment of the court so as to direct the delivery of the defendant into the custody of the officials of the Intermediate Reformatory, then in our opinion the penal board would have authority to and should transfer the inmate to the Intermediate Reformatory where the trial court intended he should be confined.

I am returning you herewith certified copies of records inclosed with your letter.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

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Attorney General.

GL:LC

Inclosures

NOTARIES PUBLIC: Deputy Circuit Clerks may take acknowledgmens of affidavits of age for marriage licenses.

May 13, 1933

FILED
80

Honorable H. M. Saxberry
Prosecuting Attorney
Schuyler County
Queen City, Missouri

Dear Sir:

This is to acknowledge your letter of April 27th, 1933, which reads as follows:

> "Please inform me as to the law governing a case of this nature.
>
> A deputy Circuit Clerk being a Notary Public prepares and takes acknowledgments to affidavits, such as affidavits of age in granting marriage license and does not remit same to the clerks office."

Your request does not give us sufficient facts from which to render an opinion and for that reason it is necessary to assume certain premises. If we have assumed too much, advise us of the facts and we will render an opinion upon same.

We assume that the circuit clerk in your county is ex officio recorder; That the deputy in the circuit clerk's office is a qualified notary public; That such deputy prepares and takes acknowledgments as notary public affidavits of age for marriage licenses as required by statute; That the fee for taking such acknowledgments is paid to the deputy and he keeps it as a fee rendered for notary services. You wish to know if such deputy has to account to the circuit clerk for such fees.

The circuit clerk has the right to hire his deputies, and Section 11680 R. S. Mo. 1929 provides that such deputy or deputies shall have

> "All other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk."

The deputy possesses no greater power than the clerk.

Springer vs. McSpadden, 49 Mo. 209.

In the present case the circuit clerk is ex officio recorder and the recorder issues the marriage licenses. We now proceed to the duties of the circuit clerk as ex officio recorder, relative to the issuing of marriage licenses.

Section 2977 R. S. Mo. 1929, provides that a license shall be obtained before a marriage shall be valid.

Section 2978 R. S. Mo. 1929, makes it the duty of the recorder to issue the license.

Section 2974 R. S. Mo. 1929, prohibits certain marriages.

Section 2983 R. S. Mo. 1929, requires the consent of parents or guardians in cases of parties applying being under age. This section reads in part as follows:

> "No recorder shall in any event except as herein provided issue a license etc.*** which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths.*****

Hence, in reading the above sections, it will be observed that the issuing of marriage licenses is the duty of the recorder, and the statute limits him as to whom he shall issue same to and provides an inquiry to be made by him before such licenses are issued. One matter of inquiry being, the age of the parties applying for a license, and an affidavit setting that fact forth with that fact embodied therein, protects the recorder in the event he issues a license and the parties are not of the age as set out in the affidavit.

A recorder is required under Section 2983, supra, to have the consent in writing, sworn to before any officer authorized to administer oaths. And Section 2978, supra, requires the recorder to certify to the age of the contracting parties, Thus, the statute requires a sworn paper (or affidavit), and no where does it provide that such paper be sworn to by the recorder or for that matter any other particular officer who may take oaths

or acknowledgments, but requires such papers to be sworn to before an officer authorized to administer oaths.

Section 11562 R. S. Mo. 1929 reads as follows:

> "Hereafter whenever, under any law of this state relating to the duties of the recorder of deeds in any county of this state, it becomes necessary for any person to be sworn to any statement, affidavit or other papers of any kind, the recorder of deeds shall be authorized to administer an oath to any person in matters relating to the duties of his office, with like effect as clerks of courts of record: Provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

Section 11739 R. S. Mo. 1929, being part of Chapter 80, designated as Notaries Public, provides in part the following:

> "They (notaries public) may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices." * * "the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing in like cases and in the same manner and with like effect as clerks of record are authorized by law. * * * *"

The question now presents itself as to whether or not a person may perform the duty of a notary public while holding the position of deputy circuit clerk. Each office entitling him to administer oaths. We find no constitutional or statutory provision prohibiting same. Some States prohibit by their law a clerk from holding a notary public commission while a clerk. Texas has such a prohibition.

In the case of Biencourt v. Parker, 27 Texas 558, the court held that the offices of notary public and county clerk were incompatible, and when a notary became a county clerk his office as notary would be thereby terminated.

We are of the opinion from the foregoing that the law permits a notary public to take acknowledgments of persons for supporting affidavits or statements showing age to obtain a marriage license, and such notary is entitled to the fee for such service as provided by the statute.

It is our further opinion that a deputy circuit clerk may hold a notary commission. And it is our further opinion that if a deputy circuit clerk holding a notary commission, takes such acknowledgments, herein considered, as a notary public, then he would not have to account to the circuit clerk for the fees which are obtained for such notary services.

Wood vs. Kansas City, 162 Mo. 303.

Bear in mind, however, that this opinion is limited solely to your inquiry and the facts assumed, and if a deputy circuit clerk notarizes papers that the statute provides should be acknowledged by the circuit clerk, then in that event such deputy should acknowledge same as provided by law and account for the fees.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:HM

Applicability of Section 11777 and Section 11791 as to fees of Constables.

CONSTABLE FEES:

May 20, 1933.

FILED 80

Mr. Henry C. Salveter,
Prosecuting Attorney
Sedalia, Missouri.

Dear Mr. Salveter:

This Department acknowledges receipt of your letter dated May 15, 1933, as follows:

> "The Constable of Sedalia Township some time ago made a trip outside of Pettis County to apprehend a criminal. In filling out the return on his warrant, he placed his mileage at $.10 per mile each way, in traveling to arrest the criminal and returning him to Sedalia. The Circuit Clerk in making up the fee bill refused to allow the Constable $.10 per mile each way, but placed his fee at $.05 per mile for each mile actually traveled. The Constable claims that he is entitled to $.10 for each mile traveled.
>
> The Circuit Clerk in answering the contention of the Constable that Section 11777 determined the fees, cited to the Constable Section 11791 as his authority for allowing the Constable only $.05 per mile.
>
> I wish you would please inform me which of the above sections determine the fees that the Constable is entitled to in the foregoing situation, in order that I might satisfy him and also the Circuit Clerk in this matter."

Section 11777 R. S. Mo. 1929, among other things, provides that Constables shall be allowed fees for their services as follows: "and for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of per mile $.10. For each mile actually traveled in serving any process, $.10.

Section 11791 R. S. Mo. 1929, regulates the fees to be allowed sheriffs, county marshalls or other officers

in criminal cases, provides, among other things, as follows:

> "The sheriff or other officer who shall take a person charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law - - - and five cents per mile for every mile necessarily traveled in going to and returning from one county to another - - - - ."

We have quoted what we deem the pertinent provisions of the Statutes.

It is the opinion of this Department that Section 11777 is a general section fixing the fees of Constables for services performed within their county, but that Section 11791 is a special section which over-rides the provisions of Section 11777 when the facts bring the question under the latter Section. It is our opinion that your inquiry is answered by the provisions of Section 11791, which fixes the mileage which the Constable is allowed to charge for the service inquired about at the rate of $.05 per mile and not $.10 per mile as urged by the Constable.

It is, therefore, the opinion of this Department that the Circuit Clerk is right in allowing only $.05 per mile to the Constable in this particular case for the service performed.

Very truly yours,

Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

ELECTIONS - SPECIAL
SHERIFF - VACANCY IN OFFICE

) Nominations of candidates in special election to fill vacancy in sheriff's office must be made by central committee or by convention.

6-23

June 23, 1933.

FILED
80

Hon. William H. Sapp
Prosecuting Attorney
Columbia, Missouri

Dear Mr. Sapp:

This department acknowledges receipt of your letter of June 21st, 1933, as follows:

> "Roger Wilson, the duly elected sheriff of Boone County, was murdered by highwaymen on the 14th day of this month. Section 11523 of the Revised Statutes of Missouri for the year of 1929 provides that a special election shall be held within thirty days after the date of his death to elect his successor. This section further provides that said election shall be held in pursuance of the general election laws of this state. The question naturally arises as to how the candidates at this special election shall get their names upon the ticket. Some of the attorneys here hold that Article 4 of Chapter 61 of the statutes provides the method.
>
> I call your attention especially to Section 10241 requiring the certificate of the candidate therein mentioned to be signed by at least two per cent of the voters voting at the last election; and to Section 10245, which provides among other things that such certificates of nomination shall be filed with the Clerk of the County Court not more than sixty nor less than fifteen days before the date of the election. The election must be held under Section 11523, within thirty days, so Section 10245, supra, permitting the certificates of nomination therein mentioned to be filed as much as sixty days

> prior to the date of the election, must not refer to special elections of the instant character. Personally, I seriously doubt whether Article 4 of Chapter 61 can be applied to the contemplated election. Many lawyers here believe that the County Clerk should receive and place upon the ticket the name of any person who may see fit to become a candidate for this office. Of course, all the candidates should be qualified to fill the office if elected.
>
> In view of the conflict in opinions and of the absence of any case law controlling the question, I hereby request an opinion from your department upon the points hereinbefore suggested. I trust you will be able to furnish this opinion at an early date because our election will be held July 14th and for that reason we have very little time to act."

Section 11 of Article V of the Constitution provides that when any office shall become vacant the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy.

Section 10216 R. S. Mo. 1929, excepts a vacancy in the office of sheriff from the vacancies the Governor is entitled to fill when a vacancy occurs.

Section 11523 R. S. Mo. 1929, with reference to filling a vacancy in the office of sheriff of any county in this State provides in part,

> "Whenever, from any cause the office of Sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same * * * . Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, * * * * Upon the occurrence of such vacancy,

> it shall be the duty of the presiding judge of the county court if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

An office is vacant whenever it is unoccupied or there is no person to fill such office.

Mays v. Bassett, 125 P. 609.

According to your letter the sheriff of Boone County departed this life on June 14th, 1933, and the office of sheriff of that County thereupon became vacant. The time for holding the next general election in Boone County will be in November, 1934, and hence more than nine months beyond the occurring of the vacancy referred to. Therefore, all the elements and facts exist for the calling of a special election in Boone County to fill the vacancy in the office of sheriff and by your letter we are informed such special election has been called and is to be held on July 14th, 1933.

State ex rel. v. Patterson, 207 Mo. 129.

In reaching a conclusion on the question presented, we will have safter footing if we begin at the root of the matter.

Section 10244 R. S. Mo. 1929, dealing with nominations for office and with reference to the certification of the names of candidates nominated at a primary provides that no certificate shall contain the name of more than one candidate for each office. This refers to the nomination of candidates for the general election.

Section 10300 of Article VII, pertaining to the from of ballot for use in general elections, provides in part,

> "The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group

> of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names."

All of which leads to the conclusion that at an election to be held, where an official is to be selected by ballot, the name of only one person can appear on such ballot as the candidate of any political party or the candidate of any group or groups of petitioners, according to the number of the petitioning groups.

There is a well recognized and defined theory, philosophy and principle of law that the citizens of our Nation or a State thereof have the qualified right to express their allegiance to certain principles as adopted by an existing political party or as may be declared by certain allowed petitioning groups. See State ex rel. v. Kortjohn, 246 Mo. 34. As a practical matter this expression can only be given force and effect, and the voter could select among the various and contending single candidates representing the various and contending political views and creeds, where each party or group was represented by but one candidate.

At the special election to be held in Boone County on June 14th, next, voters are entitled to choose between a candidate selected by each of the existing political parties, as well as the candidate or candidates selected by such petitioning group or groups as may lawfully procure the name or names of candidates on the ballot, and the ballot shall contain no other name or names than the respective candidates of the existing political parties or group or groups as may have been selected or nominated, and according to Section 10300 the party name shall be printed above the name of the respective candidates and the party candidates shall be in separate columns with a heavy line between the names of each party list or the lists of each petitioning group or groups. The law of this State, by direct reference, does not make provision for the nomination of candidates to appear on the ballots as above required in the case presented by you, and as to how such nominations shall be made and the result above required shall be brought about, is the real question in this case.

We can perhaps reach a conclusion more directly by a process of elimination.

Section 10253 of Article V, dealing with primary elections, specifically provides that such Art. V, shall not apply to special elections. That the election to be held in your County on July 14th, next, is a special election there can be no doubt. Hence, the nominations to be made for candidates whose names shall appear on ballots at that election cannot be selected under the general primary election law in force in this State.

State ex rel. v. Patterson, supra.

And we must seek some other mode of choosing such nominees.

Section 10268 of Article V, under the heading of "Primary Elections" provides as follows:

> "VACANCIES, HOW FILLED. Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Section 10245 of Article IV, under the title of "Nominations", provides in part as follows:

> "Certificates of nomination herein directed to be filed with the clerk of the county court of each county shall be filed not more than sixty days and not less than fifteen days before election: Provided, that in case of any vacancy in said nomination, by resignation, death or otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk or board of election commissioners the name or names of candidates to fill such vacancy: Provided, that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days

> before the day fixed by law for the election of the persons in nomination, and with the board of election commissioners or county clark not later than ten days before such election: "

It may occur at first blush that the two sections of the statutes last referred to have to do only with vacancies occurring in nominations and does not apply where a vacancy occurs in an office and nominations of candidates to fill same must be made. However, the Supreme Court of this State in State ex inf. Barrett v. McClure, 299 Mo. 688, has definitely settled the question to the contrary. In the latter case, one McClure was elected to the office of Treasurer of Harrison County on November 2nd, 1920, for a term of four years beginning April 1st, 1921. McClure qualified and entered upon the duties of his office and continued therein until the 3rd day of August, 1922, when he died. In the year 1922, the state-wide primary was held on the first day of August and the time for candidates to file the nomination for such primary expired on the first day of June prior thereto. The county central committee of the Republican Party in Harrison County in September, 1922, nominated one Shumard as candidate for the office of county treasurer and his name was placed on the official ballot as such candidate, and at the following general election he was elected as treasurer of the county. On the 12th day of August, 1922, the respondent had been appointed by the Governor as Treasurer of Harrison County. She refused to yield the office to relator, hence quo warranto was brought. The Court at page 693 and subsequent pages of the opinion states the contentions of the parties and its conclusions of law as follows:

> "The argument is that 'the next general election,' as contemplated in the primary law, means an election at which all the machinery of election shall be called into play, including the primary election law. Since the time for filing by a candidate at the primary expired June first, 1922, and the election took place August first, and since Joseph B. McClure died August third, there was no possibility of a candidate for the office of Treasurer to be nominated at the primary. A part of the general process by which a candidate is elected to office being inoperative, because the time in which a candidate may avail himself of it having expired, there could be no legal election to fill the unexpired term at the November election, 1922.

The rulings of this court have been contrary to the position of respondent. Graves, J., in his opinion in the case of State ex rel. v. Roach, 269 Mo. 500, stated the argument in favor of respondent's position with all the force and clearness of which it is capable. A majority of the court, however, failed to concur on that proposition, and the case was decided upon another point in which the majority concurred.

It is further contended that under the terms of the statutes quoted a political committee could fill only a vacancy on the ticket nominated; that vacancies referred to do not mean vacancies in an office. Of course a political committee can fill only a vacancy occurring on the ticket nominated. But there is no reason for saying that such a vacancy could occur only by the death, resignation or removal of a candidate nominated. Section 4786 provides for the election of someone to fill an unexpired term where the vacancy in the office occurs before a general election. By the force of that statute a vacancy in an office, occurring after a primary election, creates on the nominated ticket a vacancy which did not exist prior to the occurrence of the vacancy in the office, a vacancy which Section 4838, Revised Statutes 1919, authorized the political committee to fill.

In the case of State ex rel. v. Hostetter, 137 Mo. 636, where it was contended that a vacancy meant a vacancy in the nomination and not a vacancy in the office, this court said, l. c. 644-645, that where by reason of death a vacancy occurs in an office shortly before the general election at which someone to fill the office for the unexpired term should be chosen, 'and no one has been nominated to said office, there is a vacancy in the nominations within the meaning of the election law,' and that such vacancy might be supplied at any time prior to the election by a nomination authenticated in the mode pointed out by the ballot law.

> In State ex rel. v. Kortjohn, 246 Mo. l. c. 42, this court, in considering Section 4838, Revised Statutes 1919, said: 'This section is broad enough to permit the party committee of such party to fill any and all vacancies upon their party ticket.'
>
> These direct rulings by this court, and the attitude of the majority in the Roach Case, makes clear the accepted doctrine that a party committee has authority to fill <u>any</u> vacancy which happens to be upon the nominated ticket, no matter how or when that vacancy occurs, whether by the death or resignation of someone nominated, or by the failure or inability of the electors at the primary to make a nomination."

Along the same line, the case of Heney v. Jordan, 175 P. 402, construing the California primary law, at page 405 of the opinion said,

> "It is clear that the term 'vacancy', as used in this section, refers to any case where, <u>from any cause</u>, there is no nominee of the party for an office."

Also, in State v. Akin, 79 S. W. 805, the Supreme Court of Tennessee at page 806 held,

> "Not only, under this construction, are the justices of the peace for four districts left unaffected, but the places of the justices for the other five civil districts can be filled by an election held after 10 day's notice given by the proper authorities, for, notwithstanding these five are <u>new</u> districts, yet the places to be filled in them are 'vacancies' within our statutes."

Sections 10241 and 10242 in our opinion, refer only to nominations made by newly created or formed political parties and not to nominations made by then existing political organizations, such as the Democratic or Republican Parties. We think this position is sustained, not only by the context of

the sections referred to, but by the cases of,

State ex rel. v. Kortjohn, 246 Mo. 34;
State ex rel. v. Seibel, 295 Mo. 607, 246 S. W. 288;
20 C. J. p. 109 Sec. 104 p. 127 Sec. 146.

We are of the opinion that a vacancy exists in the office of Sheriff of Boone County as to all existing political parties and that a vacancy exists as to candidates for nominations in all existing political parties to be voted for at the special election to be held July 14th, 1933.

We are further of the opinion that the vacancy as to such candidates to be voted on at the special election can only be supplied or filled by either the central committee or convention of each of the existing political parties in Boone County, or candidates of petitioning groups.

We are further of the opinion that it is within the discretion of the respective central committees as to whether such vacancies will be filled by such committee or by party convention. If the nominations are to be made by convention the respective central committees should promulgate rules as to the time and manner of holding such convention and as to how and when the same shall be composed, organized and its business disposed of.

Beene v. Waples, 187 S. W. 191, 193;
20 C. J. 137.

After such nominations are made, the names of the selected candidates should be duly certified to the county clerk and the special election held according to the general election law of the State of Missouri.

State ex rel. v. Patterson, 207 Mo. 129.

Yours very truly,

GILBERT LAMB
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GL:EG

BANKING AND BANKING: Delinquent taxes are a preferred claim against the assets of a closed bank.

7-4

June 26, 1933.

FILED
80

Hon. Henry C. Salveter
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Salveter:

Your letter of June 13th with request for an opinion received, which letter is as follows:

> "I would appreciate an opinion from your department as to whether or not a political sub-division of the State (in this instance Pettis County) can establish a preferred claim against a defunct National Bank for delinquent taxes due the county from the bank, which taxes are assessed on the stock of the bank.
>
> In years past taxes were assessed against the stock and the banks in this county have paid this assessment. Since the failure of these National Banks, this stock assessment has not been paid. They have paid their real estate tax, but the taxes against their stock is unpaid, and we desire to know if in your opinion we can establish a preferred claim."

In approaching this subject it will be necessary to examine the statutes to discover the method of assessing National Banks in Missouri, which is found in Section 9765 R. S. 1929, as amended by Acts of 1931, at page 357, and Sections 9765a, 9766 and 9767, R. S. 1929, which sections are

as follows:

"Sec. 9765. ASSESSMENT OF MANUFACTURING AND BUSINESS COMPANIES AND STOCK IN OTHER CORPORATIONS.--The property of manufacturing companies and other corporations named in article 7, chapter 32, insurance companies organized under the laws of this state and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate names. Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business: Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent. of the capital, surplus and undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinbefore provided: Provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers in addition to such taxes shall not exceed one hundred dollars per annum. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required

to be sent to the state auditor, valuation of all property assessed under this section under the head of 'corporate companies,' and, in addition thereto, he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, on or before the twentieth day of February, in each year, an abstract of the assessment of all corporations or persons doing a banking business in his county, showing the name of each bank, the number of shares of stock and their face value, the amount of reserve funds, undivided profits, premiums or earnings, and all other values, together with the assessed value thereof, also the value of the real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book."

"Sec. 9765a. PRECEDING SECTION SOLE METHOD TAXING NATIONAL BANKS.--That the tax provided in section 9765, R. S. 1929, is hereby declared to be the sole method of taxing national banking associations, their income, shares therein and dividends from such shares."

"Sec. 9766. SUCH TAXES, HOW PAID AND RECOVERED.--The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

"Sec. 9767. PENALTY ON CHIEF OFFICER OF CORPORATION.--If the president or other chief officer of any such corporation fail to comply with the provisions of this article, he shall forfeit to the state the sum of one thousand dollars, to be recovered by indictment in any court of competent jurisdiction."

It will be seen by Section 9765, supra, as Amended by Acts of 1931, at page 357, that a different method is used to assess banks than the property of manufacturing companies and other corporations named in Art. VII, Chap. 32, R. S. 1929, as the assessment of the banks is against the shares of stock and not against the corporation ex solidum.

It is unnecessary in this opinion to go extensively into the method used in assessing National Banks in this State, but we will go to the root of your inquiry, that is, may a preferred claim be established against a defunct National Bank for delinquent taxes due the state and county from said bank. We are assuming that the assessment was made prior to the closing of the bank.

Under Section 9765a, supra, Section 9765, supra, is made the sole method of taxing National Banking Associations etc., and so far as the question involved in your query is concerned the same procedure as to assessment is used in assessing National Banks as in assessing State Banks.

In the case of Greeley v. The Provident Savings Bank et al., Sexton, Collector, 98 Mo. 468, quoting from the syllabus, it was held that,

> "The state has a right paramount to other creditors to be paid taxes due it from assets in the hands of a receiver, and the court should see that such taxes are paid before distribution to other creditors, although the demand was not presented by the collector within the time prescribed by the court for the presentation of claims."

The case of State ex rel. Donnell, Collector etc., v. A Peoples Bank of DeSoto, 263 S. W. 205, which was,

> "A suit, at the relation of the collector of the revenue of Jefferson County, against the People's Bank of DeSoto, in charge at the time, of a special deputy bank commissioner, appointed under the statute, to assist in the liquidation of the business of the bank, it being insolvent. The action is based on a claim for unpaid back taxes alleged to be due the county for the year 1920, in the sum of Two Thousand Four Hundred Twenty-three Dollars and sixty-six cents, including interest and the collector's commission."

In this case the judgment went for the collector and defendant bank appealed and judgment of the lower court was affirmed. It was also held in this case that the delinquent taxes had priority over other claims against the bank.

The more recent case of State ex rel. Wyatt, Collector of Revenue of Mississippi County v. S. L. Cantley, State Finance Commissioner in charge of the Peoples Exchange Bank of Charleston, 325 Mo. l. c. 74, 26 S. W. l. c. 979, which was a suit for taxes in the circuit court of Mississippi County. From a judgment in favor of plaintiff in the sum of Two thousand three hundred ninety-five Dollars and eighteen cents, and a order making said judgment a preferred claim, defendant appealed. The court said,

> "In view of the foregoing decisions of this court and particularly the case of State ex rel. Donnell v. People's Bank of DeSoto, supra, we are constrained to hold that the assessment and tax bill in this case were not void and that the contention of appellant to the contrary must be overruled.
>
> This brings us to the final contention of appellant which is, 'that the assessment and payment of this personal tax by the corporation itself is a mere matter of convenience, the banking corporation serving as the agent of the stockholders, which agency ceased when the banking corporation closed its doors and discontinued the banking business, said corporation not being responsible for any taxes falling due after the date of the closing of such institution.'
>
> Whether or not, as between the bank and its shareholders, the bank is their mere agent for the payment of their taxes, the statute in plain terms makes the bank directly responsible for the payment of the taxes assessed against the shareholders. The duty of the bank to pay the tax, if it has assets with which to pay it, is a personal liability of the bank to the tax collector. (State ex rel. Bay v. Citizens State Bank, supra, pages 68 to 71.) It affirmatively appears from the agreed statement of facts that the Peoples Bank of Charleston had ample assets to pay the taxes and that said assets were transferred to the Peoples Exchange Bank in consideration of the agreement of the latter bank to assume the liabilities of the former bank. Under the facts in this case the Peoples Exchange Bank must be held liable for the payment of the taxes assessed against the shareholders of the Peoples Bank.

(State ex rel. Bay v. Citizens State Bank, supra.)

The reasons for the existence of the statute requiring a failed or closed bank to pay the tax assessed against its shareholders out of its assets in the hands of its liquidating officer or of the successor bank, which takes over its assets and assumes its liabilities, are, to say the least, just as controlling as they are where the bank is a live and going concern when the assessment against its shareholders is made.

Assuming, as appellant contends, that the collector may proceed against the individual shareholder, if he can reach him, and may collect from him directly the tax on his shares assessed against him, it does not at all follow that the collector may not assert his claim against the assets of the bank made liable for the tax in the first instance and collect the tax from any person, corporation or officer in possession of such assets and standing in the shoes of the bank whose shareholders were assessed."

We think the above cases are controlling and settle the question asked in your letter, and it is, therefore, the opinion of this office that a preferred claim for delinquent taxes against the bank may be established against a bank in liquidation where the assessment was made prior to the closing of said bank.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

CRH:EG

COUNTY JUDGES: Laws 1933, re population determining salaries. Does not effect present judges holding office.

July 15, 1933 7-25

FILED
80

Hon. Henry C. Salveter
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Salveter:

This is to acknowledge your letter of June 13, 1933, which is as follows:

"There is much rumor prevalent these days concerning the salary of the Judges of our County Court. Pettis County has an actual census population of between 34,000 and 35,000.

At the last November, 1932, election there were over 15,000 votes cast for many of the major offices. Under Sec. 11808 of R. S. Mo. 1929, this places Pettis County at a population of over 75,000 inhabitants (this being what is commonly called the multiplication method of ascertaining the population). Under Sec. 2093 of the laws of 1931, page 190, counties having a population of 75,000 inhabitants and less than 90,000 inhabitants, the County judges receive an annual salary of $2,500.00. On this basis, Pettis County having a population of over 75,000 inhabitants and less than 90,000 inhabitants, our county judges have been drawing an annual salary of $2,500.00, as they are now doing.

Our representative, E. W. Couey, has made several public talks th t the Judges of the County Court in Pettis County were entitled to only $5.00 per day, by reason of the bill which passed the Legislature at the 1933 session, relating to the salary of County Judges. I have not as yet received a copy of that bill, but I am informed that it places the compensation of County Judges at $5.00 per day, and expressly provides that the method of ascertaining population shall be

determined solely and only by the last decennial census of the United States. Judge Couey's public utterances are that this bill relating to the salary of County Judges passed at the last session of legislature becomes effective 90 days after the adjournment of the legislature, and from that date on the County Judges in Pettis County will be entitled to only $5.00 per day. Section 33 under Article 6 of the Constitution of Missouri provides, "The judges of the Supreme, appellate and Circuit Courts, and all of the other courts of record receiving a salary, shall, at stated times, receive such compensation for their services as his or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

I have no personal interest in this matter whatever other than to follow the law, and to advise our County Court as to what I understand the law to be. It appears to me that Section 33, Art. 6, of the Constitution of Mo. expressly provides that the salary of all judges of courts of record shall not be increased or diminished during the period for which they were elected. That being true, it appears to me that the judges of the County Court in Pettis County are entitled under the law to continue to receive their annual salary of $2,500.00 per year. It further would appear to me that it is unconstitutional for the legislature to design some other scheme of determining the basis of compensation, if the other method devised by the legislature in reality affects the existing salary of the county judges.

I would indeed appreciate your interpretation of the situation, as I have advised the county judges as to my interpretation of the law, but I have also informed them that I would secure your opinion in addition to my own."

Section 2073 R. S. Mo. 1929, provides in part as follows:

> "At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge,* * * * * * and every four years thereafter, the presiding judge of said court shall be elected.* * * *"

The 1933 Legislature amended Section 2092 Laws Mo. 1931, p.190, and enacted a new section in lieu thereof. This new section only changed the annual salary of judges of the county court in counties of three hundred thousand inhabitants or more from six thousand dollars to four thousand dollars and added this provision:

> "And no mileage shall be paid for any special or adjourned term."

This law was approved May 1, 1933, and becomes effective July 24, 1933.

The law as amended in 1933 is the same in regard to the proposition here envolved as of 1931 section. Both provide in part the following:

> "In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars.* * * *"

And further:

> "* * *In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court.* * * *"

The 1933 Legislature, Laws Mo. 1933, p. 209, also enacted this provision:

> "Section 1. Amending Article 5, Chapter 9, by adding new section.--That Article 5, Chapter 9, Revised Statutes of Missouri, 1929, be and the same is hereby amended by adding thereto a new section to be numbered and known as 'Section 2092A,' which said new section shall read as follows:
>
> Sec. 2092a. Last decennial census to determine population.--That the number of inhabitants of any county for the purpose of the above section 2092 shall be ascertained by the last decennial census of the United States."

This section likewise carries no emergency clause and is affective after July 24, 1933.

It will be noted that the purpose of the last section (2092a) changed the method of computing the population for salaries of county judges.

Section 11808 R. S. Mo. 1929, reads as follows:

> "For the purpose of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants, the highest number of votes cast at the last previous general election, whether heretofore or hereafter held in such county, for any office, shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county."

You will note that before Section 2092A was enacted that the population for the purpose of ascertaining salaries was by the multiplication method.

Section 33, Article 6, p. 115, of the Constitution of Missouri reads as follows:

> "The judges of the Supreme, Appellate and Circuit Courts, and of all other courts of record receiving a salary, shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

Section 36 of the same Article of the Constitution reads as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 1826 R. S. Mo. 1929, provides as follows:

> "The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

In the case of Cunningham v. Current River Railroad Company, 165 Mo. 270, l.c. 277, the Court in its opinion held:

> "* * *The compensation mentioned in the Constitution means compensation paid by the State, or some subdivision thereof, in the way of an increase of salary or compensation, which can not be increased by legislation during the period for which the judge is elected, but does not mean that he may not be paid for extra services and expenses incurred in the performance thereof, even out of the State treasury." * * *

The above case quotes the rule as to increase and the constitution uses increase or diminish, and we are of the conclusion that the contra, that is, diminishing the salary is likewise prohibited by the constitution.

From the foregoing it is our opinion that Sections 2092 and 2092A, Laws Mo. 1933, pp. 304 and 309, do not effect county judges until the terms of those now in office expire.

It is our further opinion that the multiplication method of ascertaining the population of counties for the present county judges and the salaries specified in Laws. Mo. 1931 (2093) will be the compensation the present county judges shall receive due to the constitutional provision as to increasing or diminishing the salaries or compensation during the period for which the judges are elected.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED:

(Acting)
Attorney General.

JLH:MM

DEPARTMENT OF PENAL INSTITUTIONS: Right to re-number convict on re-sentence

7-17

FILED
80
33

July 17, 1933

J. M. Saunders
Department of Penal Institutions
Jefferson City, Missouri

Gentlemen:

This office acknowledges receipt of your letter dated July 15, 1933, as follows:

"In Re: Ross Gregory, 41650.

This man was convicted in Stoddard County by a jury in Circuit Court and his sentence fixed at 12 years in the penitentiary. On September 14, 1932, the Court in vacation, as this office is informed, upon motion, reduced the sentence from 12 to 8 years, and in compliance with this order the prisoner was brought to the penitentiary to serve a term of 8 years beginning September 14, 1932. He was accepted by the Warden and entered upon his service as is evidenced by the sentence and judgment submitted herewith.

Later on it was determined that the action of the Court was illegal and the prisoner was taken out of the penitentiary on a writ of habeas corpus, issued by the Circuit Court of Stoddard County, directing the warden of the penitentiary to deliver the prisoner into the said court July 7, 1933. This writ was complied with.

On July 12, 1933, this Ross Gregory was returned to the penitentiary by the Sheriff of Stoddard County, to serve a sentence of 10 years from September 10,1932. The sentence of the Court was based upon Cause No. 10143, which is the same cause that the first sentence was based upon.

What this office would like to know is whether the prisoner should be re-entered under his original number and the records changed to conform with the order of the Court, made July 8, 1933 and fixing his sentence at 10 years instead of 8 years, or whether the prisoner should be entered under a new number and a new record made to conform to the order of July 8, 1933, it not being possible to carry the prisoner under two different sentences and two different numbers.

A written opinion from your office at as early a date as is convenient, will be appreciated."

By Section 8338 Revised Statutes Missouri 1929, the members of your board, subject to law, have the exclusive government, regulation and control of the Missouri State Penitentiary and you may make and enforce such rules and regulations as you from time to time deem necessary and proper in the management of the penitentiary and the persons now or hereafter legally committed therein, which would include the method or form in which your records are kept, so that the purposes of the law may be effectually carried out.

We think it is your duty to accept the judgment and direction of the Circuit Court referred to in your letter as a valid judgment, order and direction until the same is reversed or otherwise set aside.

You undoubtedly have the right to make such entries on your records or to change, alter or add to the same so as to make them speak the facts. As a practical matter, and about which you have a right to use your judgment, we would suggest that your record of the first entrance and acceptance of Gregory be amended by adding to same so as to show his subsequent re-sentence and change in term of sentence, and the first record could recite that the number appearing on that record is hereby canceled and that he is given a new number whatever it is and state where the same may be found on your records. You could then give Gregory another sheet of your records with new number and recite the same facts as we have suggested be recited on the old record, then you will have a complete record of the chain of events and all self-explanatory. The law gives you the power and authority to use your judgment in such details as you present and

your only duty is to keep your records in such a way as is complete and most easily understood.

I am returning you your inclosures herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures

PENAL INSTITUTIONS: Sentence required to be served after return of subject from insane hospital.

August 5, 1933

FILED

Honorable J. M. Sanders
Warden Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Sanders:

This Department acknowledges receipt of your letter dated August 3, 1933, as follows:

"I beg to submit the following facts and ask for your opinion of the proper course for me to pursue:

Charles Williams, No. 23074, plead guilty to the crime of Grand Larceny before the Circuit Court of Randolph County at the June term, 1920. He was sentenced to serve three (3) years in this penitentiary from September 15, 1920, and was received here September 16, 1920.

On November 10, 1920, Williams was transferred by Gov. Gardner to State Hospital No. 1, at Fulton. From this latter institution he escaped on December 10, 1920.

Without knowledge of the authorities of the penitentiary he was captured and returned to Fulton and subsequently discharged from the Hospital there on August 31, 1921.

This same party, under the name of Dave Gentry, No. 34339, was again received at the penitentiary December 30, 1928, from Jasper County, where he had plead guilty to the crime of Burglary and Larceny at the November, 1928, term of the Jasper County Circuit Court. He was sentenced to

serve eight (8) years, four (4) years on each count, to be served consecutively.

The document ordering the Warden of the penitentiary to deliver Charles Williams to the Hospital at Fulton plainly states that if, or when, Williams is again sane the Superintendent of the Hospital shall notify the Warden of the Penitentiary. This was not done, Williams being discharged from the asylum directly and not returned to the penitentiary to complete his sentence.

His sentence should, I believe, be completed. It is usual in such cases for the subject to be transferred from asylums back to this institution by the Governor. Complications which have arisen due to the irregular manner of Williams's release from the Hospital raise a question of how best to arrange to hold him, legally, to serve out his time here."

Touching on the matter in hand Section 8659 Revised Statutes of Missouri 1929, provides as follows:

"If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, becomes insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or

> warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor."

Section 8660 provides that when a convict has served two-thirds of the sentence of the court and becomes insane and is sent to a state hospital, when such convict recovers his sanity the governor shall grant a complete discharge to the convict from the sentence of the court and the convict is not required to return to the penitentiary. Under your statement of facts Section 8660 has no application.

The warrant of the governor as to the part thereof important in determining the question at hand, reads as follows:

> "NOW, THEREFORE, I, F. D. Gardner, Governor of the State of Missouri, by virtue of authority in me vested by law, do hereby suspend the execution of said sentence, and by these presents do order and direct the Warden of the Penitentiary to immediately convey said insane convict, Chas. Williams, to State Hospital for Insane No. 1, located at Fulton, Missouri, there to be detained until restored to reason.
>
> And the Superintendent of State Hospital for Insane No. 1, is hereby directed to receive said Chas. Williams from said Warden and him safely keep confined in said Hospital, and treat for insanity until restored to reason; when he, the said Superintendent, shall give due notice thereof to the Warden of the Missouri Penitentiary, where he shall serve so much

> of his sentence as now remains unserved, beginning on the date of his return to prison. And it is further directed that the expense of conveying the said Chas. Williams to the Hospital shall be audited and paid out of the fund appropriated for the payment of the criminal costs, and the expense at the hospital for his board and clothing shall be paid by Randolph Co. as provided by Sections 5355, and 1411, Revised Statutes of Missouri 1909."

It is true the subject was not returned to the state penitentiary by the warden upon the subject regaining his sanity, but he was returned to the penitentiary as effectively as if he had been brought from the state hospital to the penitentiary by the warden.

We are inclined to the view that when the subject was returned to the penitentiary under sentence by the circuit court of Jasper County that the serving of the latter sentence was automatically by operation of law suspended and the subject began service under the sentence of the Randolph County Circuit Court. Either that is true or upon a completion of the service of the sentence of the Jasper County Circuit Court the subject would be required to begin service of the sentence of the Randolph County Circuit Court unserved at the time the subject was taken from the penitentiary to the state hospital. Either conclusion reaches the same results.

In an opinion to your Department dated July 14, 1933, this office held that in certain instances and under certain circumstances different sentences imposed on the same subject would run concurrently, however, we are not willing to extend that rule to apply to sentences imposed by separate and different courts in this state and particularly, as is true in this case, where the subject was convicted of or pleads guilty to an offense under one name in one instance and is convicted of or pleads guilty to an offense under a different name in the other instance or instances. We think the question of concurrent sentences is controlled somewhat by the intention of the court and there is no reason to think that the Circuit Court of Jasper County knew of the sentence imposed on the subject by the

Circuit Court of Randolph County. Nor do we think the Circuit Court of Jasper County would have the right to impose a sentence depending in anywise on the sentence imposed by the Circuit Court of Randolph County.

We are of the opinion that the subject mentioned in your letter should be required to serve the full time imposed by the Circuit Court of Randolph County and the Circuit Court of Jasper County and until discharged according to law.

We are returning you your inclosures herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures

COUNTY FOREIGN INSURANCE TAX FUND: Sec. 38, Laws of Mo. 1933, p. 85 held unconstitutional.

August 21, 1933.

8-23

FILED
10
39

Hon. William H. Sapp,
Prosecuting Attorney,
Columbia, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 5 in which you request an opinion from this department on the constitutionality of Sec. 38 of House Bill No. 649, Laws of Missouri 1933, p. 85.

Sec. 38 provides as follows:

> '"There is hereby appropriated out of the state treasury, chargeable to the 'County foreign insurance tax fund', for the years 1933 and 1934, the sum of three million dollars ($3,000,000) or so much thereof as may be available to be apportioned among the different counties in the state, and the city of St. Louis, as provided by Section 5982 of the Revised Statutes of Missouri, 1929. Provided, that the board of directors or the board of education of any school district in this state may, during the school years 1933-34 and 1934-35, notwithstanding the provisions of Section 18a of Committee Substitute for Senate Bills 237, 269, 322, 323, 326 and 327, passed by the 56th General Assembly, transfer to the teachers' fund any portion or all of said moneys received under the provisions of this section that may be needed in order that the district may have an eight-month term of school.'"

(Emphasis Ours)

Section 18a of Committee Substitute for Senate Bills 237, etc. (Laws 1931, p. 345), the prior existing statute mentioned in the proviso above, passed by the Legislature in 1931, sets up a

"free text book fund" in each school district and provides that when money is appropriated under the provision of Section 5982 R.S. Mo. 1929, that money shall be paid into the free text book fund of each district. The section further directs the Board of Directors of each district to purchase free text books for the use of pupils in the elementary grades when such action is directed by a vote of the qualified voters of the district. This said section, 18a, further provides that if free text books have not been authorized by a vote of the district, or if there remains a balance in the fund after the purchase of free text books, the sum not utilized shall be transferred to the Teachers' Fund.

The question as to the validity of the proviso in Section 38 (Laws of 1933, page 85) arises when the Board of Directors of a school district attempts to transfer moneys apportioned under the provisions of Section 5982 R.S. Mo. 1929, (which Act merely provides for the apportionment of the county insurance tax fund to the several counties), notwithstanding the fact that the voters of the district have directed that such money be used to purchase free text books. In such a case the action of the Board of Directors would be legal, if the proviso mentioned above is a valid enactment.

It is the opinion of this department that Section 38, Laws of Missouri 1933, p. 85, is unconstitutional for the reasons which will presently appear:

I.

Section 19, Article X of the Constitution of the State of Missouri provides:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

In the case of State ex rel Broadwater v. Seibert, 99 Mo. 122,

The General Assembly, by Act approved May 21, 1889 (Acts 1889, p. 6, Sec. 5, Sub. 7), appropriated $7500 "to pay the amount due for work and improvements on the walls and capitol grounds", and "to pay balance due under contract made for the enlargement of the capitol building, which balance was a part of the former appropriation of $250,000 which lapsed and reverted to the treasury", reappropriated the sum of $21,854.06. The court held that the object of the reappropriation must be determined by the terms of the Act making it and resort cannot be had for that purpose to the first Act. The court said (l.c. 125):

> "It is obvious, from the reading of the foregoing provision, that a reappropriation of an unexpended balance of a former appropriation is upon the same footing as the original appropriation as to the necessity of stating the object for which such reappropriation is made. ****"

Section 38, Laws of Mo. 1933, p. 85 is therefore unconstitutional when measured by the yard stick of the Seibert Case, supra, for the reason that no specific object of the reappropriation is stated. It is discretionary with the board of directors or the board of education as to the manner in which they will expend the money. In addition thereto, Section 38, supra, attempts to determine the object of the appropriation by reference to Section 18a, Laws of Mo. 1931, p. 345. This is clearly unconstitutional.

II.

There are two possible constructions of Section 38, Laws of Missouri 1933, p. 85:

(a) That it is an amendment to Section 18a, Laws of Missouri 1931, p. 345;

(b) That it is a separate Act pertinent to the appropriation made in the section of which it is a part.

If Section 38, supra, should be construed as an amendment to Section 18a, supra, it is clearly unconstitutional, for it does not comply with the mandate contained in Section 34, Art. IV of the Constitution of the State of Missouri, which is as follows:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken

> out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

A mere reading of Section 38 is sufficient to convince that it does not in any way conform to Section 34, Article IV of the Constitution of the State of Missouri.

If, on the other hand, Section 38, supra, should be construed as being a separate Act, the unconstitutionality of the law is still apparent.

Article III of the Constitution of Missouri is the usual American constitutional clause relating to distribution of powers. Section 57 of Article IV of the Constitution of Missouri, relating to initiative and referendum reaffirms the provision of Article III as far as legislative powers are concerned, with an amendment that is unimportant here. The construction which the courts of this state have placed upon these provisions relating to distribution of powers fully warrants our conclusion that the proviso of the law of 1933 is unconstitutional, should it be considered as not amendatory of the laws of 1931.

We find in State v. Field, 17 Mo. 529 what is practically an identical case. In the Field Case an Act of the legislature attemped to give to the County Court of any county the power to suspend the operation of a law relating to the mode of recovery of certain penalties. The court in that case held that under the provision of Article III of the Constitution, the legislature could not delegate a discretion to an administrative body for the purpose of investing the administrative body with the power to suspend the effect of a previously enacted statute. The situation here is identical in that the proviso of the law of 1933 attempts to vest in an administrative body the power to suspend the effect of Section 18a of Committee Substitute for Senate Bills 237, etc. (Laws of 1931, p. 345) setting up the free text book fund.

In the case of Merchants Exchange v. Knott, 212 Mo. 616, l.c. 641, 111 S.W. 565, the court held:

> "We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, to say when and where it is law is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission."

III.

If under Section 18a, Laws of Mo. 1931, p. 345, the voters of a district have directed that the money received under the provisions of Sec. 5982 R.S. Mo. 1929 be used to purchase free text books, then, in that event, Sec. 38, Laws of Mo. 1933, p. 85 is unconstitutional for the reason that it attempts to apply the appropriation to purposes other than those for which it was obtained. Sec. 20, Article X of the Constitution of the State of Missouri provides:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

The question is whether or not the voters of a district, having voted to use the appropriation to purchase free text books, have assumed a liability such as is contemplated in Sec. 20 of Article X of the Constitution.

The word "liability" is defined in Balentine's Law Dictionary as follows:

> "As a legal term the word means that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action."

Words and Phrases (2d) Vol. III, p. 98, under the heading of "Liability", says:

> "'Liability' in its broadest and most comprehensive use includes any obligation one is bound in law or justice to perform, and is synonymous with 'responsibility'; in a more restricted and perhaps in its popular sense, it means that which one is under obligation to pay to another. State ex rel City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 129 N.W. 623, 630, 144 Wis. 386, 140 Am. St. Rep. 1025. *****"

Words and Phrases, (3d) Vol. IV, p. 866 says:

> "' The word 'liability', as used in Section 3, Art. VIII of the Constitution, is to be read, construed, and accepted in the usual and ordinary sense in which that term is commonly employed, and when so used,

> means and signifies the state of being bound or obligated in law or justice to do, pay, or make good something. Feil v. City of Coeur d'Alene, 129 P. 643, 649, 23 Idaho 32, 43 L.R.A. (N.S. 1095.'"

Words and Phrases (3d) Vol. IV, p. 868, under "Debt", says:

> "'The word 'liability' as used in Const., Art. VIII, Chap. 3, limiting county and municipal indebtedness, has its ordinary meaning, and signifies the state of being bound in law and justice to pay an indebtedness or discharge some obligation. Boise Development Co. v. City of Boise, 143 P. 651, 535, 26 Idaho 347. ****"

Cooley in his work "Constitutional Limitations", Eighth Edition, Vol. I, p. 130, says:

> "'In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As Marshall, Ch. J., says: 'The framers of the constitution, and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.'"

In the light of the definitions as heretofore set out, and in view of the construction to be placed upon words as used in the Constitution, we are of the opinion that the "liability" assumed by the district when they voted to have free text books for the district is such a "liability" as is contemplated in Sec. 20, Article X of our Constitution. That being so, the remaining question that presents itself for our consideration is whether or not a diversion of the moneys, such as is contemplated by Sec. 38, Laws of Missouri 1933, p. 85, is unconstitutional.

Corpus Juris, Vol. 61, p. 1521, declares the following principle of law:

> "Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose, and neither can funds derived from taxes levied and collected for particular purposes be legally utilized for, or diverted to, any other purpose, some constitutional provisions expressly so providing. ****"

In the case of Burmank, etc. v. Douglas, (Wash.), 255 Pac. 360, the court held:

> "The general rule is that where money is raised and is payable out of a special fund, the fund in question shall not be called upon to pay any other or different charges except those for which it is credited."

In the case of In Re Opinion of the Judges, 240 N.W. 600, the court said:

> "'****And with particular reference to the possibility of employing moneys (either state or county) now on hand or to accrue under present levies, for the furnishing of feed or making of feed loans, article 11, Sec. 8, Constitution of this state, provides: 'No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which the tax only shall be applied.'
>
> Under this section we are of the opinion that moneys now on hand (or hereafter to be received) as the result of payment of

> taxes (whether motor vehicle fuel tax or other tax) already levied, and the proceeds of which have already been appropriated, must be applied to the purposes for which they were levied and to which they have already been appropriated, and we think the same could not now be diverted, even by legislative action, to any other purpose. See Opinion of the Judges, 50 S.D. 324, 210 N.W. 186; White Eagle Oil & Refining Co. v. Gunderson, 48 S.D. 608, 205 N.W. 614, 43 A.L.R. 397.
>
> This same constitutional provision would prevent the diversion of money in existing sinking or other funds raised by taxation from the specific purposes of such funds to the making of feed loans, even though the money is now on hand and the expenditure thereof is not immediately required for the particular object for which it was levied and appropriated."

Therefore, it is the opinion of this department that Sec. 38, Laws of Mo. 1933, p. 85, is unconstitutional when viewed in the light of Sec. 20, Article X of the State Constitution for the reason that it attempts to apply the appropriation to purposes other than those for which it was obtained.

IV.

Section 28, Article IV of the Constitution of the State of Missouri provides:

> "No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

Sec. 38, Laws of Mo. 1933, p. 85 is found under the general Act under the heading

> " APPROPRIATIONS: Money for Support of State Government, State Fair, Boards, Bureaus and Commissions for the years of 1933 and 1934."

Section 38, supra, is entitled: "County foreign insurance tax fund". Under the above general heading the Legislature not only appropriated $3,000,000 as provided by Sec. 5982, R.S. Mo. 1929, but in addition thereto sought to repeal the provisions of Section 18a, Laws of Mo. 1931, p. 345, and give to the board of directors or to the board of education the power to transfer to the teachers' fund any portion or all of said moneys received under the provisions of this section. This is pure unadulterated legislation and is violative of Section 28, Article IV of the Constitution of the State of Missouri.

The general rule of law on this subject is well stated in the case of State ex rel School District v. Hackmann, 292 Mo. 27, l.c. 31:

> "'Section 28 of Article IV of the Constitution provides that 'No bill *** shall contain more than one subject, which shall be clearly expressed in its title.' It is uniformly held that this provision is to be liberally construed; that its purpose is to have the title indicate the general contents of the act; that if the contents of the act fairly relate to and have a natural connection with the subject expressed in the title, they fall within the title. On the other hand, provisions incongruous in their subject-matter may not be enacted in the same act. The subject must be single. In addition to being single, the subject must be clearly expressed in the title; the title must not mislead as to the contents of the act.'"

However, the application of this general rule to a case such as we have here under consideration is most emphatically set out in the case of State ex rel Hueller v. Thompson, 316 Mo. 272, l.c. 277, as follows:

> "An appropriation bill is just what the terminology imports and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations. As to these he

is charged by the Constitution to look and watch for two things: (a) the various subjects of the bill, and (b) the account or accounts for which the payment of the State's moneys are being set apart. The same section and article of the Constitution forbids any bill, except as in the Constitution provided, to contain more than a single subject and this must be clearly expressed in the title. The exceptions are two, one of which is appropriation bills, and the other is such legislation as is provided for and limited by the third division of Section 44 of Article IV of the Constitution. (Art. IV, secs. 28 and 44). Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries, is beyond question, but has it the right to do so by means of an appropriation act? We think not.

As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill-conceived, questionable, if not vicious, legislation could be proposed, with the threat, too, that if not assented to and passed, the appropriations would be defeated. The possibilities of such legislation and this court's condemnation thereof are well illustrated in the case of State ex rel Tolerton v. Gordon, 236 Mo. 142, as well as the following cases from other states: State ex rel v. Carr, 13 L.R.A. 177; Com. v. Greg, 29 Atl. 297."

CONCLUSION.

Therefore, from a consideration of the foregoing, it is the opinion of this department that Section 38, Laws of Missouri 1933, p. 85, is unconstitutional for the reason that it violates

(1) Section 19, Article X of the Constitution of the State of Missouri;

(2) Section 34, Article IV of the Constitution of the State of Missouri;

(3) Article III, and Section 57, Article IV of the Constitution of the State of Missouri;

(4) Section 20, Article X of the Constitution of the State of Missouri;

(5) Section 28 of Article IV of the Constitution of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

EXTRADITION: Officers' expenses are paid - in what manner.

FILED
80

August 28, 1933.

Send Copy to Fort Smith

Mr. J.M. Sanders,
Warden - Mo. State Penitentiary,
Jefferson City, Missouri.

Dear Warden:

Your request for an opinion dated August 9, 1933 is at hand and contains the following query:

> "As you know, the expense of returning from another state a fugitive from justice who has signed a waiver of extradition is paid from general revenue or earnings of the penitentiary. On the other hand, the expense of returning a fugitive whom it has been necessary to extradite is paid from a fund created for the apprehension of criminals.
>
> Frequently a fugitive will waive extradition after the papers have been issued by the Governor, and it is then not necessary that they be used.
>
> Would it not then, in such cases, be regular and proper to requisition the State Auditor to reimburse the Penitentiary for the expense involved in the return of the fugitive, such payment to be made from the fund for the apprehension of criminals?"

Section 3587, R.S. Mo. 1929 provides as follows:

> "Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered,

> he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

Section 3588 R.S. Mo. 1929 provides as follows:

> "The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

It is our opinion that when the Governor of this State appoints a messenger as above provided, that said messenger may present the Executive Department with a list of his expenditures which he was out in the performance of his mission, and that the Governor, being satisfied that these expenditures are correct, has it within his power to allow said claim from a fund created for the apprehension of criminals.

It is not necessary that such expenses be paid from the general revenue or earnings of the Penitentiary. The fact that after requisition papers have been granted by the Governor and before extradition is perfected the prisoner waives extradition and is returned to this state by the messenger would not alter the messenger's right to present his claim to the Governor and have it allowed from the fund created for the apprehension of criminals.

Where no requisition has been requested of the Governor and the authorities at the Penitentiary return a prisoner on their own initiative, then the expenses of such messenger, if paid at all, could only be paid from the general revenue or earnings of the penitentiary.

If we have not fully answered your question, we will appreciate your consulting us further.

Respectfully submitted,

WILLIAM ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

WOS:AW

OFFICERS)
EMPLOYEES) No person entitled to compensation as de facto officer or employee unless there is a legal of

September 27, 1933.

10-2

FILED
80

Saunders

Hon. Dan M. Carr
Secretary
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Carr:

This is to acknowledge your letter which reads as follows:

"Under statute, the Board of Penal Commissioners changed from five to three members, July 24, 1933; but no official announcement of the continuing members was made until August 4, 1933.

In the meantime, all members continued their usual line of service.

On August 4, the official announcement was made--three of the members continued their status under reduced salary, one continued as warden without membership on the board and the fifth was relieved of service.

This fifth member was paid for twenty-three days' service at the old salary rate, and no further payment to him has been made, which brings about these questions:

1 Is he entitled to additional remuneration?

2 If so, at what rate should he be paid--the former member rate of $3500 per annum or the new member rate, $3200 per annum?"

Laws of Missouri, 1933, page 327, Section 1, reads as follows:

> "REPEALING AND REENACTING CERTAIN SECTIONS. That Sections 8316, 8317, 8318 and 8319, Article 1, Chapter 44, Revised Statutes of Missouri, 1929, be and the same are hereby repealed and four new Sections enacted in lieu thereof, to be known as Sections 8316, 8317, 8318 and 8319, and to read as follows:"

You will note that the Legislature specifically repealed four sections of the Revised Statutes, 1929, and enacted in lieu thereof four new sections. Repealed Section 8316 R. S. 1929, provided for the creating and establishment of the Department of Penal Institutions; and repealed Section 8317 R. S. 1929, provided for the appointment of five commissioners by the Governor. New Section 8316, Laws of Missouri, 1933, provides for the creating and establishment of a department to be known as the Department of Penal Institutions by name; and new Section 8317, Laws of Missouri, 1933, page 328, provides in part:

> "Immediately after the taking effect of this act it shall be the duty of the governor, by and with the consent and approval of the senate, to appoint three commissioners, of the department of penal institutions, etc. The governor shall designate one of said commissioners as director of penal institutions, and the commissioner so designated etc. The governor may also, at his discretion designate any one of said commissioners as warden of the Missouri state penitentiary; one as commissioner of paroles and pardons, and one as superintendent of any department or departments, etc."

You will note that the 1933 section, supra, reduced the commissioners from five to three and was approved March 16th, 1933, and passed without an emergency clause. The Legislature adjourned and ninety days thereafter these four (1933) enacted laws became effective, to-wit, July 24th, 1933. Thus, the Legislature repealed four of the 1929 statutes and enacted in lieu thereof four like and similar sections, and when these became effective (July 24th, 1933) such, thereafter, govern the Department of Penal Institutions.

The effect of this mode of repealing and amending the 1929 statutes is (pertaining to your inquiry) that now three commissioners are provided for instead of five. By delay in not designating who the three commissioners were to be, created the situation that all five commissioners (appointed under 1929 statutes) remained in their respective positions and performed duties under the old law until August 4th, 1933, when three commissioners were designated or appointed. Thus, as stated in your letter, one former commissioner was relieved of duty. You ask whether or not the unappointed person, so remaining, shall be entitled to compensation for services he rendered during this interim. The first question to be determined is when the act took effect.

In State ex rel. Brunjes v. Bockelman, 240 S. W. 209, (Supreme Court, in Banc) l. c. 212, the court said:

> "The real issue in this case is to determine from what exact date such a statute speaks. In our judgment it speaks as of the date it becomes effective and not otherwise."

And further,

> "The law discussed was passed February 4, 1859, and has not been passed with an emergency. Such a law became effective in 90 days."

Thus, this new law, being passed without an emergency clause, became effective ninety days thereafter. Therefore, after July 24th, 1933, said office, as was held by the person sought to be compensated, did not exist. The question, then, must be determined as to whether or not he was a de facto officer, and, if so, is he entitled to the compensation?

In State ex inf. Mytton v. Rackliffe, 164 Mo. 453, the Supreme Court, in Banc, l. c. 460, said:

> "But how he can be the legal incumbent of an office created by statute when the statute creating it has been expressly repealed, it is difficult to see."

And further at page 461:

> "The courts have no power to reform legislation. As it comes from the hands of the

> Legislature so we must take it, good or bad, perfect or imperfect, and however much we may regret the unfortunate situation in which this legislation leaves cities of the second class in regard to one of the most important departments of municipal government, it is beyond our power to relieve it."

And, in Ex Parte Babe Snyder, 64 Mo. 58, l. c. 62, the court said:

> "* * * Numerous cases can be instanced from the books, where the acts of an incumbent of an office have been held valid, upon the ground that such incumbent was an officer de facto. But an officer of that description necessarily pre-supposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto, unless there was a legal office to fill; * * * * * * * * * * * * * * * * * * *."

And, in State ex rel. Abington v. Reynolds, 218 S. W. 334, l. c. 336, the court said:

> "There is no claim here of a de facto incumbency of the office. Harwell was a mere intruder. The office of township collector had been abolished; and, there being no de jure office, there could be no de facto officer."

Therefore, we conclude that the 1933 sections, supra, in repealing the old statutes reduced the commissioners from five to three so that now the office of only three commissioners is provided and the holding of an office by one, after the 1933 sections became effective, would not constitute such person so holding thereafter even a de facto officer, because he filled no legal office.

We now proceed as to whether or not such person who holds office, not being de facto or de jure, is entitled to compensation. In Cunio v. Franklin County, 285 S. W. 1007, l. c. 1008, the Supreme Court of Missouri, Division No. 1, held:

> "It is well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office."

And further,

> "On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services."

From the above and foregoing, it is our opinion that the person mentioned in your inquiry is not entitled to compensation from July 24th, 1933, to August 4th, 1933. We are sorry such is our ruling but we can only say as did the Court in State ex inf. Mytton v. Rackliffe, supra; "As it comes from the hands of the Legislature so we must take it, good or bad, perfect or imperfect."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

SCHOOL DISTRICTS:

Where there are less than eight colored children of school age in a school district, they shall be sent to school in the nearest district where separate colored schools are maintained.

September 29, 1933.

10-4

FILED

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47

Mr. Henry C. Salveter,
Prosecuting Attorney,
Sedalia, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We have a rural school district in Pettis County in which there is just one negro family, of which there are five children of grade school age. The school board has contracted to employ a white school teacher to instruct these five colored children in her home, and carry on a system of class work as is done in the ordinary and regular rural school. The negro parents refuse to allow their children to go to this white teacher, who is qualified under the law as a teacher and has her duly issued school certificate.

The problem now before us is whether or not under the law these children can be compelled to attend school under the instruction of this white teacher. Sections 9216 and 9217, R. S. Mo. 1929, have to do with schools for colored children. Is it your understanding of the law that these children can be compelled to attend school as above named, or do you regard it as mandatory upon the school district to furnish transportation so that these children can be sent to some other colored school in the county? The facts are that the school district can provide proper training for these children as above mentioned at far less cost than they can by furnishing transportation and paying their tuition in some other district."

Section 9216, R. S. Mo. 1929, provides as follows:

"Separate free schools shall be established for the education of children of African descent; and it shall hereinafter be unlawful for any colored child to attend any white school, or for any white child to attend a colored school."

Section 9217, R. S. Mo. 1929, provides as follows:

"When there are within any district in this state eight or more colored children of school age, as shown by the

> last enumeration, the board of directors of such school district shall be and they are hereby authorized and required to establish and maintain within such school district a separate free school for said colored children or in lieu thereof shall pay the transportation and the tuition charges to any district in the county wherein a school is maintained for colored children. Provided if the number of colored children enumerated is less than eight theyshall have the privilege and are entitled to attend school in the nearest district in the county wherein a school is maintained for colored children and the transportation and tuition charges incurred shall be paid; said transportation shall not exceed five dollars per month and tuition charges shall not exceed the pro rata cost of instruction. * * *"

In view of the foregoing sections it is apparent that separate schools must be maintained for colored children and white children. Under section 9217, where the last enumeration shows eight or more colored children of school age, the board of directors of the school district are required to establish and maintain within such school district separate free school for colored children, or in lieu thereof to pay the transportation and tuition charges to the district in which such school is maintained. Under the same Section, where the enumeration is less than eight the children are entitled to attend school in the nearest district wherein a school is maintained for colored children, and the transportation and tuition incurred shall be paid by the district.

In your inquiry you state that there are five colored children of grade school age in the district. Under Section 9217, they are entitled to attend school in the nearest district in the county where a school is maintained for colored children, and the transportation and tuition charges incurred shall be paid by the district. The only limitation placed thereon is that the transportation shall not exceed five dollars a month, and the tuition charges shall not exceed the pro rata cost of instruction. The fact that the school district can provide proper training by having a white teacher teach them in her home does not comply with the requirements of the statute. The statute provides that where there are eight or more children of school age the school board may establish a separate school, or may transport the children to a school in another district. It further provides that if the number of children is less than eight, they shall be entitled to be schooled in the nearest district which maintains a school for colored children. We do not believe that said children may be required to accept private instructions in the home of a white teacher instead of being sent to a colored school in the nearest district. If employing a white teacher to teach these children in her home would be considered as maintaining a school for said colored children, it is very

doubtful whether the district would have any legal authority to expend school funds for that purpose, for the reason that the statute does not authorize the maintaining of a public school in a district where the number of children is less than eight, but expressly provides that they shall be transported to a public school in the nearest district. It is only where there are eight or more children that the school board has the option of establishing a separate school for colored children or in lieu thereof paying for their education in another district.

It is therefore the opinion of this Department that where there are only five colored children of school age in the district, that they are entitled and should be sent to a school in the nearest district which maintains a separate school for colored children. The transportation and tuition charges incurred therefor are to be paid by the district.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

FWH:S

APPROVED:

_____

Attorney General.

ELECTION COMMISSIONER OF ST. LOUIS COUNTY INELEGIBLE FOR APPOINTMENT TO OFFICE AUDITORIUM COMMISSION OF CITY OF ST. LOUIS, MO., Under SECTION 10535 R. S. MO. 1929.

10-23

October 21, 1933

FILED

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53

Honorable Lon Sanders
117 North Broadway
St. Louis, Missouri

Dear Sir:

Replying to your letter of October 20, and telegram of the 21st, beg to say your letter reads as follows:

"I occupy the position as one of the Democratic Election Commissioners, for St. Louis County. Upon my return from the east, I have been informed that Mayor Dickmann has appointed me a member of the Auditorium Commission, which Commission will have charge of the large Auditorium in St. Louis, but without salary, or compensation. * * * * * *

Will you be so good as to give me an opinion whether the acceptance of the appointment upon the Auditorium Commission would in any way embarrass me in continuing as election commissioner. I rather feel that this is not a political office in the strict sense, on account of it being a commission without salary, but I want to be sure before accepting same."

Your telegram of the 21st is as follows:

"Very important to have a quick ruling on inquiry as per my letter yesterday whether Section One naught five three six election laws interfere with my acceptance of appointment on Auditorium Commission while I am also an election commissioner in the county stop Auditorium appointment by Mayor Dickmann is in City of St. Louis and not in the county and as you know St. Louis is not a part of St. Louis County under its special charter."

DISTINCTION
BETWEEN
OFFICE AND
EMPLOYMENT.

One criterion distinguishing an office from an employment is the fact that official powers are created and conferred by law. An employment may be created by law but not necessarily so. It is more often created by contract. A public office on the other hand is never conferred by contract but finds its source and limitations in some act or expression of the Governmental power.

> "The most important characteristic which distinguishes an office from an employment or contract is that 'the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of Government to be exercised by him for the benefit of the public - that some portion of the sovereignty of the Government, either Legislative, Executive or Judicial, attaches for the time-being to be exercised for the public benefit.' "
>
> Mechem on Public Offices, Sec. 4.

Our own Supreme Court has said:

> "A public office is an agency for the State or more definitely a charge or trust conferred by public authority for a public purpose requiring the performance of duties involving the exercise of some portion of sovereign power."
>
> State ex rel Zevely v. Hackmann 300 Mo. 59.

Assuming the Auditorium Commission is created by some authority of the City of St. Louis and that the Commission will exercise control and management of the city owned Public Auditorium built by public funds and maintained by the city for the benefit of the public, it is the opinion of this Department the members of said Auditorium Commission will be public officers.

Section 10356 R. S. Mo. 1929, provides as to St. Louis County Election Commissioners as follows:

> "They shall hold no other office and shall be ineligible to any elective or appointive office during their term of office* * * *."

It is the opinion of this Department that the spirit and the letter of the Missouri Statutes forbid your acceptance of the appointment of the St. Louis City Auditorium Commission, so long as you are a member of the St. Louis County Board of Election Board.

Very respectfully,

ROY McKITTRICK
Attorney General.

EDWARD C. CROW
Assistant Attorney General.

ECC:LC

PENITENTIARY--WARDEN--CONVICT: Authority of law to imprison convitts.

November 9, 1933

FILED
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.58

Honorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Warden:

Your request for an opinion dated November 6th, was as follows:

> "At the February Term, 1931, of the Cole County Circuit Court one Charles Alberts, alias Jack Allen, plead guilty to the charge of taking away a minor female for the purpose of concubinage.
>
> He was sentenced by the Court to serve a term of three (3) years in the Missouri State penitentiary. He was paroled by the Court on the day of sentence.
>
> At the October, 1933, Term of the Cole County Circuit Court this sentence was revoked and the defendant, upon direction of the Court was apprehended by the Sheriff.
>
> However, the copy of sentence and judgment of Court nowhere contains the instructions of the Court to the Sheriff to deliver the defendant to the penitentiary, nor any order directing the Warden of the Penitentiary to receive the defendant to serve out the punishment assessed.
>
> I request your opinion regarding the procedure I should follow in this case. Should the defendant, Alberts, be refused by me, and made to remain in the custody of the Sheriff, or are the instructions of the Court to the Sheriff following the revocation of parole sufficient for me to accept?"

Section 3809 R. S. Mo. 1929, provides as follows:

> "The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power,

as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

Section 3811 R. S. Mo. 1929 provides as follows:

"When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

Section 3812 R. S. Mo. 1929 provides as follows:

"When any person shall be paroled under the provisions of section 3811 of this article the court granting said parole or the judge thereof in vacation may terminate said parole at any time without notice to such person by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and his parole has been terminated, and it shall be the duty of such officer, upon receipt of such certified copy of sentence, to immediately arrest such person and transport and deliver him to the warden of the penitentiary in the same manner as if no parole had been granted, and the time such person shall have been at large upon parole shall not be counted

as a part of the term of his sentence, but the time of his sentence shall count from the date of his delivery to the warden of the penitentiary."

Section 8413 R. S. Mo. 1939 provides as follows:

"Whenever any convict shall be delivered to said board, the officer having such convict in charge shall deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Section 648 R. S. Mo. 1939, provides as follows:

"No person's body shall be imprisoned or restrained unless by authority of law.".

In the instant case defendant was sentenced to three yearsiin the State Penitentiary, but under the right conferred as provided under section 3809 and 3811 supra, the prisoner was paroled by the Court and the parole was terminated underthe provisions of section 3812. It is to be noted that the Court followed the law in his procedure. The judgment and the sentence of the Court does not have to contain any instructions to the sheriff or directions to the warden. It is sufficient if the Court's records show that a commitment was ordered issued by the clerk of the Circuit Court, directed to the sheriff, which in this case was done as revealed in the Court's order immediately following the revocation of the parole. On delivery of a prisoner to the penitentiary, the law provides that a certified copy of the Court's orders sentencing the prisoner, accompany the prisoner as provided in section 8413 supra. This was done in the instant case and is sufficient authority of law for the Penal Board to accept the person convicted, and it would be their duty to make out a certificate of delivery for such convict.

It is to be noted that in the instant case the record shows that the parole was revoked and the clerk was ordered to issue a warrant of commitment, sentence having already been passed. It is usual that the warrant of commitment accompany the prisoner with the other necessary papers. No doubt if the Penal Board will take the matter up with the clerk of the Court,

the Board can obtain a certified copy of the warrant of commitment which the clerk issued as per the Court order. This copy is not required by law to be in your files but its absence is giving you some worry and no doubt it is of value in your Department on many occasions.

Respectfully submitted

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

JUDGMENT IN CRIMINAL CASES - Sentences for escaped convicts to be cumulative.

12-11

November 15th, 1933

FILED

Mr. J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

We have your request of November 7th, 1933, for an opinion, which request is in the following language:

> "At the September, 1925, Term of the Cass County Circuit Court the defendant, Larson, plead guilty to charges of Stealing Chickens in the Night Time and Carrying Concealed Weapons. He was sentenced to serve (consecutively) five (5) and two (2) years respectively, from October 29, 1925.
>
> He was accordingly received at this institution December 8, 1925. On May 28, 1926 the prisoner escaped from the outside carpenter shop after assaulting a guard. He was returned five days later.
>
> For this escape he was sentenced at the November, 1926, Term of the Cole County Circuit Court to serve three (3) years, "from expiration of present sentence."
>
> The sentences, therefore, and the order in which they were pronounced are:

Cass County-	5 years-	Cause 20158-	Dec.4,1925
Cass County-	2 years-	Cause 20161-	Dec.4,1925
Cole County-	3 years-		Nov.15,1926

> The prisoner's escape occurred during the first year of two sentences totaling seven (7) years. The customary penalty for escape

> being loss of merit time and benefit of the three-fourths law, should Larson serve both the five and the two years sentence in full, or only the first- 5 years- sentence?"

Sentence in Case 20158 and the judgment of the court thereon was as follows:

> "It is therefore ordered, sentenced and adjudged by the court that the said defendants, Archie DeWitt and John Larson having plead guilty as aforesaid, be confined in the penitentiary of the State of Missouri for the period of five years from the 4th day of December, 1925 and that the sheriff of this county shall without delay, remove and safely convey the said defendants to the said penitentiary there to be kept, confined and treated in the manner directed by law until the judgment and sentence of the court herein be complied with or until the said defendants shall be otherwise discharged by due course of law."

It is, therefore, the opinion of this office that the above judgment and sentence of the circuit court was valid and binding and that the defendant must serve his five year sentence from December 4th, 1925 until he is discharged therefrom by operation of law.

In Case no. 20161, the defendant was sentenced on the same day as Case no. 20158, and the judgment and sentence in the later case reads in part as follows:

> "it is therefore sentenced ordered and adjudged by the court that the said defendant John Larson having plead guilty as aforesaid be confined in the Penitentiary of the State of Missouri for the period of two years to follow termination of sentence in case No. 20158, and that the sheriff of this county shall without delay remove and safely convey the said defendant to the said

> penitentiary there to be kept, confined and treated in the manner provided by law until the sentence and judgment of the court herein be complied with or until the said defendant shall be otherwise discharged by due course of law."

It therefore appears that the sentence in case No. 20161 cannot begin until the defendant has served his sentence under case No. 20158.

With reference to the conviction of the defendant for escaping from the penitentiary, which conviction occurred in the Cole County Circuit Court on November 15, 1926, and was for a term of three years, we may disregard that part of the sentence making it begin, "From the expiration of the present sentence", as surplusage. The above phrase "from expiration of present sentence" was unnecessary in this judgment, because under Section 3912, R. S. Mo. 1929, the Legislature specifically provided for the sentence in such a case as this, and the statute automatically becomes a part of every sentence, whether included therein by the judge or not. That section of the statute reads as follows:

> "If any person confined in the penitentiary for any term less than life, or in lawful custody going to the penitentiary, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding five years, to commence at the expiration of the original term of imprisonment.

It is, therefore, the opinion of this office that the above convict must serve the three sentences in the order in which he was sentenced, and that a prior sentence must be served and the defendant discharged therefrom before he can obtain credit for serving time upon any subsequent sentence.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

Schools -- Sec. 9340, R.S.1929, requiring county and township collectors to turn over school moneys of city, town and consolidated districts to treasurer of board of education thereof, modifies Sec. 9264 and 9266, requiring such moneys for all classes of schools paid to county treasurer.

FILED
81

January 10, 1933

Hon. Chas. A. Lee
State Superintendent of Public Schools
Jefferson City, Missouri

Dear Sir: Attention of Mr. Geo. B. John

We have your letter of January 5, 1933, as follows:

"I desire to have your official opinion on the following problem:

Explanations:

Some confusion has arisen relative to the proper method for county collectors to dispose of school money collected each month for six-director school districts (town, city, or consolidated). It is the practice of many county collectors to turn over all school money for town, city or consolidated districts to the county treasurer who in turn forwards this money to the treasurer of the school board. Other county collectors turn over all school money direct to the school board treasurer.

Section 9340 R.S. 1929, provides the collector shall turn over all money direct to the school board treasurer. However, Sections 9264 and 9266 appear to conflict with the foregoing section.

Section 9340 applies to special cases.
Sections 9264 and 9266 applies to all classes of schools.

Questions:

1. Is there any conflict between the foregoing

sections?

2. Does the special section take precedence over the general?

3. To whom should county or township collectors make their monthly turnover of school taxes collected for town, city or consolidated districts?"

The conflict between the sections is removed by holding that the later and special one modifies the general sections, and that county and township collectors should make their monthly turnover of school taxes, collected for city, town and consolidated districts direct tothe treasurer of the Board of Education thereof.

Respectfully yours,

Denton Dunn
Assistant Attorney General

Approved

Roy McKittrick
Attorney General

DD:ER

RE; Schools, Section 9217, R.S. 1929, requiring districts to maintain separate schools for negro children resident therein, or in lieu thereof transportation to and tuition in such a school in the county, on penalty for failure of being deprived of public schools funds, is mandatory and State Superintendent of Public Schools should ascertain facts and act thereon in apportioning such funds.

January 13, 1933

FILED
81

Hon. Charles A. Lee,
State Superintendent, Public Schools,
Jefferson City, Missouri.

Att: Mr. George B. John.

Dear Sir:-

Your letter of January 5, 1933 to us is as follows:

"Complaint has reached this department upon a number of occasions from parents of colored pupils saying the school board has neglected or refused to provide school facilities for colored pupils according to the provisions of Section 9217.

"Section 9217 provides that should any board neglect or refuse to comply with the provisions of this act they shall be deprived of any part of the public funds so long as the law is not complied with.

"Each year during the month of August the State Superintendent makes the apportionment of the state school moneys. Also the county clerk at different times during the year apportions to each school district public funds derived from the Foreign Insurance, County Interest, Township Interest, and Railroad taxes.

"Questions:

"1. Can the State Superintendent or county clerk legally apportion money to school districts when valid information is available showing that the board has neglected or refused to provide school facilities for colored pupils?

"2. What would be valid information sufficient to deny the ap ortionment of public funds to such districts?

"3. Is it necessary that a writ of prohibition be served upon the state

superintendent or county clerk before the apportionment of public funds can be denied according to Section 9217?

"4. Does the word "shall" in the last provision of Section 9217 make it mandatory that the state superintendent or county clerk deny the apportionment to a district without a "writ of prohibition" when valid information is available that this law has not been complied with?"

This Section 9217, R.S. 1929, follows the mandate of Section 3, Article XI of the Missouri Constitution:

"Separate free public schools shall be established for the education of children of African descent."

Although the Supreme Court has said that "shall" in the Constitution does not compel the legislature to act (Fahey vs Hackmann, 231 Mo. 351, 379), because there is no way to compel a legislative body to act, yet, when it does act and itself uses mandatory words and provisos to enforce the legislation enacted by it in pursuance of its constitutional powers and duties, the administrative officers are bound thereby, as they do not have the prerogative of declining to act with no one to call them to account for non-action other than the voters at the next election, as is the case with legislators, as the court says.

In fact, the Kansas City Court of Appeals held Section 9217, R.S. Mo. 1929 to be mandatory upon the school boards in the case State ex rel. vs Cartwright, 122 App. 257, 99 S.W. 48, holding that mandamus should issue to the board to establish and maintain a school for colored children in the district as the statute required, and this case has been cited with approval in State ex rel. Whitehead vs Wenom, 326 Mo. 352, 359, 361, 32 S.W. (2d) 159. So it would seem that parties injured by non-action of the board have a remedy by mandamus against the board.

However, the legislature has"imposed a penalty on the district by the last proviso of Sec. 9217, as you say, by depriving it of public funds in case of its board of directors' failing or refusing to comply with this Section. Though this statute's enforcement may bear hard upon the negligent district and its schools, the statute like all others is presumptively valid, and in our opinion should be complied with by the State

Superintendent of Schools, when he comes to make his apportionment and is satisfied by proper inquiry that a district is failing or refusing to provide school facilities for negro children resident therein as required by Sec. 9217, that is, either to maintain a separate school for them, or in lieu thereof provide transportation to and tuition in such a school in the county. Of course, the enforcement of this penalty depends first upon the ascertainment of the fact of the failure or refusal of the district to comply with the law, and as no method of its determination is set out in the statute, the fact should be ascertained as any other, that is, by finding competent witnesses who are familiar with the facts and could testify thereto in court, if the fact is disputed therein. If the board is notified of the proposed action on the ground of its failure or refusal to obey this law, there ought to be no great trouble about determining the facts, which must be well known in any district which is actually so failing or refusing. We do not think it necessary to wait for some injured party to sue out a writ of prohibition against the Superintendent, as the burden ought not to be primarily upon injured persons to enforce a law of this kind, and if the State Superintendent should act upon an error of fact, then the district would have its remedy by mandamus against him, or if the district disputed the validity of this proviso, it could raise that question also for the courts to determine.

We have not attempted to consider the duty of the county clerks in this matter, because their legal adviser is primarily the local prosecuting attorney, who can then ask the opinion of this department, if he is not himself satisfied in regard thereto.

Trusting we have fully answered your inquiries, we are

Respectfully yours,

DENTON DUNN
Asst. Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DD/mh

COUNTY ENGINEERS: St. Louis County--right to hire and fire employees of Highway Department.

July 26,1933 7-29

FILED
81

Hon. R. E. Schumacher,
Associate Judge of County Court,
St. Louis County,
St. Louis, Missouri.

Dear Sir:

We have your request of June 13th, 1933 for an opinion from this Office upon the following questions:

> " In view of section 6 of Article 36 of the Constitution of Missouri, does the County Court of St. Louis have the right to employ employees of the county working in the County Highway Garage, or does that right belong to the Highway Engineer?
>
> Further, is it within the jurisdiction of the County Highway Engineer to dismiss any employees within his department without preferring charges and securing the consent of the County Court?"

With reference to the first paragraph, namely as to whom the power belongs to employ workmen in the County Highway Garage, we refer you to an opinion of this Department under date of January 25th,1933, furnished to the Prosecuting Attorney of St. Louis County, a copy of which is enclosed herewith. In that opinion it was held that the County Highway Engineer had only such authority to employ workmen who came within the class of assistants to the Highway Engineer.

With reference to the contract of employment, we assume that such employment is for an indefinite term, and the rule for the termination of such a contract of employment is stated in 39 C. J. p. 70, sec. 60 as follows:

> " A contract of employment for an indefinite term may, in the United States be terminated at the will of either party. "

Under Section 8011 R. S. 1929, with reference to the power of hiring employees, it provides:

> "In the event the County Highway Engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants who shall receive such compensation as may be fixed by the court."

As to the meaning of the above term, "duties of his office", we look to Section 8013, R. S. 1929, which is as follows:

> "SEC.8013. TO HAVE SUPERVISION OVER HIGHWAYS OF COUNTY. -- The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

It is therefore the opinion of this Office that three conditions must be met before the County Highway Engineer can employ anyone to assist him;

(1) The duties to be performed must be duties imposed by law upon the County Highway Engineer;

(2) The County Highway Engineer, from lack of time or otherwise, cannot properly perform such duties for which the persons to be employed are to perform;

(3) The employment of such assistants must be approved by the County Court.

The Highway Engineer is charged with supervision over the construction and maintenance of all roads, culverts and bridges. Such assistants as are appointed by him must come within the class of assisting the engineer in the supervision and construction of roads, culverts and bridges. The power to employ all other workmen, that is workmen employed for the purpose of executing construction, laboring on the highway or in the garage is vested in the County Court. This general authority originates in Section 36 of Article VI of the Missouri Constitution, which reads as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Specific authority for such is found in Section 7946, R. S. 1929, which reads, in part, as follows:

> "Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. * * * "

When the engineer is given power to employ such assistants as may be necessary, "with the approval of the court", the duties involve upon the engineer to employ such assistants, and the duty involves upon the county court to approve or disapprove of such assistants. Such is the construction placed upon this term in Butler v. Sullivan County, 108 Mo. 630, l.c. 638. In the Sullivan County case, the Statute gave the county collector the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court in construing this term in the Sullivan County case, l.c. 638, said:

> "The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is terminated, and the liability therefor fixed by the final judgment of such court."

The meaning of a power conferred upon an official which is subject to the approval of another official, is fully set out in Makenson v. Dillon, 171 Pac. 673, l.c. 676, as follows:

> "The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are to be selected under the direction and subject to the approval of the secretary of the interior. The words 'subject to the approval' we do not regard as giving the secretary of the interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the secretary of the interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the state."

It is therefore the opinion of this Office that the County Court possesses the right to employ workmen in the County Highway Garage. It is also the opinion of this Office that County Highway Engineer in contracting with assistants for an indefinite term of employment, possesses the right, without the approval or consent of the County Court to discharge such assistants, but that all other employees who are not assistants, as herein defined, to the County Highway Engineer, and who are employed by the County Court at will,

may be discharged at any time by the County Court, and not by the Highway Engineer.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

COUNTY WARRANTS: Warrants, school or county, of 1932 issue cannot be paid out of 1933 revenue

Sec. 12140, R.S. Mo. 1929 is the guide for the County Treasurer in the payment of warrants.

October 26, 1933.

10-28

FILED
81
55

Hon. H.B. Schroeder,
Treasurer - Crawford County,
Steelville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 5, 1933 relating to county warrants, which reads as follows:

> "I would like to have some information concerning the paying of county revenue warrants. We have in our county several warrants that, written in January, 1933, were for the payment of county officers for the month of December, 1932. Should these warrants be paid out of this year's money, or out of last year's? There is something like $3700.00 in the treasury that is back taxes, and as numerous county warrants are unpaid, what action should I take in paying any of these?"

I.

Warrants, school or county, of 1932 issue cannot be paid out of 1933 revenue.

We have written a number of opinions bearing on numerous phases of this question. The leading case in Missouri is Kansas City, Fort Scott & Memphis Railroad Company, Appellant, v. Thornton, 152 Mo. 570, l.c. 575-76, wherein the Court decided this question, and the same has never been overruled. The pertinent part of the decision is as follows:

> "As claimed by counsel, section 3205 has been on our statute books since 1835, but prior to the adoption of the Constitution of 1875 there was no organic law which stood in the way of its enforcement. The result was, overwhelming debts were contracted, which necessarily went unpaid

or excessive taxation had to be levied to pay them; the effect of which impaired the credit of the counties and cities, engendered recklessness and extravagance in the management of the public business and constantly oppressed the taxpayers. These were the evils that sections 11 and 12 of Article X of the Constitution were intended to remedy, first, by limiting the rate of taxation and, second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish a cash system in public business. If this rule results in any county not having money enough to pay as it goes or to run its governmental affairs, the remedy is not with the courts. Having reached this understanding of the meaning of the Constitution it follows, without the necessity of any analytical examination or comparison of statutes or prior decisions, that all statutes or decisions providing or holding a contrary rule must give way."

In view of the above decision, the salary warrants for the month of December, 1932 cannot be paid out of the revenue for 1933, but should be paid out of revenue for the year 1932.

II.

Section 12140, R.S. Mo. 1929 is the guide for the County Treasurer in the payment of warrants.

Regarding the money which you have in the treasury, received from back taxes, the warrants should be paid out of same in the order and in the manner as prescribed in Sec. 12140, R.S. Mo. 1929, which is as follows:

> "No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current expenses of the county as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment. ****"

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

Attorney General

LIQUOR: WHOLESALE DRUGGISTS: In Re. Right of Wholesale Druggists to import Whiskey for medicinal purposes and ship it to their retail drug customers for medicinal purposes.

12-14

December 13, 1933.

FILED

64

Mr. Edward P. Schrader
Meyer Brothers Drug Company
Fourth Street and Clark Avenue
Saint Louis, Missouri.

Dear Sir:

Your letter to this Department on December 12th received requesting opinion on the right of wholesale druggists to import into this State whiskey for medicinal use only and sell and ship same to your retail drug customers for medicinal purposes only.

The pertinent parts of your letter read as follows:

> "As we understand Section 4508 of Chapter 31, our status since repeal is just as it was prior to repeal of the 18th Amendment, in that we are permitted under the existing Missouri Laws to sell and ship either within or out of the state when such sales are to retail druggists and intended for medicinal purposes.
>
> *
>
> "It is our belief that under Section 4508 we are permitted to import whiskey for medicinal purposes and ship it to our retail drug customers for the same purpose."

PROVISIONS OF SECTIONS ONE AND TWO OF TWENTY-FIRST AMENDMENT REPEALING THE EIGHTEENTH AMENDMENT AND PROHIBITING IMPORTATION INTO STATES OF INTOXICATING LIQUORS IN VIOLATION OF STATE LAWS.

The Twenty-First Amendment to the United States Constitution (Sections 1.and 2. thereof) repealing the Eighteenth Amendment reads as follows:

> "Section 1. The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed.
>
> "Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited."

It is plain to be seen that intoxicating liquor is forbidden, by the Twenty-First Amendment, to be imported into any state or territory in violation of the laws thereof.

The first question therefore presented is - whether or not Missouri Statutes prohibit importation by wholesale druggists of intoxicating liquors for medicinal use only. The second question is - if intoxicating liquors can be imported by wholesale druggists for medicinal use, can the wholesale druggist sell and ship same to retail drug customers for medicinal use only.

PROVISIONS OF MISSOURI STATUTES AND DECISIONS THEREON RELATIVE TO SALE AND IMPORTATION OF INTOXICATING LIQUORS FOR MEDICINAL PURPOSES ONLY BY WHOLESALE DRUGGISTS.

The Statute Law of Missouri as to intoxicating liquors relating to druggists deals with whiskey as a medicine.

The Prohibition Laws of Missouri are directed to prohibiting the use of whiskey as a beverage.

Chapter 31. Revised Statutes of Missouri, 1929, contains the laws of the State forbidding sale, possession, manufacture, transportation, importing and exporting intoxicating liquors except for certain non-beverage purposes named in Section 4482 of said chapter.

Chapter 94, Revised Statutes of Missouri, 1929, authorizes sale by druggists and pharmacists of intoxicating liquors in manner and quantity as provided in Section 13157 of said Chapter 94.

In State v. Ryan, 217 M. A., l.c. 545, our court said:

> "The prohibition statute is separate and distinct from the druggist statute and does not repeal the provisions of the druggist act unless it be so clearly in conflict therewith that both cannot stand. It is familiar law in this State that prior to the adoption of the Federal Prohibition Amendment and subsequent State legislation of a prohibitive character, the adoption of the Local Option Law which put prohibition in force in the territory adopting it did not repeal or supersede the druggist's statute. * * * *"

Section 4482, found in Chapter 31. Revised Statutes of Missouri, 1929, which chapter contains the State-wide Prohibition Law of Missouri provides as follows:

> "That the provisions of this chapter shall not be construed so as to prevent the manufacture, importation, exportation or sale of

> * * * * * ethyl alcohol for scientific, pharmaceutical, mechanical, or industrial purposes, or to prevent the sale of ethyl alcohol or wine by pharmacists or druggists as provided herein for medicinal or sacramental purposes."

Section 4507. of said Statute, dealing with State-wide Prohibition, defines "ethyl alcohol"as follows:

> "The term 'ethyl alcohol' as used in this chapter, or in any other law of this state pertaining to intoxicating liquors, shall be held and construed to mean any ardent spirits containing grain alcohol, or alcohol made from molasses, sugar, or by any other process whatsoever, exceptmethyl alcohol, commonly known as wood alcohol, and except also ethyl alcohol denatured by any formula prescribed, or approved, by the treasury decisions, or regulations of the United States government."

Section 4496, Revised Statutes of Missouri of 1929, being a section of the State-wide Prohibition Law, defines the phrase "Intoxicating Liquor" or "Intoxicating Liquors" as follows:

> "The phrases 'intoxicating liquor,' or 'intoxicating liquors,' whenever used in this article, shall be construed to mean and include any distilled, malt, spiritous, vinous, fermented or alcoholic liquor, all alcoholic liquids whether proprietary, patented or not, which contain one-half of one per centum of alcohol by volume and which are potable or capable of being used as a beverage: * * * *"

Prior to August 8, 1890, the Federal Supreme Court decided, a law of a State forbidding importation of intoxicating liquor in the original package was an inter-

ference with interstate commerce and was unconstitutional.

Bowman v. Chicago & N.W. RR. Co.,
125 U. S. 465.

On August 8, 1890, the "Wilson Law" was enacted by Congress. It provided:

> "All fermented, distilled or other intoxicating liquors, transported into any state, or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This Act was held constitutional.

In Re: Rahrer, 140 U. S. Reports 545.

Later, the Webb-Kenyon Act (March 1, 1913) was enacted to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws and thus, in effect, to afford a means by subterfuge and indirection to set such laws at naught.

This Act was upheld by the Supreme Court.

McCormick v. Brown, 286 U. S. l.c.
141.

On March 3, 1917, the Reed Act was passed prohibiting the introduction of intoxicating liquor into States in violation of their laws.

The United States Supreme Court, later on May 16, 1932, held the Webb-Kenyon Act was not repealed either by the Eighteenth Amendment or the National Prohibition Act.

It is the opinion of this Department that all three of the above acts of Congress are yet in force.

These Acts have now been supplemented by the above quoted Section 2. of the Twenty-First Amendment prohibiting the importation into any State of intoxicating liquor in violation of the laws of the State.

MISSOURI STATE-WIDE PROHIBITION ACT NOT REPEALED BY ADOPTION OF EIGHTEENTH AMENDMENT NOR BY THE REPEAL OF SAID EIGHTEENTH AMENDMENT.

The Federal Supreme Court recently said:

> "State Prohibition Laws derive their force from the power originally belonging to the States and preserved to them by the Tenth Amendment, and are not superseded by the Eighteenth Amendment where they do not sanction what it forbids."

Of course, it follows, if the Eighteenth Amendment did not repeal State Prohibition Laws, the repeal of the Eighteenth Amendment does not repeal the State Prohibition Laws.

THE STATUTES OF MISSOURI AND THE DECISIONS OF OUR COURT PERMITS IMPORTATION AND EXPORTATION OF INTOXICATING LIQUORS BY WHOLESALE DRUGGISTS FOR MEDICINAL USE ONLY TO RETAIL DRUGGISTS.

The Second Section of the State-wide Prohibition Law (Sec. 4482, R. S. Mo. 1929,) expressly excepts from the provisions of the State-wide Prohibition Act "ethyl alcohol" or wine used for medicinal purposes and allows both importation and exportation thereof. Section 4507, Revised Statutes of Missouri, 1929, being a section of the State-wide Prohibition Act defines "ethyl alcohol" as the term is used in the Act or in any other Act of the State pertaining to intoxicating liquor as "any ardent spirits containing grain alcohol or alcohol made from molasses or sugar or by any other process whatsoever."

Section 4496, Revised Statutes of Missouri of 1929, being another section of the State-wide Prohibition Act defines "intoxicating liquor" as "any distilled, malt, spiritous, vinous, fermented or alcoholic liquor."

These statutory definitions cover "whiskey" and Section 4482, Revised Statutes of Missouri, 1929, (being part of the State-wide Prohibition Law) expressly authorizes the importation and exportation of liquor for medicinal purposes as above defined, because the said section declares nothing in the State Prohibition Act shall be held to prevent the importation, exportation of said defined liquors into the State or the sale thereof, and if the State law does not prohibit the sale nor importation or exportation of said liquors for medicinal use, the Twenty-first Amendment to the Federal Constitution does not do so because it specifically prohibits importation and transportation only when same is in violation of the laws of the State.

Section 4508 - (same being a section of the State Prohibition Act) provides as follows:

"This shapter shall not be construed as to prevent the manufacture, or sale, by a distiller, or wholesale druggist of any intoxicating liquors, alcohol and wine for non-beverage purposes under authority of, or in compliance with the laws of the United States or this state."

The last above quoted section of the Statutes expressly provides the State-wide prohibition act shall not be construed to prevent the manufacture or sale of intoxicating liquors in compliance with or under the authority of the laws of this State.

The provisions of the Druggist's Statute of Missouri of 1929, heretofore referred to herein authorizes the sale, by wholesale druggists, for medicinal use of intoxicating liquors; and the opinion of our Court, hereinbefore quoted holds the Druggist and Pharmacy Laws of Missouri are not repealed by the State-wide Prohibition Act.

What is said herein as to importation, exportation and sale of intoxicating liquor for medicinal use only must be understood to mean the wholesale druggist must have a permit under Section 4483, Revised Statutes of Missouri, 1929, to handle intoxicating liquors for medicinal purposes and any wholesale druggist complying with Section 4483 is entitled to a permit.

RAILROAD OR OTHER CARRIER SHOULD TRANSPORT ONLY TO ONE HAVING A PERMIT UNDER SECTION 4483 SO LONG AS STATE PROHIBITION ACT IS IN FORCE IN THIS STATE.

Section 4481, Revised Statutes of Missouri, of 1929, prohibits the transportation of intoxicating liquor in Missouri and this Section, construed in connection with all of the statutory provisions relating to State prohibition, in the opinion of this Department, renders it advisable

for railroad or other carriers to transport intoxicating liquors in Missouri only when consigned to a corporation or person or firm holding a permit under section 4483 Revised Statutes of Missouri of 1929.

It is the opinion of this Department that, if your firm has a permit under Section 4483, Revised Statutes of Missouri of 1929, you can import and export whiskey for medicinal use only into this State; and you can sell to your retail drug customers whiskey for medicinal use only, to be sold by retail customers only in accordance with provisions of Missouri Statutes.

Very respectfully,

EDWARD C. CROW
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

Non-resident attorneys, effect of prior disbarment in this state, -- construction of - Sec. 11692, 11693, 11696, Sec. 11703, 11695, R.S. Mo. 1929.

January 28, 1933

FILED
82

Hon. J.B.Searcy
Prosecuting Attorney
Shannon County
Eminence, Missouri

Dear Sir:

Your recent letter addressed to the Attorney General has been handed the undersigned for attention. You state the following facts and request an opinion thereon:

> "One J.D.Wallace, a practicing attorney in the State of Missouri, and two times Prosecuting Attorney of Oregon County, Missouri, was convicted of the offense of seduction. The merits of the case need not be discussed as his conviction was affirmed and he served his sentence except for the allowance for good behavior. The conviction was in 1925. He was disbarred in 1928, at the instance of attorneys in that county who were not friendly to Mr. Wallace. He was granted a pardon by the Governor of the State of Missouri. At the time of his disbarment the Supreme Court intimated that the suspension from practice might be terminated at a later date.
>
> "Mr. Wallace moved to the State of Arkansas and appeared before the Board of Law Examiners who are appointed by the Supreme Court of that State. He made frank disclosure to the Chairman of the Board of Law Examiners as to all the facts pertaining to his conviction and disbarment, also his pardon from the Governor of Missouri and many certificates of good moral character from citizens of both Arkansas and Missouri. These certificates were under oath. He was licensed at that time to practice law in the State of Arkansas and is now and has been for more than two years past a member of the bar of the State of Arkansas, in good standing and residing at Mammoth Springs, Arkansas, not far from the Missouri line. In the course of his practice some residents of Missouri conferred with him concerning litigation in this State and he has been offered employment to come into the courts of Missouri and represent such clients. Mr. Wallace takes the position that under Section

11703 of the Missouri Revised Statutes for 1929 that he is entitled to appear in any court of the State of Missouri as long as he can show that he is a member of the bar, in good standing in some other State."

Section 11692, R.S. Mo. 1929, among other things, provides:

"The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies."

Section 11693, R.S. Mo. 1929, among other things, provides:

"No person shall engage in the 'practice of law', *** as defined in section 11692, *** unless he shall have been duly licensed therefor and while his license therefor is in full force and effect. *** "

Section 11696, R.S. Mo. 1929, among other things, provides:

"Every applicant for such admission and license must be at least twenty-one years of age, of GOOD MORAL CHARACTER AND A RESIDENT OF THIS STATE."

Section 11703, R.S. Mo. 1929, among other things, provides:

"Nothing in this chapter shall be construed to require a non-resident attorney in good standing from appearing in a case in which he may be employed."

Section 11695, R.S. Mo. 1929, is as follows:

"The power to admit and license persons to practice as attorneys and counselors in the courts of record of this state, or in any of them, is hereby vested exclusively in the supreme court, subject to such regulations as are hereinafter provided."

From the section as above quoted, it is to be noted that the Legislature required that in addition to the other requisites, a person

seeking the privilege of admission and of the right to practice law in this state, should possess a good moral character.

If the non-resident attorney can meet the requirements of Section 11703, R.S. Mo. 1929, in respect to the requirement of good moral character under said section, he is granted the privilege of appearing in the capacity of an attorney at law in the courts of this state. There is a general presumption in our law extended to all persons, such as good reputation, innocence from crime, etc., but that presumption is destroyed upon actual and positive proof to the contrary. It was not the intention of the Legislature to grant to a citizen of another state, privileges of which its own citizens would be deprived. If the positive proof should be disclosed that a citizen of this state was not of good moral character, the Supreme Court would refuse to grant the privilege of practicing law to such person, were he an applicant so to do, and will likewise refuse a non-resident attorney upon the same ground.

In the case of In Re Wallace 19 S.W.(2) 625, in an action of disbarment instituted against J.D.Wallace, under Section 681, the Supreme Court, in banc, by reason of a conviction of J.D.Wallace, the then Prosecuting Attorney of Oregon County, for the crime of seduction under promise of marriage, which conviction was affirmed on December 20, 1926, said:

> "At the time of the commission of the offense, he was an officer of the court, and the prosecuting attorney of a county. The nature of the offense considered, we are of the opinion that he should no longer be permitted to enjoy the high privileges of an attorney at law."

Judgment was therefore ordered entered, removing from practice in the courts of this state said J.D.Wallace.

From the above, it will be seen that the presumption of good moral character that clothed a non-resident attorney appearing in the courts of this state, under the privilege of the section above quoted, has been destroyed by the solemn record of the highest tribunal in this state, and until such record has been changed, or modified, in respect to the removal of J.D.Wallace from practice in the courts of this state, it is the opinion of this department, that his appearance in the courts of this state as an attorney at law, would be unlawful, and would constitute an offense for which he might be prosecuted, under the law of the state, or he could be cited by the Supreme Court in contempt for a violation of its order and mandate, as above stated.

Yours very truly,

CCA:ER

CARL C. ABINGTON
Assistant Attorney-General

Approved:

ATTORNEY GENERAL

CORPORATIONS: Incorporation fees, similarity in names.

FILED
82

March 8, 1933

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

We are replying to your letter of date February 23, 1933.

You state that the National Cloak and Suit Company was organized under the laws of the State of New York and the name changed by amendment, to National Bellas Hess Co., Inc., that $1861.25 was demanded of the latter company on the amendment, payment of which was refused; that on April 28, 1932, the National Bellas Hess Co., Inc., went into receivership which has not yet been terminated; that on February 7, 1932, The National Bellas Hess, Inc., was incorporated under the laws of the State of Delaware and application made to the Corporation Department of your office in September, 1932, for license to transact business in this state, accompanied by a check for $786.50, which check was refused on the theory as I gather it, that the National Bellas Hess, Inc., was in fact the same company as National Bellas Hess Co., Inc., and the former company being in default to the state you would not license the latter without payment of back dues from the former company.

You state that:

"The records of this office show that the charter of the original National Bellas Hess Co.,Inc., was canceled January 1, 1933, for failing to comply with Section 4619 Revised Statutes Missouri, 1929".

If the latter statement is correct then the National Bellas Hess Co.,Inc., is not in existence in this state and there is no question before you as to the similarity of the names National Bellas Hess Co.,Inc., and National Bellas Hess, Inc., as the former company has ceased to exist. If both corporations are in existence then in determining whether the National Bellas Hess, Inc., should be licensed in this state on account of the similarity of its name to National Bellas Hess Co., Inc., the matter is in your discretion and upon which we express no opinion. The law to guide you in this respect is stated in State ex rel Hutchinson v. McGrath, 92 Mo. 355, 358. The Supreme Court of this state saying:

> "It is the evident purpose of our statute to protect, to some extent, these common-law rights, and, to do this, both as to the corporation first adopting the name, and as to the public, which may be misled by the similarity of the two names. It is difficult to state a precise rule by which one name may be said to be an imitation of another, in the sense of the statute. Where, however, the names so far resemble each other, that a person using that care, caution, and observation which the public uses, and may be expected to use, would mistake one for the other, then the new name is to be regarded as an imitation of the former. The character of the business, and the location of the two corporations, must be considered. Now, in the present case, both corporations are located in the same city. Both are created for precisely the same purposes, i. e., to establish and maintain a place, with a suitable building, for the public and private sale of real estate, stocks, and other property. The only difference between the two names consists in the use of the words "and stock". These words appear in the name of the former corporation, but are omitted in the name adopted by the relators. The omission of them from the combination with the other words, it is believed, does not furnish a fair distinguishing feature. A reasonably prudent person would be constantly liable to mistake the one for the other. It is doubtless the purpose of both corporations to encourage the public sale of property, real and personal, at their places of business, under mortgages, deeds of trust, and the like, and the names ought not to be so similar as to lead to confusion and litigation".

If the National Bellas Hess Co., Inc., is yet in existence we fail to find any authority of your department to refuse to license the National Bellas Hess, Inc., on the ground that the National Bellas Hess Co., Inc., is derelict in its obligations to the state, unless it is a fact that the National Bellas Hess, Inc., is but the alter ego of the National Bellas Hess Co., Inc., and being used for the purpose of evading the payment of legal fees to the state by the National Bellas Hess Co., Inc.

If in fact the National Bellas Hess Co., Inc., is no longer an existing corporation under the laws of this state, then in our opinion it is your duty to accept the legal incorporation fees of the National Bellas Hess, Inc., as a new corporation unless you find the facts as above detailed and if the National Bellas Hess Co., Inc., is yet in existence as a corporation under the laws of this state, then unless you find the facts as above detailed your sole duty is to determine whether or not the name National Bellas Hess, Inc., is the same name or an imitation of the name National Bellas Hess Co., Inc., under Section 4541 Revised Statutes Missouri, 1929, the above facts and the question named are matters for you to pass upon and upon which we express no opinion.

Very truly yours,

GILBERT LAMB,
Assistant Attorney General.

APPROVED:

_____

Attorney General.

GL:LC

FOREIGN CORPORATIO[illegible]
CORPORATION SUPERVISOR: Foreign corporations not ~~entitled~~ to transact business in this state unless qualified.

April 5, 1933

82

Honorable Neal J. Ross
Corporation Supervisor
Secretary of State's Office
Jefferson City, Missouri

Dear Mr. Ross:

We have your letter dated March 29, 1933, as follows:

"This Department has several inquiries recently as to whether or not a foreign corporation duly incorporated under the laws of another state can qualify in this state to do business without actually having any capital or business transactions in this state at the time they asked to be qualified, We are unable to find any statute exactly on this point but are going to have to make some ruling on account of the various inquiries."

Section 4598 Revised Statutes Missouri, 1929, requires every corporation incorporated for the purpose of gain under the laws of any other state, territory or country now or hereafter doing business within this state, to qualify to do business in this state as provided in such Section 4598. Section 4596 requires every such corporation before it is authorized or permitted to transact business in this state, or to continue business herein if it is established, to maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it.

Section 4597 makes further provision to the same effect with reference to corporations formed in any country outside of the United States.

Section 4599 provides a penalty being inflicted for failure to comply with Sections 4596, 4597 and 4598.

Under the settled law of this state the corporations mentioned in the foregoing sections can not do or transact business in this state until they have complied with the provisions of the foregoing sections. The Supreme Court of this state in

Parke, Davis and Company v. Mullett, 245 Mo., 158, 173 said

> "The reply, in effect, admits plaintiff was transacting business in Missouri in violation of the statute (Secs. 3039, 3040, R. S. 1909) in so far as the business of its Kansas City branch office was concerned and it follows its business was, to that extent at least, unlawful and contrary to State policy as declared by the statutes mentioned (Zinc and Lead Co. v. Zinc Mining Co. 221 Mo. 404) and every contract into which it entered in furtherance of that business was void."

The only exception to the foregoing rule is that if the business being transacted by the corporation referred to in the above sections is Interstate in its character, then the statutes are not applicable.

> Yerxa, Andrews & Thurston v. Macaroni Manufacturing Co., 315 Mo., 927, 951.

It necessarily follows that any corporation mentioned in the foregoing section, is not only not required to have but it is a violation of the law for it to have capital and transact business in this state prior to its qualification so to do under the foregoing statutes.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

Notary Commission valid if issued on April 13th, Jefferson Day.

April 13,1933

FILED
82

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Attention: G. W. Forsythe
Commission Clerk.

Dear Sir:

We are in receipt of your letter dated April 11th, 1933 concerning the following:

"Will you kindly advise whether this department shall issue Notary Commission on April 13th in view of the fact that this date has been proclaimed a holiday."

Laws of Missouri 1931 page 260 reads as follows:

"The thirteenth day of April of the year 1932, and the thirteenth day of April of each year thereafter is hereby declared a public holiday to be known as "Jefferson Day," and the same shall be recognized, classed and treated as other legal holidays under the laws of this state: Provided, that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing, or to interfere with judicial proceedings."

"The governor shall annually issue a proclamation setting apart April thirteenth as "Jefferson Day," and recommending that it be observed by the people with appropriate exercises in the public schools

and otherwise to the end that
the memory of the public service
and the humanitarian principles of
Thomas Jefferson may be perpetuated."

It is our opinion that a notary commission issued on April 13th, does not affect the validity thereof, even though said date has been proclaimed a holiday by virtue of the above statute.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General.

APPROVED
ROY McKITTRICK
Attorney General.

JLH:MM

In re: Senate Bill No. 427 is unconstitutional

January 16, 1933

FILED
83

Hon. Jerome M. Joffee,
Senator, 7th District,
Senators' Office Building,
Jefferson City, Missouri.

My dear Senator:-

At your request, I am furnishing you an opinion as to the validity of Senate Bill No. 427, purporting to amend Section 5978, Article XII, Chapter 37, Revised Statutes Missouri, 1929, and by adding three new sections thereto, all of which are shown at pages 238, 239, 240, Session Laws, 1931.

An examination of the House Journal, which is admissible in evidence, State ex rel. vs Mead, 71 Mo. l.c. 270, at pp. 1363-64, 56th General Assembly, reveals that S.B. 427 was taken up April 30th, 1931 for third reading on final passage. This bill was amended, but received only thirty-six votes in support thereof, and therefore was defeated.

Section 35, Article IV of Missouri Constitution reads as follows:

> "When a bill is put upon its final passage in either house, and failing to pass, a motion is made to reconsider the vote by which it was defeated, the vote upon such motion to reconsider shall be immediately taken, and the subject finally disposed of before the house proceeds to any other business."

In accordance with the above constitutional provision, a motion to reconsider the bill was taken up May 1st, 1931 and defeated. House Journal 1422.

No provision similar to Section 35, supra has been found in the constitutions of other states, and apparently has never been passed upon by the Missouri Courts. What construction then shall be placed on Section 35?

In construing it we must bear in mind that,

> "The constitution was written by plain men for a plain and obvious purpose and should be construed without refined subtlety, i.e., delicacy of mental action." State ex rel. vs Drabelle, 261 Mo. l. c. 522.

A proper construction of Section 35, hinges upon the meaning of "final" and "finally disposed of".

Webster defines final as "conclusive", "decisive" and Bouvier's Law Dictionary, 3d, Rev. Vol. 2, p. 1221, defines final as "last", "conclusive", "pertaining to the end". Webster defines finally as meaning "the end or outcome", "lastly", "conclusive", "for all time", "beyond recovery or alteration".

"Disposed of" as defined by Webster means to "arrange or settle finally", "to determine the fact of", "to get rid of", "to put out of the way", "to finish with", and similar definitions are found in Vol. 3, Words and Phrases, p. 2114.

When S.B. #427 was taken up on motion to reconsider to be "finally disposed of", the defeat of such motion to reconsider means that the house parts with, relinquishes, gets rid of, finishes with, and lastly acts upon the bill, and such decision is conclusive, decisive, and the motion to reconsider when defeated is beyond recovery or alteration, has reached the end, and dies. Only one motion to reconsider is in order and permissible under the above constitutional provision, and this procedure is approved in Hines Precedents, Vol. 5, S.6037. The House was therefore without authority, after the defeat of the motion to reconsider, to act further upon S.B. #427.

A second objection to S.B. #427 is that it violates Section 31, Article IV of the Missouri Constitution.

Section 31, supra is as follows:

> "No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor."

The only place in the House Journal where it appears that S. B. #427 was passed by the House, is under date of May 2nd, 1931 and shown in the House Journal, p.1467. The bill appears to have been approved by the Governor, May 14, 1931, Laws Mo. 1931, p.240. A close examination of the House Journal under date of May 2nd, 1931, p.1467 fails to show a compliance with mandatory provisions of Section 31, supra. The Journal fails to show the recording of the yeas and nays vote, and fails to show the names of the members of the House voting thereon. This omission is fatal to the bill. The Supreme Court of Alabama in State ex rel. Attorney General vs Buckley, 54 Alabama, l.c. 613, in passing upon a provision of the Alabama Constitution, in substance identical with Section 31 of the Missouri Constitution said:

> "The Constitution, then, requiring that the yeas and nays shall be matter of record, no other evidence can be received of this requirement, nor can its want be supplied by intendment. Of this fact the record (journal) must speak, and if silent, the fact, in legal contemplation, does not exist."

Section 31, supra, is mandatory and has heretofore been construed by the Supreme Court of Missouri, in State ex rel. Schmoll vs Drabelle, 261 Mo., l.c. 522, 523, in the following language:

> "The provision in hand is cast in language unmistakable, mandatory, and of an import not to be misunderstood. It stands on its own reason. Stat pro ratione voluntas. But many substantial and controlling reasons might be given did time permit or the occasion demand. Look at it. It starts off with the peremptory phrase, "No bill shall become a law unless"--unless what? Unless on its final passage "the vote be taken by yeas and nays." If that were all of it then the fore or aft recital of the journal that the vote was taken by yeas and nays and announcing a result might be sufficient. But the constitution-maker writing paramount law controlling the legislative law-maker the courts and the Governor, went further; witness, unless "the names of the members voting for and against the same be entered on the journal," and it did not stop there but goes on to say "and (unless) a majority of the members elected to each house be recorded thereon as voting in its favor." All these elements are essential prerequisite to the validity of a law, and one is just as essential as another. The recording of the votes is essential. The entering of the names of the voting members on the journal and showing a majority is essential, and the taking of the vote by yeas and nays is essential. Now, by the solemn admissions of our Attorney-General hereinbefore reproduced, that part of the journal of the house devoted to the constitutional purpose in hand, shows the bill did not receive a constitutional majority. No criticism can weaken, no analysis shake and no reasoning can overthrow that monumental fact. There it stands emblazoned on the record so that even he who runs may read. Hence, however much we might agr e with counsel that every presumption is allowed in favor of the validity of a law and that courts, to sustain an act of the Legislature, will indulge such presumptions and not declare the law invalid nor make it perish except it be bad beyond a reasonable doubt, cannot apply here. We have written the law too often to the effect that presumptions take flight in the presence of the actual facts not to stand by the doctrine now."

S.B. #427 was not passed in accordance with the constitutional provisions heretofore pointed out and did not become a law even though signed by the presiding officer of each house and approved by the Governor. State ex rel. vs Drabelle, 261 Mo. 515.

The above statute being unconstitutional, we hold that Section 5978

R. S. Mo. 1929 is still in full force and effect.

Yours very truly,

FRANKLIN E. REAGAN
Asst. Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER/mh

RECORDER OF DEEDS, ST. LOUIS: Affidavits to release deeds of trust if glued in permanent book comply with the statute relative to recording.

September 15, 1933. 9/18

FILED
83

Mr. Oliver Senti
Assistant City Counselor
City of St. Louis, Law Department
St. Louis, Missouri

Dear Mr. Senti:

This is to acknowledge your letter which reads as follows:

> "Section 3078 R. S. Mo. 1929 as amended laws of 1933, p 196, contains the following provisions which relate to the recording of affidavits reciting the loss or destruction of notes which are not presented when a deed of trust is released, to wit:
>
> 'The affidavits so required shall be recorded in the same manner as deeds, in a permanent record, and the recorder shall make a notation upon the margin of the mortgage so satisfied giving the number of the book and page wherein said affidavit has been recorded:"
>
> The Recorder of Deeds has asked us to advise him whether this section can be complied with by glueing the affidavits into permanent record books numbered consecutively, the number of the affidavit book and the serial number of the affidavit being entered on the margin of the record of the Deed of Trust being released; on the page to which the affidavit is permanently affixed there is also a printed form of affidavit that the notes

> are lost or destroyed, which is to be signed by the person presenting the Deed of Trust for cancellation and sworn to before the deputy recorded.
>
> The foregoing procedure seems to accomplish everything intended by the statute and in addition preserves the instrument itself instead of a mere record of what it contains. I have suggested to the Recorder that this appears to be a substantial compliance with the statute and that he continue to keep his record in this manner until the matter has been passed upon by your office.
>
> Will you please write the City Counselor at your convenience whether, in your opinion, preserving the affidavits in the manner above described complies with the requirements of Section 3078 as amended so that we can advise the Recorder accordingly?"

Section 3078, Laws of Missouri, 1933, page 196, pertains to acknowledgment of satisfaction and release of mortgages and deeds of trust, and contains this provision:

> ";provided, however, that, if such note or notes shall not have been delivered to the maker or his legal representative, the affidavit so required of the cestui que trust or his legal representative shall recite that the note or other evidence of the debt named in said mortgage or deed of trust has been paid and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same, and the term legal representatives as used in this section shall include assigns;"

And further,

> "and the affidavit of the maker of such note or notes or his legal representative shall recite that said note or notes have been

paid; the affidavits so required shall be recorded in the same manner as deeds, in a permanent record, and the recorder shall make a notation upon the margin of the mortgage so satisfied giving the number of the book and page wherein said affidavit has been recorded;"

Section 11547a, Laws of Missouri, 1933, page 362, provides as follows:

"MANNER OF RECORDING INSTRUMENT--RECEIPT. In all cities in this State which now have or which may hereafter have 600,000 inhabitants or more and in Counties now having or which may hereafter have 200,000 and less than 400,000 inhabitants, the Recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, by writing them, word for word, in a fair hand, or by typewriting them or by photostating them, noting at the foot of such record all interlineations and erasures, and the words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered. Except when otherwise provided by law it shall be the duty of the recorder to deliver to the person holding his receipt therefor, every instrument so recorded within sixty days from the date upon which it was presented for recording."

Section 3078, supra, provides that the affidavit shall be recorded in the same manner as deeds, and Section 11547a, supra, provides that deeds shall be recorded "by writing them, word for word, in a fair hand, or by typewriting them or by photostating them, noting at the foot of such record all interlineations and erasures, and the words visibly written on

erasures, and noting, at the foot of the record," etc. We call your attention to the provision relative to photostating. As we understand from your request, the recorder merely takes the original affidavit and glues such into a permanent record book. Does such constitute recording?

The third paragraph of your letter reads:

> "The Recorder of Deeds has asked us to advise him whether this section can be complied with by glueing the affidavits into permanent record books numbered consecutively, the number of the affidavit book and the serial number of the affidavit being entered on the margin of the record of the Deed of Trust being released; on the page to which the affidavit is permanently affixed there is also a printed form of affidavit that the notes are lost or destroyed, which is to be signed by the person presenting the Deed of Trust for cancellation and sworn to before the deputy recorded."

What is sought to be accomplished by this would be the same exactly if such were photostated. However, in this case you always preserve the original, which we believe comes within the statutory requirments of recording such.

Corpus Juris, Vol. 18, paragraph 187, page 248, reads:

> "Registry acts of a state have been declared to be remedial, and it has been decided that they should be liberally and beneficially construed, etc."

And quoting from page 250, paragraph 194:

> "The registration or recording of a deed will not be rendered inoperative by reason of slight and immaterial mistakes therein. * * * * * * * * * * * * * * * * * It is immaterial that a portion of the record is printed instead of written. * *"

We believe the method proposed sufficiently meets the requirements of Section 3078, supra, in recording affidavits. It is our opinion that the affidavits required to be recorded, if

such are glued into permanent record books numbered consecutively, the number of the affidavit book and the serial number of the affidavits being entered on the margin of the record of the deed of trust being released, and on the page the affidavit is affixed there is also a further printed form of affidavit stating that the notes are lost or destroyed which is signed by the person presenting the deed of trust for cancellation and sworn to, meets the requirements of Section 3078, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

LEGISLATURE: Election of officers at an extra session.

FILED 83

September 26, 1933

10-7

47

Mrs. Grace Shay
Chief Stenographer
57th General Assembly
Montgomery City, Missouri

Dear Mrs. Shay:

This Department acknowledges receipt of your letter of September 12, requesting an opinion regarding the elective officers of the House of Representatives and Senate in the event an extra session is called by the Governor. Your letter is as follows:

> "I am writing for information regarding an extra session of Legislature should there be one.
>
> Will the elective officers of the regular session be called back to act or will new ones be elected? Who notifies the officers at that time?
>
> I will appreciate and thank you very much for this information."

Authority for the Governor to call an extra session is found in Section 9, Article V, page 101 Constitution of Missouri, which is as follows:

> "The Governor shall, from time to time, give to the General Assembly information relative to the state of the government, and shall recommend to its consideration such measures as he shall deem necessary and expedient. On extraordinary

> occasions he may convene the General Assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary."

The limitation of matters which can be considered by an extra session is Section 55, of Article IV, page 98 of the Constitution of Missouri, which is as follows:

> "The General Assembly shall have no power, when convened in extra session by the Governor, to act upon subjects other than those specifically designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened."

The Constitution makes no distinction between an extra session, a called session, or a regular session of the Legislature insofar as the election of officers is concerned, and places the matter wholly within the two legislative branches as set forth in Section 17 of Article IV, page 83 of the Constitution of Missouri, said section being as follows:

> "Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; may arrest and punish by fine not exceeding three hundred dollars, or imprisonment in a county jail not exceeding ten days, or both, any person, not a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence during its session may punish its members for disorderly conduct, and, with the concurrence of two-thirds of all members elect, may expel a member; but no member shall be expelled a second time for the same cause."

In the absence of any direct law bearing upon the question of the election of officers we shall consider precedent. In 1921 there were two extra sessions of the Legislature. In the first extra session the following proceedings were had relating to the election of officers in the Senate:

> "The Senate was called to order by the Honorable Hiram Lloyd, Lieut. Governor and President of the Senate. The President announced the following temporary officers: (names listed)
> On p. 1200, the following proceedings were had:
> Senator Anderson of St. Louis offered the following resolution, which was read and adopted:
>
> 'RESOLVED, that the following officers of the Senate in the Regular Session of the 51st General Assembly be declared officers of the Extra Session, to-wit:'
>
> And again on p. 1201 the following proceedings were had:
> Senator Seneker offered the following resolution, which was read and adopted:
> 'RESOLVED, That the Secretary of the Senate inform the House of Representatives that the Senate is now organized in pursuance to the proclamation of the Governor and ready for business by the election of the following officers:' ".

And the following in the House:

> " HOUSE JOURNAL, 51st GENERAL ASSEMBLY, Vol. II. p. 1535.
> Tuesday, June 14, 1921.
>
> The following proceedings were had:
> The House was called to order by Speaker O'Fallon, and the following proceedings were had (p. 1536):
>
> Mr. Morgan offered the following resolution, which was read and adopted:

'BE IT RESOLVED that the House of Representatives of the 51st General Assembly of Missouri now here in extra session convened be, and the same is, hereby organized by the selection of the same officers had during the regular session of the 51st General Assembly with the exception of Chief Clerk, Reading Clerk and Chief Enrolling Clerk;

BE IT FURTHER RESOLVED that the Chief Engrossing Clerk exercise the function of the Chief Enrolling Clerk in addition to the duties of Engrossing Clerk.
* * * * * * '

On the same page (1536) Mr. Morgan offered the following resolution, which was read and adopted:

'BE IT RESOLVED that the Assistant Chief Clerk inform the Senate that the House is duly convened, is now in session, and ready for consideration of business, with the following elected officers:' .

In the second extra session the following proceedings were had in the Senate:

"SENATE JOURNAL, VOLUME II, p. 1561.
First day of Second Extra Session
Thursday, Nov. 3, 1921.

The following proceedings were had:

Pursuant to a proclamation by the Governor, the Senate was reconvened in extra session, Lieut. Governor Lloyd, President of the Senate, in the chair. The President announced the following temporary officers:

And again, on the same page, the following proceedings were had:

Senator Pickett offered the following resolution, which was read and adopted:

'BE IT RESOLVED that the following officers be declared the officers of the Senate of the Special Session of the 51st General Assembly: '

And on p. 1563, the following resolution was offered by Senator Irwin, which was read and adopted:

'RESOLVED, that the Secretary of the Senate inform the House of Representatives that the Senate is now organized in pursuance to the proclamation of the Governor and ready for business by the election of the following officers: '. "

And the following proceedings were had in the House:

"On p. 1962 of the same volume, same being the first day, Thursday, November 3, 1921, of the second extra session, the following proceedings were had:

Mr. Morgan offered the following resolution, which was read and adopted:

'BE IT RESOLVED that the following persons constitute the officers of the Second Extra Session and that they serve in their capacities indicated:

S. F. O'Fallon, Speaker
George Kigel, Speaker Pro Tem, etc.

AND BE IT FURTHER RESOLVED, that the Chief Clerk appoint four competent clerks to assist him in his duties; that the Engrossing Clerk appoint two competent clerks to assist him; That the doorkeeper appoint 9 competent persons to assist him.******'

And again on p. 1963, Mr. Morgan offered the following resolution, which was read and adopted:

'BE IT RESOLVED that the Chief Clerk inform the Senate that the House of Representatives is now organized with the following officers:

S. F. O'Fallon, Speaker,
George Sigel, Speaker Pro Tem, etc.'. "

We next refer to the call session of the 21st General Assembly in 1861. The following proceedings were had in the Senate:

"On motion of Mr. Johnson it was resolved that the Secretary, Assistant Secretary, Enrolling Clerk, Doorkeeper, Sergeant at Arms and standing committees of the last session without further election or appointment.

On motion of Mr. Parsons, the vote agreeing to the resolution was reconsidered. Then Mr. Parsons moved to amend the resolution by striking out all after the word 'resolved' and inserting in lieu thereof the following:

'That the Senate do now proceed to the election of a Secretary, Assistant Secretary, Enrolling Clerk, Engrossing Clerk, Doorkeeper, and Sergeant at Arms in the order herein stated.'

which amendment was read and agreed to by the following vote: (vote listed)

The Aye's and No's having been demanded by Mr. Johnson. The question then being on agreeing to the resolution, it was then agreed to."

All officers to the individual offices were then elected according to the records.

And the following in the House:

"A quorum being present, Mr. Vest offered the following preamble and resolution:

'WHEREAS, we believe that the adjournment sine die of the 21st General Assembly of the State of Missouri on the 28th day of March last was a virtual dissolution of the organization thereof; and

> THEREFORE BE IT RESOLVED, that the House of Representatives now proceed to the election of a Speaker, Chief Clerk, Assistant Clerk, Enrolling and Engrossing Clerk, Door Keeper, and Sergeant at Arms in the order in which they are named in this resolution.'
>
> Further, the question then being on agreeing to the first part of the resolution offered by Mr. Vest in relation to the election of Speaker, it was decided in the affirmative by the following vote: (vote listed)
>
> Aye's and No's having been demanded by Mr. Riley."

The House of Representatives then proceeded to elect all of the above mentioned officers.

We offer the above precedents showing that the extra sessions in the past have elected officers and in most instances the same officers who presided over the regular session. You will further note in each instance that the Legislature treated it as an election of officers. A precedent of many years evolves itself into a custom and becomes law, as is defined in 17 C. J. page 446, as follows:

> "In its more technical legal sense, a custom is a usage which has obtained the force of law. In other words, it is a law established by long usage. *******"

In the case of Thompson v. Musser, 1. Pa. 464, the Court in determining this question said:

> "Although the practice of the courts, or forms of pleadings, which pass sub silentio, do not make the law, yet a constant practice of permitting acts of assembly, or laws, to be read out of printed books, without opposition, is a great evidence of the law."

It is the opinion of this Department that when the 57th General Assembly of 1933 adjourned April 25, 1933, sine die, it was the dissolution of that organization, and that in the event the

Governor exercises his power and calls an extra session it will be necessary to re-elect the of icers who presided over the 57th General Assembly or to elect officers in their places.

Referring to your question as to who notifies the officers, it is the opinion of this Department that if you were chief stenographer in the regular session of the 57th General Assembly, and desire to serve again it will be necessary for you to follow the same routine that you did to obtain that office in the regular session.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

TAXATION:- County Collectors have no right to charge County
COUNTY COLLECTORS:- Court for "indexing taxbooks".

FILED 83

November 14, 1933.

Mr. William Settle,
County Collector,
Richmond, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I am writing in regard to some information concerning the indexing of the tax books of this county. It has been a custom here for the past thirty years for the county court to pay the collector for this work, and they have payed me the last two years for this job, however, this year they refuse to pay me, claiming that it is a duty of the county assessor.
>
> Not long ago I talked with one of the traveling men of the Geo. D. Barnard Stationery Co., and he tells me that he finds in his territory that it is the duty of the county collector to do this work, and that he finds that other collectors receive a fee of one hundred and fifty dollars for this duty. Where they have only been paying me seventy-five.
>
> If you would kindly give me your opinion on this matter I would most surely appreciate it and perhaps some time I will be able to return the favor."

You inquire as to your right to be paid by the county for "indexing the tax books." We have diligently searched the statutes and find no statute dealing with "indexing the tax books." We assume, therefore, that in using the term indexing the tax books, you refer to the practice used in some counties of the state of placing under the taxpayer's name on the personal tax book the various line numbers at which there appears real property assessed against the same individual. As an example, under the name of John Smith on a personal tax book would appear the numbers 500, 600 and 700, indicating that at those lines in the real estate tax book there appears certain pieces of real estate owned by John Smith and assessed in his name.

We have been unable to find in our statutes any statute requiring either the assessor or the county collector to make

such notations upon the personal tax book. In counties where that practice is followed it is done purely as a matter of convenience in the collection of taxes. In some counties, apparently this indexing has been done by the assessor and in others by the collector, but we fail to find any provision in the statute which would authorize either the assessor or the county collector to receive extra compensation for doing this work.

In State ex rel. v. Brown, 146 Mo. 401, 406, it is said:

> "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services."

In State ex rel. v. Adams, 172 Mo. 1, the court in passing upon the right of a county officer to collect certain fees says at page 7:

> "In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed."

It is apparent from the above decisions that the officer claiming fees or compensation from the statute or county must be able to put his finger upon some statute authorizing the allowance of such compensation. We are unable to find any statute which would authorize the county court to pay you any compensation for indexing the tax books. If you can point out to us any statute which would authorize you to charge for these services we would be glad to amend this opinion accordingly.

It is therefore the opinion of this Department that there is no statute authorizing the county collector to charge for "indexing the tax books," and in the absence of such statutory authority the county court would have no right to pay you for such services.

Very truly yours,

/signed/ Frank W. Hayes
Assistant Attorney General.

APPROVED:

Attorney General.

Sec. 938

(JUSTICES' COURTS - Applicability of R.S. 1929/to actions in justices' courts so as to allow continuances when party or counsel is at session of General Assembly as member thereof.)

12-2

November Twenty-Ninth,
1933.

FILED
13

Honorable Arthur S. Shaw,
Justice of the Peace,
308 Thompson Avenue,
Excelsior Springs, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of November 11, 1933, such request being as follows: "In your opinion does Section 938, Revised Statutes of the State of Missouri, 1929 apply to actions in Justice Court?"

Revised Statutes of Missouri, 1929, Section 938, provides as follows:

> "In all suits at law or in equity or in criminal cases pending in any court of this state at any time when the general assembly is in session, it shall be a sufficient cause for a continuance if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney, solicitor or counsel of such party is a member of either house of the general assembly, and in actual attendance on the session of the same, and that the attendance of such party, attorney, solicitor or counsel is necessary to a fair and proper trial or other proceeding in such suit; and on the filing of such affidavit the court shall continue such suit and any and all motions or other proceedings therein, of every kind and nature, including the taking of depositions, and thereupon no trial or other proceedings of any kind or nature shall be had therein until the adjournment of the general assembly, nor for ten days thereafter. Such affidavit shall be sufficient, if made at any time during the session of the general assembly, showing that at the time of making the same such party, attorney, solicitor or counsel is in actual attendance upon such session of the general assembly."

There have been no decisions in this state as to whether or not the above section applies to courts of justices of the peace, but the statute itself expressly uses the phrase "in any court of this state", which would certainly by its language include a justice court, and like-

wise the purpose of the statute would seem to apply equally to a justice court as to a court of record or other court, because the statute is a legislative declaration that any party to a case or his attorney who is serving the public as a member of the General Assembly by being in attendance at a session thereof, should not have his private interests prejudiced thereby by being forced to proceed with litigation which would conflict with attendance at the General Assembly.

Revised Statutes of Missouri, 1929, Sections 2259 and 2260, deal with continuances in justices' courts, and contain nothing which would prevent Section 938 from applying to justices' courts.

It is our opinion that Revised Statutes of Missouri, 1929, Section 938, applies to actions in the courts of justices of the peace in this state.

Very truly yours,

E. H. MILLER,

Assistant Attorney General

APPROVED:

Attorney General.

EHM/MO.

LOSS BY THEFT OF STATE FUNDS BY AN OFFICER--- THE OFFICER AND HIS BONDSMEN ARE RESPONSIBLE FOR SAME.

May 23, 1933.

FILED

Hon. Claud M. Shepherd
Secretary
Barbers' State Board of Examiners
517 Pickwick Building
Kansas City, Missouri

Dear Mr. Shepherd:

Regarding your letter of May 2nd, 1933, wherein you spoke of your office at 517 Pickwick Building being burglarized April 25, 1933, between the hours of 5 p. m. and 8 a. m., in which you state funds in the amount of $105.00 were stolen, $97.00 of which was for licenses, permits of examination, and apprentice permits, and $8.00 was for money left on deposit by the barbers. You state further that the burglary was reported to the Police Department of Kansas City and an investigation of same was made; that every precaution was taken to safeguard the State's money and that this was the first and only loss sustained during your four-years term. You spoke further as follows:

> "The money was kept in a metal strong box which was locked, and the key for same was in a locked drawer which was forced open. The outer office door was also locked. We banked our money on Saturday, the 22nd of April, and this money was an accumulation of Monday and Tuesday, April 24th and 25th. I was away, holding examinations in St. Joseph, Missouri, and my clerk, Mr. Lake in the Kansas City office, was unable to leave to deposit the money in the bank."

Replying to your communication relative to the above matter, will state that it was an exceedingly unfortunate affair and we are very sorry that same happened. We will call your attention to the law in the case.

Section 13523 R. S. 1929, provides,

> "A board of examiners, to consist of three persons, citizens of this state * * * * * * * * * * * * * * * * Each member of said board shall, before entering upon the discharge of his duties, give a bond in

> the sum of fifteen thousand dollars, with a duly authorized surety or bonding company, to be approved and filed by the secretary of state, conditioned for the faithful performance of his duties, and shall take oath * ."

Section 13525 R. S. 1929, after providing for a salary to the members, including traveling expenses etc., says,

> "Provided, however, that all moneys collected by the board or its treasurer shall be paid into the state treasury, there to constitute a fund for the purpose of carrying out the provisions of this chapter. * * * * * * *."

Sections 13527 and 13528, R. S. 1929, provide for the fees to be charged and collected by the Board. This makes the members State officers and the handling of the money doubly important.

It has been ruled in cases of this type that while,

> "* * * the defendant was guilty of no want of care or prudence in failing to ascertain the true condition of said bank. (Where he kept his money on deposit) The question for determination is, whether, on the facts stated, the defendant, Powell, and the sureties on his bond, are liable for the sum so lost."

After reviewing the authorities in that case where the bank had failed, the court said:

> "Public officers, however, are universally held to a more rigorous accountability than simple trustees for the public funds committed to their keeping; and though, in a general sense, they may be said to be bailees, still they are bailees who are subject to special obligations for the benefit of the public, * * * * * * 'Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. * * * * * * * * * * * * * * * * *

AND THAT THE FACT THAT THE MONEY WAS STOLEN FROM HIM, WITHOUT HIS FAULT, DOES NOT RELEASE HIM FROM HIS OBLIGATION TO MAKE SUCH PAYMENT."

State ex rel. Powell, 67 Mo. 395.

This is an old case but has been followed in a long line of decisions down to the present time.

City of Fayette v. Silvey, 290 S. W. 1019 l. c. 1021;
University City v. Schall, 275 Mo. 667;
Bragg City Special Road District v. Johnson, 323 Mo. 990.

In view of the law above quoted, although it is a very unfortunate affair, it is our opinion that you and your bondsmen would be answerable to the State for the money and would be compelled to pay same into the State Treasury, notwithstanding the unfortunate surroundings in the loss of same.

Very respectfully,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

TA . ION:--Cities are not exempt from paying state gasoline tax on gasoline purchased; occupation taxes upon gasoline dealers levied by cities apply to purchases made by state and its political subdivisions.

10-28

FILED
84

October 21, 1933.

Shell Petroleum Corporation,
Shell Building,
St. Louis, Missouri.

Gentlemen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Will you please advise if the state gasoline tax is applicable to sales of gasoline to a municipality for use by it in its governmental functions, and whether or not a municipal gasoline tax is applicable to sales made to the state or its political subdivisions.

We understand that these questions have not been definitely settled, but are being considered at the present time.

We are requesting the information for use in connection with bids which we are submitting both to the state and to several municipalities."

Section 7794, R. S. Mo. 1929, provides as follows:

"For the purpose of providing funds to complete the construction of and for the maintenance of the state highway system of this state as designated by law, there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this article used in motor vehicles of the public highways of the state, which license tax shall apply and become effective January 1, 1925."

Section 7795, R. S. Mo. 1929, provides as follows:

"Every distributor shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into and distributed or sold by him within this state during such year."

Section 7796, R. S. Mo. 1929, provides as follows:

"Every dealer shall for the year 1935, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels sold or distributed by such dealer in this state during such year; Provided, however, that no motor vehicle fuels sold or distributed by such dealer and which were refined, manufactured, produced or compounded and sold by a distributor in this state, and no motor vehicle fuels sold by such dealer which when purchased by him were contained in containers or packages, other than the original containers or packages in which the same was shipped, transported or imported into this state shall be included or considered in determining the amount to be paid by such dealer, but only such motor vehicle fuels as were shipped, transported or imported into this state and purchased by such dealer in the original packages in which they were so shipped, transported or imported into this state and then resold by such dealer after the breaking of such original package by him shall be included or considered for the purpose of computing said amount."

Section 7805, R. S. Mo. 1929, provides as follows:

"All motor vehicle fuels, as herein defined, distributed or sold in the state of Missouri by any distributor or dealer, shall be deemed to have been sold for use in operating motor vehicles upon the public highways of this state; provided, however, that any person who shall buy and use any motor vehicle fuels, as defined in this article, for the purpose of operating or propelling stationary gas engines, farm tractors or motor boats, or who shall purchase or use any of such fuels for cleaning, dyeing, or other commercial use of the same, or who shall buy and use such motor vehicle fuels for any purpose whatever, except in motor vehicles operated, or intended to be operated, upon any of the public highways of the state of Missouri, as defined in section 7759, and who shall have paid any license tax required by this article to be paid, either directly or indirectly through the amount of such tax being included in the price of such fuel, shall be reimbursed and repaid the amount of such tax directly or indirectly paid by him, upon presenting to the inspector an affidavit accompanied by the original invoice showing such purchase, which affidavit shall state the total amount of such fuels so purchased and used by such consumer, other than in motor vehicles operated or intended to be operated upon any of the public highways of the state of Missouri, as hereinbefore defined, and shall state for what purpose used. Upon the receipt of such affidavit and invoice, the inspector shall cause to be repaid the amount of such tax to the consumer aforesaid, by a warrant drawn by said inspector on the road fund which shall be audited and allowed by the state auditor and shall be paid by the state treasurer: Provided further, that application for refunds, as provided herein,

> must be filed with the inspector within ninety (90) days from the date of purchase on invoice."

Section 7794 above provides expressly that the funds arising under this Act shall be used to complete the construction and the maintenance of the state highway system of this state. Section 7795 provides for a tax of two (2¢) cents a gallon on each gallon of motor fuel refined, manufactured, sold, etc., by the distributor. Section 7796 applies the same tax to every dealer who shall or distribute motor fuel in the state. Section 7805 provides for the exemption of fuels from the tax when used for certain purposes and under certain circumstances. We find no exemption in Section 7805 which would exempt gasoline sold to a municipality, whether it be used in a governmental function or otherwise.

You inquire whether the state gasoline tax, under chapter 41, R. S. Mo. 1929, of which the above sections are a part, is applicable to sales of gasoline to municipalities when used by them in their governmental functions.

The municipalities and political subdivisions of the state are subject to be taxed by the State of Missouri, unless the State has in some way exempted them. The only exemption contained in the Constitution in favor of municipalities is found in Section 6 of Article X of the Constitution, which provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

We call your attention particularly to the fact that the above section exempts the real and personal property of municipal corporations from taxation. The Constitution does not exempt municipal corporations from taxes other than taxes upon real and personal property. The tax levied under chapter 41 above is not a real or personal tax, but is a tax levied upon the dealer or distributor. It is true that the tax is added to the price of the gasoline sold, but it is equally as true that all state taxes levied upon all dealers and distributors in other lines of business are reflected in the price of the product sold, whether it be to municipalities or to individuals. The question as to whether or not a municipality is liable for a gasoline tax suchas we have in

this state is a complicated one and the courts are divided in their opinions concerning it, depending a great deal upon the wording of the statutes and the constitution of the state involved.

There is one line of cases of which the case of O'Berry v. Mecklenburg County, 67 A. L. R. 1304, is typical, to the effect that cities and counties are impliedly exempt from such a tax. The theory of these cases is found in the following quotation from page 1308:

> "Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the Constitution or a statute."

There is another line of authorities upholding the validity of such tax, as exemplified by the case of Crockett v. Salt Lake County, 60 A. L. R. page 867, where it is said: at page 872:

> "The court pointed out that undoubtedly the amount of the tax finally falls upon the purchaser, as it would be natural for the seller to add the amount of the tax to the price of the commodity. In the course of the opinion, the court uses this language: 'The language of the later statute is definite as to the persons who are required to pay the tax therein provided. The municipalities are in no way relieved from the burden of paying any addition that may be added to the price of motor fuels which may be occasioned by the tax. There is no indication in the language of either of the statutes in question that it was the intention of the lawmakers to relieve municipalities from the burden of paying any such enhanced price."

We therefore have two lines of decisions dealing with this question. The determination of your inquiry, however, with the aid of those decisions, must depend upon the constitution and statutes of this state. Section 6 of Article X above quoted does

unquestionably exempt from taxation the real and personal property of municipal corporations. The tax levied under this statute, however, is not a tax upon the property of a municipal corporation in any sense of the word. Under Section 7795 the distributor must pay the tax and under Section 7796 the dealer must pay the tax. It is what is commonly known as an excise tax. It is true that the excise tax is, in all probability, always passed on to the ultimate consumer, but such is true of all taxes, whether they be excise, property or otherwise, because all taxes are included in the expense of doing business and ultimately are passed on to the consumer. We therefore conclude that it would not be in violation of Section 6 of Article X, were this tax to be exacted from dealers who sell to municipal corporations, because under such circumstances the gasoline tax is not a tax upon the property, real or personal, of a municipal corporation.

Section 7805, R. S. Mo. 1929, provides that certain gasoline sold by dealers and distributors should be exempt from the tax and provides for refunds in favor of the persons named in said Section. The Section does not exempt gasoline sold to municipalities by said dealers. It, therefore, must be assumed that when the Legislature passed a law exempting certain persons from the paying of the tax under certain conditions, that it impliedly expected all other persons not exempted to pay the tax. The tax itself is levied not for general revenue purposes but under Section 7794 for the completion and maintenance of the state highway system.

In Crockett v. Salt Lake County above, at page 871, it is said:

> "It thus appears that the tax is not for the purpose of raising revenue for the payment of the usual and ordinary expenses of state government, but for the construction and maintenance of public highways. These highways are open, not only for the use of the citizens of the state, but for others traveling within the state and for the counties and cities in the discharge of their public duties. While it is true the statute does not expressly provide that the municipalities of the state shall be subject to the tax, nevertheless there is no provision or language found in the act which indicates the intent of the Legislature to exempt or relieve counties or cities from paying the tax imposed upon all who use motor vehicle fuels for vehicles, engines, or machines, movable or immovable, within the state. On the contrary the admitted purpose of the legislation and the directions contained in the act as to the disposition of the funds so raised not only fail to indicate an intention on the part of the Legislature not to exempt municipalities from payment of the tax, but negative any inference that such municipalities were intended to be relieved from the payment of the tax.
>
> The tax levied is by the statute designated an excise tax; that is, it is a tax for the privilege of selling

motor vehicle fuels and likewise for the use of such fuels when purchased outside of the state and brought within the state for use. It is in no sense a general tax upon the property of the municipality, but is a tax charged against the municipality for the privileges included within the terms of the act and which are made subject to the tax. It does not purport to be a tax against any specific property, real or personal."

While there is authority to the contrary, we are inclined to adopt the position taken by the court in the Crockett case above, so far as deciding the question raised in your inquiry. Our statutes do not impose a property tax as would be exempted under Section 6 of Article X of the Constitution. It lays an excise tax on the dealer or the distributor. The revenue derived from the tax is not for the usual and ordinary expense of the state government, but is for the particular purpose of the construction and maintenance of the state highways. No good reason appears why municipalities whose motor vehicles use the public highways should not bear their just portion of the expense of maintaining and constructing them. Our statutes provide for specific exemptions and fail to exempt municipal corporations from the payment of this tax. Considering the Constitution and the statutes involved, we are inclined to the view that the Legislature did not intend to exempt cities from the payment of this state gasoline tax.

We are therefore of the opinion that regardless of the decisions of other states, that the cities of Missouri are not exempted from the payment of the gasoline tax levied by our statutes against the dealers and distributors of this State.

You next inquire whether a municipal gasoline tax would apply to purchases made by the state or its political subdivisions. Whether or not purchases made by the state are subject to the municipal gasoline tax depends upon the nature of the tax. The cities are creatures of the state and only have such powers as are expressly designated to them by the state. The cities would have no right to levy any tax upon the real or personal property belonging to the State of Missouri, or to levy any direct tax against the state. Whether the purchases made by the state are subject to municipal gasoline taxes, therefore, depends, we believe, upon whether the gasoline tax is to be construed as a tax against the state, or whether it is a tax against the dealer and incidentally increases the price of the articles sold to the state.

The ordinary tax levied by municipalities upon gasoline dealers is at the rate of one (1¢) cent per gallon sold. These municipal gasoline taxes are occupation taxes levied upon the dealer or distributor, the amount of tax measured at the rate of so much per gallon. This tax is the charge made by the city upon the dealer for the privilege of carrying on the business of selling gasoline within the limits of the city. It is true

that in many instances the amount of the tax is added to the price per gallon and that the purchaser, whether it be the state or an individual, if such tax applies, would have to pay the enhanced price. This is true, however, of all taxes, which eventually reflects in the purchase price of the commodity sold.

In Viquesney v. Kansas City, 366 S. W. 700, the Supreme Court of Missouri in banc had for construction an ordinance of the City of Kansas City requiring every person engaged in the business of selling and offering for sale gasoline, to take out a license and requiring that for the privilege of doing such business the licensee should pay the license collector the sum of one (1¢) cent for each gallon of gasoline sold, transported or stored by such person. In discussing the nature of the tax the court says on page 702 as follows:

"

"The first question for determination is whether the tax of 1¢ a gallon on gasoline sold by the dealer is a property tax, or an excise tax or an occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by the taxpayer irrespective of the value of his assets, it is an excise tax. (Citations omitted).

Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is occupation tax--one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. In re Opinion of the Justices, (Me.) 121 A. 902; State v. Hart, 125 Wash. 520, 217 P. 45; Altitude Oil Co. v. People, 70 Colo. 452, 202 P. 180. In case of Bowman et al. v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, it was held by the Federal Supreme Court that such a tax was consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution." "

Under the foregoing decision, it is settled in this state that the tax similar to the Kansas City tax is an occupation tax levied upon the dealer for the privilege of doing business. The amount of the tax exacted from the dealer being measured at the rate of one (1¢) cent per gallon. It is not a property tax in any sense of the word; it is not a direct tax against the purchaser. The purchaser, under no circumstances, can be made to pay the tax, and if the dealer does not pay the tax the city has no way of collecting it. The tax might be included in the price of the article sold so as to enhance the price of the gasoline to the purchaser, but it is in no way a tax against the purchaser.

If, instead of levying an occupation tax at the rate of one (1¢) cent per gallon, a flat fee of $1,000.00 was required that also would enhance the price of gasoline in the hands of the purchaser, but no one would contend that if the State of Missouri bought an article from such a merchant that the State would be entitled to buy it less that portion of the tax which, according to the merchant's volume, should be allocated to the article. It is easier to determine how much the article is enhanced in value when the occupation tax is figured on the basis of one (1¢) cent per gallon than it is were the occupation tax to be fixed at a flat sum. Yet, whether or not the State is to be excused from paying the tax should not be made to depend upon the facility in arriving at the amount of tax to be refunded. If the state would not be entitled to a refund where a gasoline occupation tax was a thousand dollars on the merchant, then by the same token it should not be entitled to a refund because the occupation tax is measured at the rate of one (1¢) cent per gallon for gasoline sold.

The manufacturer engaged in the business of manufacturing road machinery might be required in St. Louis to pay a very high license tax as well as other municipal and state taxes. All of these taxes are reflected in the price of the machinery which the state buys from the manufacturer, yet, no one would contend that the state would be entitled to buy such machinery cheaper than any other person, or obtain any refund of taxes, nor would the manufacturer himself be excused from paying the full amount of all taxes simply because he sold to the State.

If the tax imposed by the cities is construed as a tax upon the article sold, then purchases made by the state of Missouri might be said to result in a direct tax against the state of Missouri which the city would have no right to levy. However, we are of the opinion that under the law of this state, the tax imposed upon gasoline dealers by the cities of this state is an occupation tax levied upon the dealer and measured at the rate of one (1¢) cent per gallon. This is the view taken in the Vicuesney case above. Adopting the theory of the Vicuesney case, the city gasoline ordinances levied a tax upon the dealer and not against the purchaser, which in this case would be the state. It is true that the value of the gasoline when purchased is enhanced by reason of tax, but this does not change the nature of the tax. Being a tax upon a merchant for the privilege of doing business, it is in the same category as other taxes levied upon merchants for the privilege of doing business which enhanced the value of various articles purchased by the State of Missouri.

We are therefore of the opinion that municipal gasoline taxes, when they are in the form of an occupation tax, apply to purchases made by the State of Missouri and its political subdivisions the same as it does to individuals.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

COUNTY COURTS: May reduce compensation of County Treasurer during term of office.

12-11

December 6, 1933

FILED
84
63.

Hon. Wm. Short
County Treasurer
Court House
Huntsville, Missouri

My Dear Mr. Short:

Acknowledgment is made of your request for an opinion of this office, your letter reading as follows:

> "* * *This office was paying $200.00 a month when I announced for it and was nominated on the 2nd of Aug. 1932 and was elected of course in November 1932. There had been nothing said in regards to the salary of this or any other office in the County up to and including the present time.
>
> On Dec. 27th, 1932, 4 days before I took the office of County Treasurer of this county, the fourth Monday in Dec. 1932, and took charge on January 1st, 1933, it came out in the Moberly paper that the County Court had cut the salary of the County Treasurer and the county Surveyor $50.00 a month each. I did not know the law but I never did think that there was a law like that for them after all three of them serving eight years in the County Court to wait until I was elected to cut the pay. If there was a law so I could call an election on this cut the people would vote to leave it like it was as they had a right to cut it before anyone was elected. If the law give them the right to cut it all but not four days before a new man took charge after a man had the office for twelve years and was running again but was defeated and that is one reason the County Court decided to cut the pay.
>
> Now Roy if this is not asking to much of you I would like to have your opinion on my case with the County Court.* * *"

I.

COUNTY TREASURER'S COMPENSATION BASED UPON SECTION 12138 R. S. Mo. 1929.

The statutory provision providing for the compensation of the County Treasurer is found in Section 12138 R. S. Mo. 1929 which reads as follows:

> "Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

By virtue of the foregoing section the state Legislature has delegated the power of determining the County Treasurer's compensation to the county court. See Sanderson vs. Pike County, 195 Mo. 598, l. c. 605:

> "It will thus be seen that the Legislature has vested in the county court the power to fix the compensation of the treasurer for his general services and for his services in disbursing the school moneys of the county."

Also, State ex rel. Dietrich vs. Daues, 287 S. W. 430, l. c. 431:

> "It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office is purely legislative in character. That power, as respect the office of county treasurer, the Legislature has delegated to the county court the agency most familiar with the fiscal affairs and financial condition of the county," * * *"

We are aware of the fact that Section 12138 R. S. Mo. 1929, was repealed by the 57th General Assembly, and a new section enacted in lieu thereof, but it has not been materially changed in respect to the present inquiry, and the new Section does not become effective until 1936.

We are next confronted with the limitations, if any, upon the power of the County Court in fixing the salary of the County Treasurer.

II.

ONLY LIMITATION ON COUNTY COURT
IS THAT IT BE JUST AND REASONABLE
IN FIXING COMPENSATION.

The only constitutional provision regarding the changing of the compensation of the County Treasurer is found in Section VIII of Article XIV of the Constitution of Missouri. This section reads as follows:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

It is to be noted that this provision is a limitation only upon the power to increase the salary or compensation of the county officer, but in no way limits the power of the County Court to reduce or diminish the compensation.

It is a recognized law of this State that a public officer has no vested interest in his office or in the compensation provided therefor. This is well stated in the case of Sanderson vs. Pike County supra, wherein the Court stated at page 605 as follows:

> "* * *It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it." * * *
>
> Such compensation is not the creature of contract nor dependent upon the fact, or value of services actually rendered," * * *and cannot be recovered upon quantum meruit." * * *"

There being no constitutional provision prohibiting the reduction and no vested interest or right to the compensation, we are left to the limitation which is placed upon the County Court' power by the statute itself to-wit, that the compensation allowe shall be just and reasonable. We again refer to the case of State ex rel. Dietrich vs. Daues supra, wherein the Court stated at page 431 as follows:

"The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only." * * *

III.

COUNTY COURT HAS POWER TO DIMINISH COMPENSATION OF TREASURERS DURING THE TERM.

In the early case of Givens vs. Daviess County, 107 Mo.603, the Supreme Court passed upon the power of the County Court to reduce the salary of the County Treasurer during his term of office. And at page 609 remarks as follows:

"* * *the county court of defendant county had the undoubted right, at least within the limits of reasonableness and justice, to determine the compensation plaintiff should receive for his services as treasurer, and to diminish the same during the term, if in its judgment circumstances demanded a reduction." * * *

The ruling in the foregoing case was recognized in the late case of Dietrich vs. Brickey, 48 S. W. (2d) 69, l. c. 70:

"Plaintiff concedes the power of the county court, in the exercise of an honest discretion to reduce his salary, but insists that the weight of the evidence shows that the order of the county court reducing his salary was made arbitrarily, corruptly, and fraudulently, and not in the exercise of an honest discretion, and asks that this court reverse the judgment of the circuit court and direct that court to set aside the order of the county court and enjoin its enforcement." * * *

In the case last quoted, the County Court had reduced the salary of the County Treasurer from $1500.00 to $1000.00 per annum during his term. The County Treasurer brought an injunction suit against the County Court alleging that they had made the reductio arbitrarily, corruptly and fraudulently and that any sum of les $1500.00 per annum was not just and reasonable compensation. Circuit Court found that the County Court had in fact acted i

accordance with their best judgment based upon facts within their knowledge and not for any ulterior motive and accordingly denied the relief sought. This finding was affirmed, the Court stating, l. c. 71:

> "We cannot say, in view of this evidence, that the order of the county court was made arbitrarily, corruptly, or fraudulently, or that there was an abuse of discretion in making the order."

CONCLUSION.

From the foregoing authorities it is the opinion of this office that the County Court has the power to reduce the salary of a County Treasurer during his term; provided, the salary fixed is just and reasonable and the County Court has not acted arbitrarily, corruptly or fraudulently in making the order of reduction.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

DISTRICT ROAD F[illegible] -- Section 8047 and 8060, R.S. Mo. 1929.

FILED
85

January 26, 1933

Hon. Arch M. Skelton
Prosecuting Attorney
Lexington, Missouri

Dear Mr. Skelton:

I acknowledge receipt of the request of L. Irwin Morris, your assistant, for an opinion of this department on the following:

> "In 1922 the Waverly Special Road District, together with the county of Carroll, at a special election voted in the Waverly district the sum of $50,000.00 in bonds for the construction of a free bridge across the Missouri river at Waverly. At the present time these bonds have been retired with the exception of $1,000.00 by levy's within the said district.
>
> "Recent refunds from the State Highway Department under the provisions of the Statutes have been made to the said district to the amount of about $46,000.00. The commissionersof this district have paid some small attorney fees out of this amount and have been petitioned by the tax payers in the district to return to each individual tax payer who has paid his levy during 1922 to 1932 his proportionate share of the remainder of this fund; in other words a direct refund of tax money to the tax payer."

An investigation of the statutes reveals that thereis no statutory authority to make a direct refund of a tax legally collected. Section 9981, R.S. Mo. 1929, provides for the refund of taxes illegally collected, but specifically limits such refunds to levies declared illegal by the Supreme Court of Missouri.

The powers and duties of commissioners of the Waverly Special Road District, are set out in Article 9 of Chapter 42, R.S. Mo. 1929. Their duties in respect to the disbursement of road funds of the district, are provided for in Section 8047, R.S. Mo. 1929, which is as follows:

> "The fund received from the poll and road tax of said district shall constitute a general district road fund, and shall be disbursed only as hereinbefore provided, and shall be

> used only for working, repairing and improving the public roads of such district as herein provided, and for no other purpose; and no part thereof shall be used for paying damages and costs for opening new roads, but all such damages and costs for opening new roads paid by the county shall be paid out of the other county revenue, except as this article may otherwise provide."

The Legislature has seen fit to modify the above section in respect to the disposition of highway commission refunds to special road districts, by enacting Section 8060, R.S. Mo. 1929, which is as follows:

> "In all cases in which the state highway commission may have refunded, or shall refund any moneys to any special road district organized and existing under the laws of this state, the commissioners of such special road district are hereby authorized and empowered to use and apply the moneys so refunded or such part thereof as may be necessary, to pay and retire any outstanding bonds of such special road district or to pay any interest that has accrued or may accrue on such bonds."

Thus permitting the disbursement of this fund for the payment of road district bonds.

A situation similar to yours arose in Kansas City several years ago. Taxes were assessed, and many of the assessments paid, for certain sewer construction in the Turkey Creek sewer district. It was later decided to float a bond issue to pay the expense of this improvement. In order to refund the tax assessment for this improvement, Section 15 of Article 14 of the Constitution was adopted, particularly authorizing the refund of the assessment made.

In view of the lack of statutory authority to make this refund, and of the mandatory wording of Section 8047, R.S. Mo. 1929, it is the opinion of this office, that the refund referred to, would be unauthorized and illegal.

Yours very truly,

H. G. WALTNER, JR.
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney General

HGW:ER

COUNTY FARM BUREAU:

Suggestion and citation of cases to support county defense in suit by Bureau for appropriation.

7-4

June 21, 1933.

FILED
85

Mr. Arch M. Skelton,
Prosecuting Attorney,
Lexington, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 1, 1933, in which you inquire as follows:

"The Lafayette County Farm Bureau, a voluntary association, has filed suit against Lafayette County, Missouri to recover a claim against an appropriation made November 14, 1932, by the Lafayette County Court for salaries paid to the county agent and home demonstrator. Enclosed you will find a copy of the county court record showing every appropriation and account of the county court from 1920 to date with reference to the appropriations and money paid by said county court to the use and benefit of the Lafayette County Farm Bureau.

I respectively ask an opinion from your office on the following question: Does the County Court record making the last or any prior appropriation, as enclosed, show the necessary jurisdictional facts whereby the said order or orders are valid or could be sustained as such in the court for the payment of the claim made by the Lafayette County Farm Bureau?

Since it is my duty to defend the county in the action instituted I would appreciate any suggestions from your office as to the best manner of meeting the action instituted. The action instituted by the Lafayette County Farm Bureau is a claim against the said county for money due for each of said months of January, February and March; each month being for one-twelfth (1/12) of the appropriation made.

The present county court refuses to make payment of the appropriation because the order does not show that the Lafayette County Farm Bureau has in any manner complied with the statutory requirements as to sufficiency of members and paid up dues.

Thanking you very much for an immediate answer and an opinion, I am."

We have examined the orders made by the county court which you enclosed. We do not believe that any of these orders contain the necessary jurisdictional averments. The order made on November 14, 1932, is the one which is the basis of the suit in question. It is similar to all other orders heretofore made by the court relating to this subject.

Article 16, chapter 87 R. S. Mo. 1929, provides for County Farm Bureaus and their organization. Section 12617 R. S. Mo. 1929, defines a county farm organization as one composed of not less than 250 bona fide farmers, farm women or tenants, with an annual membership fee of not less than fifty cents per member fully paid up, its constitution and by-laws formally adopted and its officers elected and installed. It is apparent from the foregoing section that a farm organization whose membership has decreased below the minimum fixed by the statute is not a County Farm organization within the definition of the statute. It is not every county farm organization or organization within the county that is entitled to receive the benefit of the Smith-Lever act and of Article 17, chapter 87. The county court is only authorized to make appropriations of public money for the benefit of the County Farm Bureau when such Bureau has complied with the requirements of the statute.

The county court is, of course, a court of limited jurisdiction and does not operate under the common law. Its powers are those specifically delegated to it by the Legislature and, under the County Farm Bureau act, it only has power to appropriate the public money for support of county farm organizations, when such organizations are organized according to the terms of the statute, and so long as those organizations remain entitled to the appropriation. It is not within the contemplation of the statute that simply because an organization has once organized and has fulfilled the requirements of the statute, that it may continue to receive public support even though it may have ceased to fulfill the requirements of the statute. It appears to us that before the county court will have authority to make any appropriation under this chapter, they must find and their record must show that the county organization is entitled to receive the appropriation. It is only upon the organization's compliance with the statute that the right to receive the appropriation accrued. When the right to act is dependent upon certain requirements being met, its requirements are jurisdictional. The county court is a court of limited jurisdiction, and courts of limited jurisdiction and inferior courts, not proceeding according to the course of common law, are confined strictly to the authority given, and the record of such courts must show the existence of all the facts necessary to give jurisdiction, both of the subject-matter and the parties to the action. That general rule is supported by the following cases:

State v. Trimble, 247 S. W. 187,
State v. Metzger, 26 Mo. 65,
Hansberger v. Pacific Railroad Company, 43 Mo. 196,
Schell v. Leland, 45 Mo. 289,
State v. Colbert, 201 S. W. 52,
State v. Woods, 333 Mo. 357,
Evans v. Andres, 42 S. W. (2d) 32, 34,
State ex rel V. Wilson, 216 Mo. 315.

The above cases are also authority for the proposition that where the court's power to act depends upon special statutory authority and upon a condition precedent fixed by the statute, it could have no jurisdiction save under such condition.

The above cases are also authority for the proposition that upon a direct attack, presumptions are not indulged to support or supply the jurisdiction of a court of inferior and limited jurisdiction, but its jurisdiction must affirmatively appear on the face of its proceedings.

There is another line of cases, however, such as State v. Fulton, 152 M. A. 345; Ansell v. Bridge Company, 223 Mo. 237; Desloge et al v. Tucker, 198 Mo. 587, 601, which announces the doctrine that a county court is a court of limited jurisdiction. Yet, as to such matters as the statute places exclusively within their jurisdiction, they stand on the same footing as courts of general jurisdiction and the same presumptions are to be indulged in favor of the regularity of their proceedings and the validity of their judgments in relation to their jurisdiction of judgments and orders in courts of general jurisdiction. However, under the rule announced by this line of cases, it would be proper to overcome the presumptions by proof of facts tending to show a state of facts to the contrary.

The record of the county court is bare as to facts that would show that the farm organization was properly in existence as required by the statute. We believe you should rely upon the cases cited above which announce the doctrine that such additional facts must appear in the order or records of the court, and unless they do so appear, they will not be presumed. If the court should adopt the view that such jurisdictional facts are presumed to exist as held under the last line of cases, you would be entitled to prove, if such were a fact, that the organization did not consist of 250 fully paid up members.

Of course, we cannot predict how the court will decide the case. We have pointed out to you certain cases which may be helpful to you in defeating the suit now pending. The last line of cases suggested by us no doubt will be relied upon by the attorneys for the plaintiff, but we believe that you will be able to point out to the court the rule announced in those cases does not apply to the case at bar.

We are returning the copy of the county court record.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

TAXATION: Fact that a foreign insurance company pays tax upon premiums does not excuse it from paying a property tax upon office fixtures located within the State; live stock located within this State on June 1st, is taxable in the name of the holder or agent, though owner is a non-resident.

10-13

October 11, 1933.

FILED
85

Mr. Arch M. Skelton,
Prosecuting Attorney,
Lexington, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"There has been some contention between our assessor and the Metropolitan Life Insurance Company over the question as to whether the county has the right to assess and tax personal property, such as office fixtures and equipment, located in the county and belonging to the Metropolitan Life Insurance Company. Section 5979, Laws of 1931, page 242, with reference to tax on premiums states that insurance companies have been taxed at 2% per annum on all premiums received in lieu of all other taxes. It is kindly submitted for your opinion whether this section exempts the insurance company from paying the tax on such personal property above mentioned to the county.

Another question for your opinion is herewith submitted. Where a tax is paid on live stock in the State of Texas January 1st, 1933, and shipped to a county in Missouri before June 1st, 1933, is such live stock subject to taxation in the county where the property is located in this state? Further, if the live stock above mentioned is shipped here under contract for feeding purposes, the person in whose care and control they are receiving a percentage for his work in feeding them, as such live stock is subject to taxation is the feeder or the owner, who is a non-resident, liable for the tax."

Section 5979, Laws of Missouri, 1931, page 242, provides as follows:

"Every insurance company or association, not organized under the laws of this state, shall, as hereinafter provided, annually pay tax upon the premiums received, whether in cash or in notes, in this state or on account of business done in this state, for insurance of life,

> property or interest in this state at a rate of two per cent. per annum in lieu of all other taxes, except as in this article otherwise provided, which amount of taxes shall be assessed and collected as hereinafter provided: Provided, that 'Fire and casualty' insurance companies or associations shall be credited with canceled or return premiums, actually paid during the year in this state, and with premiums on reinsurance with companies, authorized and licensed to transact business in Missouri, which reinsurance shall be reported by the company reinsuring such business; but no credit shall be allowed any such insurance company or association for reinsurance in companies not licensed to transact business in Missouri."

The above section in various forms has been upon our statute books for many years. As it now stands every foreign insurance company is required to pay a premium tax at the rate of 2% per annum in lieu of all other taxes. Under the various laws dealing with cities of various classes, such cities have a right to exact license tax upon a great variety of occupations including insurance companies. In City of Lamar v. Adams, 90 M. A. 35, the question arose as to the meaning of the foregoing section. The court at page 42 says:

> "By reference to the emergency clause of the act it will be seen that, after all, the main purpose intended by it was to withdraw from the counties, cities and towns, the power which was conferred upon them under the statute of 1899, supra, to tax foreign insurance companies on their annual premiums, or in other words to eliminate from the then existing statutes the power thereby given to the various local authorities to impose taxes on the annual premiums received by them. And these local taxes so abolished were we think, the 'other taxes' referred to in the second section of the act."

In Massachusetts Bonding Company v. Chorn, 201 S. W. 1122, the court had under consideration the identical section which we are now discussing. The court says at page 1124:

> "The payment of the tax entitles the company under the laws of the State to transact this business in its capacity as a corporation. The amount of the tax is fixed at 2% on premiums received whether in cash or in notes in this State on account of business done in this State. That this is a tax upon the business done in this state under the protection of its laws, there can be no doubt."

Again at page 1125, the court says:

> "In addition to what we have incidentally said on that subject in the preceding paragraphs, we will say that

> this tax is not imposed upon property in any sense. The only property right involved in this tax is the right of appellant to acquire property by the exercise of its corporate capacity in this State purchased and paid for by the payment of this tax."

It will be seen from the foregoing that the tax of 2% which the Metropolitan Life Insurance Company pays under Section 5979 on its premiums is not a property tax in the sense that the tax on its office fixtures and equipment would be. The court above says that the above tax entitles the Company to do business in this State. In the City of Lamar case above the court held that the "other taxes" mentioned in the section meant other taxes on its premiums which cities and counties might levy. It was certainly never intended that a foreign insurance company, by the payment of its premium tax, which entitled it to do business in this State, should be exempt from paying taxes upon its tangible property located within your county. Bear in mind this situation is not similar to a tax laid upon the net assets of a corporation, or upon its capital stock where its tangible property is reflected and contained in the net assets of the company. This, as we understand it, is purely a tax upon the premiums, and, while under said section it is no longer possible for cities and counties to exact a tax on premiums from such companies, yet we do not believe that the payment of the premium tax exempts such corporation from the other constitutional and statutory provisions of this State.

Section 6 of Article X of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 7 of Article X of the Constitution of Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Under Section 6 above the Constitution provides what property in this State shall be exempt from taxation. Section 7 above provides that any laws exempting property from taxes other than the

property enumerated in Section 6 shall be void. We do not find any provision in the Constitution or in the statutes of this State that exempts from taxation tangible property such as furniture and fixtures owned by foreign insurance companies and located within your county. Not being expressly exempted it, therefore, must be taxable. In view of Sections 6 and 7 above, any attempt made to exempt from taxation office fixtures of this Insurance Company would be void. It is therefore our opinion that Section 5979, Laws of Missouri, 1931, page 242, does not exempt the Metropolitan Life Insurance Company from paying a property tax upon its office fixtures and equipment when assessed by your county.

Your next inquiry is whether live stock belonging to a person in Texas, upon which a tax was paid January 1st, 1933, would be subject to a tax within this State where such stock was shipped into Missouri for feeding purposes and was found here on June 1st, 1933.

Section 9746, R. S. Mo. 1929, provides as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

The live stock shipped from Texas here before the first of June, 1933, and located here on the First day of June, 1933, was found here on said date, within the meaning of the foregoing Section. So far as this Section is concerned it is immaterial what the contract between the owner and the bailee or holder is. The property may and should be assessed to the holder or agent, regardless of the fact that the owner resides in Texas.

In Leavell v. Blades, 237 Mo. 695, 702, the rule is announced as follows:

> "'The personal property of a resident actually situated beyond the limits of this State, is without its jurisdiction, and cannot be assessed for taxation in this State; but the property of a non-resident is taxable here if it be found situate within the local jurisdiction, whether in the hands of the owner or his agents.' The reasoning upon which that pronouncement is rested appears in the following excerpt: 'In reference to taxation, personal property does not necessarily follow the domocile of the owner, nor does its liability to taxation depend upon his residence, merely, but rather upon the local situation--the situs--of the property. The property is subject to taxation in consideration of the protection which it receives from the laws of the place where it is found, and where the owner or his agent is resident!"

It is therefore our opinion that live stock found in Missouri on June 1st, 1933, is taxable in the hands of the agent, even though the owner is a non-resident and living in Texas. Taxes cannot be assessed against the non-resident owner but should be assessed against the agent in whose hands the property is found.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

FWH:S

APPROVED:

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Attorney General.

BEER LAW:

Quantities of beer stored in county is subject to property tax, even though owner is a holder of a beer permit.

October 13, 1933.

10-14

FILED
85

Mr. Arch M. Skelton,
Prosecuting Attorney,
Lexington, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "This office respectfully requests your opinion of the following questions.
>
> Is beer stored in our county subject to a property tax, the same as a stock of goods in any store? Section 13139z10 of the new beer law states that no county or municipality in this state shall impose any tax on the holder of any permit authorized by this article, for the sale of non-intoxicating beer within its borders. Does this section exempt persons storing beer in quantities in ware-houses from the payment of a property tax on said beer?"

Section 13139z10, R. S. Mo. 1929, provides as follows:

> "No county or municipality in this state shall impose any tax on the holder of any permit authorized by this article, for the sale of non-intoxicating beer within its borders. No municipal corporation shall increase any occupation tax which it now levies, upon any holder of such permit over the amount of such tax imposed upon merchants and dealers in the same or similar lines of business, and not holding any such permit."

Prior to the passage of the Beer Act, Laws of Missouri, 1933, pages 255-267, every municipal corporation, under the general statutes, authorized to license merchants would have had a right to have exacted a license tax on any person engaged in the business of selling beer, either as a distributor, wholesaler or retailer. The Legislature, under Section 13139z10, has plainly expressed its intention that no county or city shall exact a license tax from any holder of a permit, nor should any such county or city increase any occupation tax upon any holder of such permit over the amount of such tax imposed upon merchants in the same or similar lines of business. By the Act the Legislature has reserved to itself the right to

issue or withhold the permit to sell non-intoxicating beer, and has provided for fees and licenses in connection therewith. It is apparent, however, that all the Legislature sought to do by said Section was to restrict to itself the complete authority in the licensing of people in selling non-intoxicating beer. This tax is by no means a property tax, nor does the Legislature any place in the Act seek to exempt from property tax any tangible property, beer or otherwise, owned by a holder of a beer permit.

Section 6 of Article X of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Section 7 of Article X of the Constitution of Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Section 6 above provides what property shall be exempt from taxation, and Section 7 provides that no property other than that enumerated in Section 6 shall be exempted from taxation, and any attempt to exempt any other property should be void. Under the foregoing constitutional provisions an attempt by the Legislature to exempt the tangible property of the holder of a beer permit from taxation would have been unconstitutional.

Section 9742, R. S. Mo. 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Under that Section the Legislature has provided that all personal property shall be subject to taxation except property enumerated in the succeeding section, which makes no exemption in favor of non-intoxicating beer. The Beer Act itself does not exempt from taxation beer stored in your county any more than it exempts trucks or other personal property used by the

beer dealer as a necessary part of his business in operating under the permit issued to him by the state.

It is therefore our opinion that while the Legislature, under Section 13139z10, did withdraw from the counties and cities the right to impose upon the holder of any non-intoxicating beer permit a license or occupation tax, yet the Legislature did not attempt to exempt such holder from taxation properly assessable against him under the constitution and general laws of this state. We think, therefore, that a holder of a beer permit that stores large quantities of beer in warehouses in your county might be assessed upon the beer so stored, the same as any other personal property owned or held by him.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

COUNTY BUDGET LAW:-In 1934 treasurer could be personally liable for
COUNTY TREASURER: payment of protesting of warrant prior to the
date of the filing of the budget, but will not
be personally liable for protesting warrants
presented in 1933.

FILED
85

58

November 10, 1933.

Mr. E. W. Sikes, Treasurer,
Wright County,
Hartville, Missouri.

Dear Sir;

We are acknowledging receipt of your letter in which you inquire as follows:

> "I have been advised that under the last session of the Legislature that there was a law passed that I will be held responsible if I protest any warrants beyond the anticipated revenue for the year of 1934. Will that apply to this year or the year 1933?
>
> I also want your opinion as to whether or not I will be held responsible for protesting warrants to pay salaries and other county expenses that occurred in 1933 in the year 1934 as this county has been a custom to doing."

Laws of Missouri 1933, page 346, Section 8, among other things, provides as follows:

> "* * *The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts dur for prior years, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.
>
> Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

This law is known as the county budget law. Under this law it is the duty of the county courts, at the regular February Term of said courts in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated expenses and receipts for the year beginning January 1, and ending December 31. This law went into effect on July 24, 1933. As the county court, under the law, is not required to make and file its budget until the February Term of the court, we do not see how said law could affect the current year of 1933. No budget was made or required for the year 1933.

Under the provisions of the above section, the county treasurer shall not pay, nor enter protest for the current year until such budget estimate shall have been filed, and if he does pay or enter protest for any warrant before the budget estimate has been filed, he shall be liable on his official bond. We understand the term current year, as used in this section, to apply to the current year after the budget has been put into effect. Section 12171, R. S. Mo. 1929, provides as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

We do not find anything in the Laws of 1933, that repeals the above section. After the budget has been filed with the treasurer, we believe that the treasurer still may protest warrants when there are no funds on hand to meet such warrants. Under the Laws of 1933 above, however, the treasurer is prohibited from paying or protesting any warrant prior to the time that the budget has been filed with him. The statute does not prohibit protesting warrants after the budget has been filed.

While this statute went into effect on July 24, 1933, the statute makes no provision for any budget for the latter half of 1933, having gone into effect after the February Term of the county court of 1933, we believe that the provisions regarding protests do not apply to warrants presented for payment during the year 1933. In 1934, however, if the treasurer pays or protests a warrant before the budget is filed with him, then he becomes personally liable. However, after the budget has been filed with him he may protest warrants under Section 12171 without becoming personally liable.

It is therefore the opinion of this Department that under the county budget law the county treasurer would be personally liable for the payment or protesting of any warrant in 1934, before such time as the budget is filed with him. After the budget is filed he may protest a warrant under Section 12171 in the year 1934, without personal liability. Since, under the budget

law, it is not contemplated that a budget shall be made for 1933, and no budget will be made and filed until the February Term, 1934, the treasurer would not be personally liable for protesting warrants during the current year of 1933.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

IN RE: WOULD AN AGREEMENT ENTERED INTO BY BUSINESS MEN AS TO TIME FOR OPENING AND CLOSING OF STORES; ALSO NUMBER OF EMPLOYEE WORK HOURS PER WEEK BE CONTRARY TO EXISTING STATE LAWS?

8-2

August 1, 1933.

FILED
86

Mr. L. E. Slate, Secretary,
The Columbia Chamber of Commerce, Inc.
Columbia, Missouri.

Dear Sir:

You have submitted to this department the following inquiry:

> "Some of the business men of Columbia are discussing the possibility of forming a local business men's code of fair practice that will conform to the requirements of the National Industrial Recovery Act and at the same time keep in harmony with existing state laws.
>
> "Before going further with the matter, however, we would like to know if an agreement entered into by business men of Columbia in which (1) all business concerns agree to open and close their stores at the same time, (2) all enter into an agreement concerning the number of employee hours work per week, would be contrary to any existing state laws? In the event we are not prohibited from making such an agreement voluntarily, do we have the power under the state laws to enforce such an agreement?"

It is the opinion of this department that if the business firms of Columbia agree to open and close their stores and at the same time agree concerning the number of employee hours work per week and nothing more, the Anti-Trust Laws of Missouri would not be violated.

It is the position of this department that the National Industrial Recovery Act does not repeal the Anti-Trust Laws of Missouri.

This department has not challenged the right of business men so far to join in the movement of the Federal government under the National Industrial Recovery Act for code of fair practices in business. This department declines to pass upon any specific code or to advise in advance whether same would or would not violate the laws of the State of Missouri.

The National Industrial Recovery Act provides that no code shall make discrimination against small dealers or operators and shall not oppress same and shall make discrimination against no one and shall not create a monopoly nor approve of monopolistic practices. The spirit of N. I. R. A. seems to be opposed to monopolies and combinations and trusts which stifle trade and business; but, how these codes may work out in actual operation, no one can tell in advance.

It is the opinion of this department that it is doubtful if an agreement as to opening and closing time and limiting hours of employee's work would be enforced by court.

Very respectfully yours,

EDWARD C. CROW
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

ECC/AJ

LABOR DEPARTMENT:-Missouri State Nurses Association is not employment agency within Section 13190, R. S. Mo. 1929.

December 16, 1933.

FILED
86

Messrs. Smith & Pearcy,
Suite 1554 Bell Telephone Building,
St. Louis, Missouri.

Gentlemen:

We are acknowledging receipt of your letter in which you offer suggestions as to why the Missouri State Nurses Association should not come within the provisions of the labor law requiring a license for employment agencies. You ask for a ruling upon this feature by this Department.

Section 13190, R. S. Mo. 1929, provides, among other things, as follows:

> "No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection.* *"

It appears from your letter and the by-laws that the object of this Association is to establish and maintain ethical standards among nurses; to promote the educational and social standing of the nursing profession; to conduct a Central Directory for Registered Nurses; to operate a club house and for the general well-being of the members of the Association. Dues are required from members of the Association.

It appears that this incorporated Association does maintain a Directory for Registered Nurses, and that one of the objects of the Association is to assist the members in finding employment. No fee is required from the nurses by the Association as a perquisite to finding employment, nor does the applicant for help pay any compensation to the Association for supplying their demand for a nurse. The fee entitles the nurse to full membership in the Association and the Association, in consideration of that fee, furnishes a great list of services and advantages to the nurse which are separate and distinct from the service of assisting in finding employment for them.

As we interpret the above section we construe it to mean that a license shall be paid by agencies whose substantial business is furnishing employment to applicants and which

agencies receive a fee for the purpose of furnishing such employment. We do not believe that it was within the contemplation of the law-makers that organizations or associations such as yours, who furnish a great variety of advantages to its members, should come within the provisions of this Section. It is true that assisting in the finding of employment for nurses is one of the objects of this association but it appears that it is only incidental. The same may be said of many voluntary organizations existing among various classes of persons. We believe that the whole purpose of the association must be considered in determining whether or not they are an employment agency, and that the mere fact alone that they assist in finding employment will not bring it within the purview of the above section.

We are therefore of the opinion that the Missouri State Nurses Association is not an employment agency within the purview of the above section, and that such being true they should not be required to pay a license fee as an employment agency.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

SCHOOLS; Rolla School of Mines, handling of funds.

June 1, 1933

FILED
87

Hon. A. A. Speer, Chairman
Executive Committee
Missouri School of Mines & Metallurgy
Curator University of Missouri
Jefferson City, Missouri

Dear Sir:

We wish to acknowledge your letter of May 29th, 1933, requesting an opinion from this department as follows:

"Under the Law the Board of Curators of the University of Missouri is required to advertise for bids for a depository for the funds of the Missouri School of Mines and Metallurgy at Rolla, Phelps County, Missouri, for the ensuing year.

The law requires that bids shall be limited to banks within the county where the institution is located. There is, at this time, only one bank in Phelps County, the Rolla State Bank, and it is under restrictions.

We are advised that the Rolla State Bank will not make a personal bond for the use and custody of the funds of the institution as required by law.

In the event the Rolla State Bank should not submit a bid for funds, or, if it should refuse to secure the funds as required by law, or if the bank should fail to legally qualify in any other respect, what will be the alternative? Can the Curators legally select a depository in some other county or in St. Louis?

Trusting we may have your opinion, I am"

Article 21 of Chapter 57, Revised Statutes of Missouri, 1929, provides for a school of mines and metallurgy at Rolla, and that same shall be as a distinct department of the University of the State of Missouri. Said article further provides for a treasurer for the Rolla School to handle its funds and divorces such funds from the State University's funds (Sections 9678-9682 inclusive) i.e. makes the provision for two separate and distinct funds.

Article 20 of Chapter 57, Revised Statutes of Missouri, 1929, establishes a State University and the government of such invested in a board of curators. Said article further provides the duties and powers of the board of curators.

Section 8666 R. S. Mo. 1929, provides for the establishing and creating in the treasury department of this State funds in which a "University" fund is included. This section further provides that when any moneys are paid into the state treasury that it shall be placed to the credit of the fund to which it belongs.

Section 8676 R. S. Mo. 1929, provides that it shall be the duty of the board of curators to receive bids for depositories for funds, that it has the use or custody of, on or before the first Monday of July of each odd numbered year. And provides for a notice that bids to be received shall be published in a newspaper twenty days before such meeting.

Section 8677-78 R. S. Mo. 1929, provide the methods for receiving the bids, and the selection of a depository.

Section 8679 R. S. Mo. 1929, provides that a bond shall be given within ten days by the depository after receiving notice of its selection; the amount of the bond; the qualifications of the sureties; and a further provision for a surety bond.

The above sections provide the manner in which the funds of the school of mines and metallurgy are to be handled. You will note that it is the duty of the board of curators to select a depository. The purpose and intent of the law being that funds of the school be safeguarded. The legislature intended that the looking after the funds of the school would be given the serious attention and caution of the Board of Curators, and the legislature prescribed a rigid procedure for the handling of such funds. It provided (1) that proposals should be received so that each bank in the city, town or county in which such institution was located would have an opportunity to bid for the funds, and interest would also be paid

to the funds by the banks for the privilege of having the funds deposited therein. (3) That the school money would be protected by a bond given by the banks receiving the funds.

You ask if the only bank in the county wherein Rolla school of mines is located refuses to submit a bid then what may the board of curators do towards securing some bank in another part of the state to handle such funds?

The statutes, supra, specifically limits depositories to the city, town or county in which such institution is located. However, if the banks in such county will not submit proposals for the funds then the board of curators may under section 8678 select a temporary depository. This provision reads as follows:

> "If, for any reason, no selection of a depository is made at the time fixed by this article the board of managers by whatever name called may, at any subsequent time, after twenty days' notice, receive bids and select a depository or depositories in the manner herein provided, in which event the selection shall only be for such period of time as may intervene until the next regular period for the selection of such depository."

The statutes provide that a newspaper notice shall be given and that it is the duty of the Board of Curators to receive proposals from banks in the county in which the school is located for the funds. Thus if no proposals are received or submitted by the banks in the county in which such institution is located, and the statute is silent thereon, it would follow that the Board of Curators would have to make some arrangements for the handling of the funds and the place where same would best be protected would be the only logical place for their deposit. In other words, after the Board complied with the sections of the statutes, supra, and no banking institution in that county met the requirements of said sections, then the Board of Curators would have the right to select a depository in some other county that would meet such requirements. However, before the selection of a depository in another county, twenty days notice must be given and proposals received in the same manner as provided for the receiving of bids in the first instance from banks located in counties in which such institution is located.

The Board of Curators must follow the statutes, but if it is impossible then they have the right to use reasonable discretion.

In the case of State ex rel. Thompson, State Treasurer, v. Board of Regents for North-East Missouri State Teachers' College, 264 S. W. 688 l.c. 700, the Supreme Court in Banc, in writing its opinion held the following:

> "While in a sense the board is an agent of the state with defined powers, the importance of its duties with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. This is inevitably true, first, because of the difficulty in framing a statute with such a regard for particulars as to cover every exigency that may arise in the future; and, second, because a restriction of the board's powers to the letter of the law would destroy its efficiency, and to that extent cripple the purpose for which the institution was created." " " ""

From the above and foregoing it is the opinion of this department that the board of curators may select a depository in some other county or in St. Louis City, if after complying with the terms of the statutes, hereinbefore set out, they fail to receive proposals or reject all proposals from banks located in such city, town or county where such institution is located. And that in the selection of a depository in some other county or in the City of St. Louis the board shall follow the same procedure and require a bond that complies with the statute.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED:
Attorney General.

J.H:MM

Accounts in State Auditor's office with various departments must be carried according to the appropriations made in House Bill 661, and it is not permissible to group these various divisions for which appropriations are made and carry the aggregate appropriation made for each department in one item.

June 7, 1933. 6-14

FILED
87

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

Your letter reads as follows:

> "Under H.B. 661, etc. appropriating funds to the various departments, we have four major divisions as follows:
>
> A-Personal Service
> B-Additions
> C-Repairs and Replacements
> D-Operation
>
> Q-Is it necessary for us to carry our accounts with the various departments according to these four major sub-divisions or would it be permissable to group them and carry the aggregate appropriation made each individual department as one item?"

This department assumes that the order in which you set out the "major divisions" as you term same, is the order in which same appears in H.B. 661, same being the general appropriation bill. Section 19, Article X of the Constitution of Missouri is as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and

and expenditures of all public money shall be published from time to time."

It will be observed that this section provides "and every such law making a new appropriation **** shall distinctly specify the sum appropriated, and the object to which it is to be applied." This language is very clear and definite and can hardly be misunderstood. In order to understand the full force and effect of this section of the Missouri Constitution (Sec. 19 of Art. X), one must go back to the reason therefor and the origin thereof. The following extract from 4 Corpus Juris, p. 1460 gives a concise and accurate history of the constitutional provision Section 19 of Article X in our State Constitution, and a similar one which will be found in the constitutions of most of the states:

> "The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parliament of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. ..... When our governments, state and federal, came to be established, the requirement of legislative appropriations was adopted from England, along with many provisions having in view the preservation of the liberties of the people, and our own state constitution in the provisions quoted is somewhat more strict and more in accordance with the English practice than either the federal constitution or the constitution of most of the other states." State v. Moore, 50 Nebr. 88, 94, 69 N.W. 373, 61 AmSR 538. To same effect Humbert v. Dunn, 84 Cal. 57, 24 P. 111; Ristine v. State, 20 Ind. 328; State v. Eggers, 29 Nev. 469, 91 P. 819, 16 LRANS 630; State v. King, 108 Tenn. 271, 67 S.W. 812; State v. Burdick, 4 Wyo. 272, 33 P. 125, 24 LRA 266."

Two objects were sought by our English ancestors in obtaining the provisions of what is Section 19, Article X in our constitution embedded in the English law, to-wit: (1) to control the amount of taxation, and (2) to control the expenditure thereof. The amount was sought to be controlled by putting the power in the hands of parliament and taking it away from the King, and the expenditures were to be controlled by providing the specific object for which the money should be spent.

In the light of this history of the origin of these constitutional provisions found in the state constitutions of the United States, the reason for the existence thereof, and the importance of same, are outlined clearly against the background of the struggle in England between the people and the exercise of uncontrolled power in the person of the King.

Many of the courts of this country have discussed this question and the effect of these provisions similar to Section 19 upon the expenditure of funds through state governments. Our own court in many decisions has construed the provisions of Section 19, Article X, but none that we are able to find upon this precise point submitted by your letter. Among other things our court held in State ex rel v. Gordon, 236 Mo. 142 that although a tax might be legally levied and collected for a specific purpose, and thereby constituting a special fund, yet it could not be paid out except by regular appropriations.

In State ex rel v. Seibert, 99 Mo. 122, the court held in a Reappropriation Act, the object of the appropriation must be stated , and it is not sufficient to refer to the first appropriation act for that purpose.

In State ex rel Holladay, 66 Mo. 385 Sec. 19 of the Constitution is held to be self-enforcing. Our court holds with reference to this section that it forbids the payment of money from the state treasury received from any source whatever, or of any funds under its management except in pursuance of regular appropriations made by law, and so, in State ex rel Publishing Co. v. Hackmann, 314 Mo., l.c. 34 and 35, our Supreme Court held:

> "The fact that the separate appropriation acts for the support of the State Highway Commission mention printing as an item to be paid for out of the moneys so appropriated is no reason why the commission should not conform to the statute authorizing and regulating printing for the executive departments. An appropriation does no more than to set apart the amount and designate the purpose for which the designated sum may be expended, and is immaterial in determining the manner in which it shall be expended, and cannot impair a general statute prescribing that it

> shall be expended under the authority and regulation of another commission.
>
> * * * * * * * * * *
>
> The money out of which the State Highway Commission is maintained is public or state revenue. Whether it be called motor-vehicle-registration fees, or license fees, or a tax, or by any other name, it is a tax levied by the State upon the right of motor vehicles to use the public highways, is collected by the State, and paid directly into the State Treasury, and all of it that can be used for maintaining the commission is subject to legislative appropriation, just as is other state revenue.
>
> * * * * * * * * * * *
>
> The State Auditor is expressly prohibited by plain statute from paying a bill created by the State Highway Commission for printing done by a company which does not hold a contract with the State for doing the printing for the executive departments; and with whatever company a contract for doing the State printing may be made, the State Auditor cannot pay its bill until the Legislature first appropriates money with which to pay it.
>
> Nothing in Chapter 89, Revised Statutes, 1919, as amended in 1921, regulating public printing, attempts to prescribe the particular fund out of which claims for printing and stationery may be paid, but it simply prescribes that such claims shall be paid out of any moneys in the Treasury appropriated for that purpose; and in that respect the chapter is constitutional, and it therefore contemplates that the Legislature will biennially make appropriations to pay such claims, and is not restricted to making appropriations out of the general revenue fund for the payment of claims for public printing and stationery, but may require the cost of printing for the State Highway Commission to be paid out of the money appropriated for its maintenance."

We see here the Supreme Court says that the appropriation sets apart the amount of money and <u>designates the purpose</u> for which the designated sum may be spent. Having taken this review of the history of Section 19, and examining some of the many decisions of our Court upon said section, we are naturally led up to the inquiry: what constitutes an appropriation within the provision of Section 19 prohibiting payment without one?

An excellent definition of the meaning of the word "appropriation" as the word is used in constitutional provisions such as Section 19, is found in Ristine, Auditor, v. the State of Indiana, 20 Ind. 338, as follows:

> "Appropriation, as applicable to the general fund in the treasury, may, perhaps be defined to be an authority from the Legislature given at the proper time, and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the State."

We see in this definition stress is laid on the specification of the object for demands against the state and that to be an appropriation the Legislature must specify the objects for which the money is to be spent. The following different definitions that have been given by various courts will be found in 4 Corpus Juris, page 1460 under the title of "appropriation of funds", as follows:

> "An appropriation of funds is an authority from the legislature, given at the proper time and in legal form to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the state; the act of the legislature in setting apart of assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors; a setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money and no more for that object, and for no other; the setting apart of a portion of the public funds for a public purpose; the setting apart of public moneys by legislative vote or enactment to be applied to specific objects of public expenditures; the legislative authorization prescribed by the constitution that money may be paid out at the treasury; the setting aside by congress of a designated amount of public money for a designated purpose."

And on the same page in the same book (4 C.J. 1460), a definition of "Appropriation Bills" is given as follows:

> "Annual statutes by which the legislative branch of the government regulates the manner in which the public money voted at each session is to be applied to the various objects of expenditure."

The definitions given, it will be noticed, all declare that the money authorized, and so much as is authorized, and no more, can be

expended for the object named in the appropriation bill, and for no other.

One of the leading cases in more recent times upon this construction of the constitutional provision similar to Section 19 is that of State v. Moore, 50 Nebr. p. 88. The facts were that an Act of the Nebraska Legislature provided bounties for sugar manufactured in the state from beets, sorghum or other sugar yielding cane or plants grown in Nebraska at the rate of $.005/8 per pound, and another provision was that persons establishing after the passage of the Act additional factories should receive an additional bounty of $.003/8 per pound. Section 8 of the Act provided that when any claim arising under this Act was filed, verified and approved by the Secretary of State as herein provided, he should certify the same to the Auditor of the State who should draw a warrant upon the treasury for the amount due thereon payable to the party or parties to whom said sum or sums are due. The Auditor of the state refused to issue a warrant for $805.00 first, because there was no lawful appropriation out of which such bounty could be paid; and second, that if there were such an appropriation, it would be in excess of the power of the legislature to make such expenditures, as the power to appropriate had been already exhausted. It was conceded the legislature had made no general appropriation act relative to this subject outside of the sections hereinabove cited, but the claim was made by claimant, sugar beet grower, that in the provision quoted above from the Nebraska Legislature's enactment there existed an appropriation wherewith to pay the bounties created. Section 19, Article III of the Nebraska Constitution provided as follows:

> "That each legislature shall make an appropriation for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriation shall end with such fiscal quarter."

By Section 3 of Article III it is provided that legislative sessions shall be biennial. By Section 22 of Article ''' it is provided that

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the Auditor thereon, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or separate resolution."

This question was presented under this state of facts as to whether or not the act of the legislature of Nebraska was an appropriation

within the meaning of the constitutional provision. It will be observed that the Nebraska Constitution REQUIRED A SPECIFIC APPROPRIATION JUST AS OUR MISSOURI CONSTITUTION REQUIRES A SPECIFIC APPROPRIATION. The Nebraska Court held that the act of the Nebraska Legislature above quoted from constituted no appropriation, and said:

> '"Having in view the origin and history of appropriations, as well as the general lexicographic meaning of the words 'to appropriate', is to set apart from the public revenue a certain sum of money for a specified object in such a manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other."'

And in the case of Black and White Taxi Company v. Standard Oil Company, 218 Pac., l.c. 148, the Supreme Court of Arizona said that an appropriation is

> "The setting aside from the public revenue of a certain sum of money for a specified object in such manner that the executive officers of the government are authorized to use that money and no more for that object".

And the following cases are cited to sustain that definition of an appropriation:

State v. Moore, 50 Nebr. 88, 69 N.W. 375;
Clayton v. Berry, 27 Ark. 129;
Stratton v. Green, 45 Cal. 149;
State v. LaGrave, 23 Nev. 25, 41 Pac. 1075;
Proll v. Dunn, 80 Cal. 220, 22 Pac. 143;
State v. Kinney, 9 Mont. 389, 24 Pac. 96;
State v. Lindsley, 3 Wash. 25, 27 Pac. 1019;
State v. King, 108 Tenn. 271, 67 S.W. 812;
Ristine v. State, 20 Ind. 328;
Campbell v. State, etc., 115 Ind. 591, 18 N.E. 33;
Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758;
Henderson v. Board of Commissioners of State Soldiers and Sailors Monument, 129 Ind. 92, 38 N.E. 127.

We see, therefore, that an appropriation to be valid must be (1) for a specified definite amount and must be paid within the time limited within the Constitution (which in Missouri is two years); and second, it must be for a specified object which must be named in the appropriation. After these two conditions have been met, the third legal condition is that the money so appropriated can be used for no other purpose except that named in the appropriation act.

In line with this constitutional provision and the decisions of the courts are the statutory provisions of Missouri with reference to the State Auditor and Treasurer. Section 11421 R.S. of Mo. 1929 provides:

> "No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

Reading this section in the light of the decisions above referred to, this section means that unless an appropriation bill has been passed specifying the object for which, and the amount thereof, the money may be used, the Auditor is prohibited from drawing a warrant on the Treasurer, and likewise, unless the amount is specifically named in the law making the appropriation and the object thereof is specifically named therein, the Treasurer is prohibited from paying same; and the third legal condition is that the Auditor cannot draw a warrant, nor the Treasurer pay one, for any other object than that named specifically in the appropriation bill.

Section 11425 R.S. of Mo. 1929, with reference to the duties of the State Treasurer, provides:

> "The State Treasurer shall receive and keep as provided by law all the moneys of the state ****; disburse the public moneys upon warrants drawn on the treasury according to law, and within the time limited in the Constitution, and not otherwise. ****"

Section 11429 provides:

> "Whenever a warrant shall be presented to the treasurer it shall be his duty to pay the same in lawful money, or by giving a check on some depository of state funds, attesting the same by affixing his seal of office to said check; provided, said warrant is properly drawn against a legal appropriation, and does not exceed the amount thereof; and no money shall be drawn from a depository of state funds in any other manner."

Section 11404, relative to duties of State Auditor, among other things, provides:

> "***Third, express in the body of every warrant which he may draw upon the treasury the particular fund, appropriated by law, out of which the same is to be paid. ***"

We see in these sections the same principle of law carried out that the courts enforce in construing constitutional provisions with reference to appropriations, to-wit: that the appropriated sum must be for a definite amount---that the appropriation bill must specify the specific object for which it is appropriated---and that the Auditor is not authorized to draw, nor the Treasurer to pay, any warrant unless same is to be paid for the object and purpose specified in the appropriation act. The same reason actuated the Legislature in enacting these legislative provisions that actuated the framers of the Constitution of Missouri placing Section 19, Article X in the Constitution of Missouri, and that is to control the amount of the expenditures and the purpose for which the expenditures are made.

Applying these principles enunciated by the Court to Section 19, Article X of the Constitution and to H.B. 661, it is the opinion of this department that the accounts in the Auditor's office should be so kept that same will disclose accurately that the money appropriated for different purposes was used only for those specific purposes and paid to the department or departments provided for in the appropriation act, and that the accounts in the Auditor's office should show affirmatively that none of the money appropriated was paid out for any other object than that specified in the appropriation bill, and if paid out was paid for the specific object named in the act making the appropriation.

It is the opinion of this department that it would not be permissible for you to group the various items of appropriation and carry the aggregate appropriation made to each individual department as one item.

Respectfully yours,

EDWARD C. CROW

APPROVED:

ROY McKITTRICK,
Attorney General

ECC:AH

APPROPRIATION: Sec. 2-a of House Bill 645 is unconstitutional.
BLIND PENSION FUND: Surplus of fund after payment to pensioners and providing for adequate support of Commission must be transferred, if at all, to Public School Fund created under and by virtue of Sec. 6 of Art. XI

June 10, 1933.

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated May 24, 1933, which is as follows:

> "H. B. No. 645, passed by the last Session of the Legislature, set aside one-third of the State Revenue into the Public School Moneys Fund, and also transferred and appropriated from the Blind Pension Fund to the support of the Free Public Schools.
>
> The portion of this Bill in which I am particularly interested is Sec. 2A, transferring $700,000 from the Blind Pension Fund to the Public School Fund.
>
> Q - "Can this Transfer be legally made?"

It is the opinion of this department that the $700,000 referred to in House Bill numbered 645 cannot be legally transferred from the Blind Pension Fund to any fund other than the Public School Fund created under and by virtue of Sec. 6 of Art. XI of the Constitution of Missouri. It is also the opinion of this department that House Bill 645 is not sufficient to transfer said $700,000 from the Blind Pension Fund to the Public School Fund referred to above.

The opinions expressed above are predicated upon the following reasons:

> Sec. 47 of Art. IV of the Constitution of Missouri provides for the Blind Pension Fund in the following language:
>
> "That the General Assembly of the State of Missouri shall cause an annual tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation of the taxable property of the State to be levied for the purpose of providing a fund

> to be devoted in the manner provided by law to the pensioning of the deserving blind. If any balance shall exist in such fund after the deserving blind have been pensioned, then the same, or so much thereof as may be necessary, may be used for the support of the commission for the blind. And if there shall be a balance in said fund after the blind have been pensioned and the commission for the blind has received adequate support, then the same shall be transferred to the PUBLIC SCHOOL FUND. Said tax shall be levied and collected annually in the same manner as other State taxes are levied and collected, and such fund shall be subject to appropriation for above purposes by the General Assembly."

Under the above section of the Constitution it appears that if there occurs a balance in the Blind Pension Fund after the deserving blind have been pensioned and the Commission for the Blind has received adequate support, then such balance, if any, must be transferred to the "Public School Fund."

The question then presented is: What is meant by "Public School Fund" as used in the above quoted part of Sec. 47, Art. IV of the Constitution?

It is an elementary rule of construction that all writings, whether they be laws, deeds, wills, contracts or constitutions, must be construed as a whole and not in detached fragments or isolated sections. (See: State v. Adkins, 225 S. W. 981, 284 Mo. 680; State ex rel City of Carthage v. Hackmann, 229 S. W. 1078, 287 Mo. 184)

Under the above rule of consturction we find on examination of the entire Constitution that the only reference made elsewhere to a "Public School Fund" is to be found in Sec. 6 of Art. XI of the Constitution; hence, we construe the fund referred to in Sec. 47 of Art. IV as the "Public School Fund" to be the fund created under and by virtue of Sec. 6 of Art. XI which, as we will hereinafter disclose, is a permanent school fund from which only the income therefrom can be expended.

Possibly it could be argued that the above reasoning does not apply in view of the fact that that part of Sec. 47 of Art. IV which provides for the Blind Pension Fund was not adopted until November 2, 1920, whereas, Sec. 6 of Art. XI was adopted in 1875; but in our opinion this argument is unavailing for the reason that at that time (and even now) no other school fund provided for either by statute or by constitution bore the name "Public School Fund" except Sec. 6 of Art. XI heretofore considered. (For an

excellent history of school funds in this state, we refer you to an opinion rendered by the former Assistant Attorney General, Walter E. Sloat, dated January 2, 1933, which we understand is in your files at the present time; but note, however, that said opinion is upon a different inquiry from that here made and involves different principles.)

Since the "Public School Fund" mentioned in Sec. 47 of Art. IV of the Constitution (Blind Pension Section) is the same fund as created in Sec. 6 of Art. XI, then the surplus moneys, if any, contained in the Blind Pension Fund must be transferred, if at all, to the school fund referred to in said Sec. 6 of Art. XI, and no other.

Is House Bill 645 legally sufficient to transfer the $700,000 therein mentioned to the "Public School Fund" created under and by virtue of Sec. 6 of Art. XI? Sec. 2-a of House Bill 645 is as follows:

> "There is hereby set aside to the credit of the public school fund and appropriated to the support of the free public schools of the state for the period beginning March 1,1933, and ending March 1, 1934, the sum of Seven Hundred Thousand Dollars ($700,000.00) of the balance remaining in the state treasury to the credit of the fund for pensioning the deserving blind, as such fund has been accumulated under the provisions of Section 47, Article IV, of the Constitution of this State, and Article 1, Chapter 51, of the Revised Statutes of Missouri, 1929, which amount of Seven Hundred Thousand Dollars ($700,000.00) is in excess of the requirements of said section 47, Article IV, of the Constitution and Article 1, Chapter 51. Revised Statutes of 1929, to pension the deserving blind and to give adequate support to the Commission for the Blind, and is available under the terms of said section 47, Article IV of the Constitution for purposes herein set forth. Said funds hereby appropriated shall be apportioned and distributed for the support of the free public schools for the period herein specified by law."

It is apparent from the above section that the Legislature intended to transfer said amount of money from the "Blind Pension Fund" to the "Public School Fund" so that the whole of said fund could be apportioned to the various schools of the state between March 1, 1933 and March 1, 1934.

It is the opinion of this department that the Legislature had no right to provide that moneys properly belonging to the "Public School Fund" could be used in the above manner. Sec.6 of Art. XI providing for the "Public School Fund" is as follows:

> "The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a PUBLIC SCHOOL FUND; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, AND FOR NO OTHER USES OR PURPOSES WHATSOEVER."

Under the above section of the Constitution and the cases sonstruing similar sections of the Constitution (Railroad v. Gildersleeve, 165 Mo. A., l. c. 379), it was the intention of the framers of the Constitution to provide a permanent fund-- a fund, the corpus of which was to remain intact and not to be dissipated, ie., only the income therefrom was to be expended. Therefore, that part of House Bill 645 providing for the apportionment of the $700,000 between March 1, 1933, and March 1, 1934 is contrary to the Constitution; and under such circumstances the Constitution, of course, prevails. (See: State ex rel Bradshaw v. Hackmann, 276 Mo. 600.

Notwithstanding the fact that the Legislature in said House Bill has used the words "Public School Fund", it is the opinion of this department that said House Bill is ineffectual to transfer the said sum of $700,000 to the "Public School Fund" mentioned in Sec. 6 of Art. XI of the Constitution, and is ineffectual for any purpose.

In 59 Corpus Juris, p. 639, it is said:

> "The effect of judicial decisions declaring particular statutes unconstitutional and void has been discussed elsewhere in this work. A statute may, however, be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected, and this rule applies, even though the constitutional and unconstitutional parts are in the same section of the act; but if the parts are inseparably connected with each other the entire statute will be held void."

A test for determining whether or not a statute is severable within the meaning of the above rule of law is given in the same volume of Corpus Juris on p. 642, as follows:

> "Whether the valid or invalid parts of a statute are independent and separable, or inter-dependent, is a question of construction and of legislative intent, and in determining the question the rule is that if, when the invalid part is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained to that extent; ***** In other words, the whole act will be declared invalid where the unconstitutional part is so connected with the remainder or with the general scheme, that it cannot be stricken out without making the legislative intent ineffective, or is of such import that, without it the other parts would cause results not contemplated or desired by the legislature, or is the consideration and inducement of the whole act. ******"

The above principles enunciated in Corpus Juris have been adopted in this state.

State v. Gordon, 188 S. W. 160, 268 Mo. 713;
State v. Lollis, 33 S. W. (2d) 98.

Applying the foregoing principles to the section of the statute here under consideration, it is the opinion of this department that said part of the statute providing for the unconstitutional

restraints upon the use of the fund involved is so much a part of the expressed intention of the Legislature and so inter-mingled with that part of the section providing for the transfer of the money from the "Blind Pension Fund" to the "Public School Fund" as to render the entire section unconstitutional. In other words, it is our opinion that the Legislature did not intend to transfer the $700,000 into the "Public School Fund" as that term is used in Sec. 6 of Art. XI of the Constitution due to the restraining provision heretofore considered, and hence, the entire section under the decisions heretofore cited is unconstitutional, void, and of no effect.

In rendering the above opinion, we are not unmindful of the great need for funds on behalf of our public schools, but we find ourselves bound by the principle correctly expressed in State ex rel Elsas v. Missouri Workmen's Compensation Commission, 2 S. W. (2d) 796, 318 Mo. 1004, as follows:

> "Nor can we change the Constitution by mere force of our opinion, just because some hardships may be occasioned by following the Constitution."

Respectfully submitted,

POWELL B. McHANEY,
Assistant Attorney General.

APPROVED:

Roy McKittrick,
Attorney General

PBM:AH

BANKS: SCHOOLS: Board of Curators of Rolla School of Mines may withdraw cash from depository for emergency purposes and keep the same as a trust fund in a bank at Rolla, Missouri, to be re-delivered on order of the treasurer or board.

July 13, 1933

FILED
87

Honorable A. A. Speer
Chairman Executive Committee
Rolla School of Mines,
Jefferson City, Missouri

Dear Mr. Speer:

This Department acknowledges receipt of your letter dated July 7, 1933, as follows:

"The University of Missouri has designated the Central Missouri Trust Company as depository for the Missouri School of Mines and Metallurgy at Rolla, Missouri. When the bond of the Central Missouri Trust Company shall have been approved, the funds of the institution will be deposited with it.

In order to facilitate the payment of current local bills at Rolla, we desire that the treasurer of the Missouri School of Mines and Metallurgy shall have available at Rolla not exceeding $5,000 in cash. There is only one bank in Phelps County, where Rolla is situated, and it is under restrictions at the present time.

Can the treasurer of the Missouri School of Mines and Metallurgy legally draw funds from the depository, the Central Missouri Trust Company at Jefferson City, and leave in a special trust account with the restricted Rolla State Bank such sums as may be required from time to time to meet the local demands of the institution, these sums to be kept segregated from all other funds of the Rolla State Bank and paid only upon order drawn by the treasurer of the Missouri School of Mines and Metallurgy, without legal liability upon the treasurer or the Board of Curators?

If and when the restrictions of the Rolla State Bank at Rolla, Missouri, shall have been released, may we continue the same authority of the treasurer of the School of Mines and Metallurgy to withdraw from the depository at Jefferson City a similar amount of funds not in excess of $5,000 for convenience in paying current local bills at Rolla?

Thanking you for the favor of your opinion, I am."

We understand from your letter it is necessary that your treasurer have cash on hand to the extent of $5,000.00 to meet emergency payments by the Missouri School of Mines and Metallurgy at Rolla, and your depository being at Jefferson City, Missouri, and we understand that you intend to keep the identical money drawn out of your depository in vaults of the Bank of Rolla and that you do not intend to create the relation of debtor and creditor between your treasurer and the Rolla Bank, and upon these assumptions we see no reason why you can not handle the fund in the manner outlined in your letter as the Rolla Bank would simply be an institution of safe-keeping or bailee so far as you are concerned, and we do not think that such handling of the funds would change the legal liability of your treasurer or board of curators of the institution in any respect.

We suggest the following form of receipt to be taken by your treasurer from the bank:

"Received of _____, as treasurer of Missouri School of Mines and Metallurgy at Rolla, Missouri, the sum of _____ DOLLARS in cash, the identical money to be held by the undersigned bank as a trust fund and to be redelivered upon the order of such treasurer".

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

_____
Acting Attorney General.

GL:LC

COSTS:

Informant in insanity matter may be required to give bond for costs under Section 1237 if non-resident before suit is commenced, and if a resident and unsettled in his affairs, may be required to give security under Section 1238 after suit is commenced.

August 3, 1933.

8-10

FILED
87

Mr. J. E. Smith,
Judge of Probate,
Sedalia, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of July 28, 1933, in which you inquire as follows:

"Will you please give me an opinion as to whether or not a Probate Judge has the power and authority to compel an informant in an insanity matter to give bond or security for costs, before issuing process to the person alleged to be of unsound mind?

Will appreciate your opinion in the above matter."

Section 1237, R. S. Mo. 1929, provides as follows:

"In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators or guardians, qui tem actions, actions on penal statutes when the penalty is given to the informer, and in all civil cases when the plaintiff or person for whose use the action is to be commenced shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced shall, before he institutes such suit, file with the clerk of the court in which the action is to be commenced the written undertaking of some person, being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which said suit is brought, a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time, whenever the court may deem proper, and by its order of record require, the court, on motion, may dismiss the same, unless such undertaking be filed or sum of money be deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein."

Section 1238, R. S. Mo. 1929, provides as follows:

45-8.090

"If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money deposited before the motion is determined."

Under Section 1237 above, if the informant be a non-resident he may be required to give bond before he institutes such suit. If, however, the informant is not a non-resident or does not become a non-resident, the court, after the commencement of any suit, if the court is satisfied that the informant is unsettled in his affairs, may on motion of the defendant or any officer of the court, rule the informant to give security for costs, and make an order accordingly. A failure to comply with the order requiring security would warrant the dismissal of the action.

Section 455 R. S. Mo. 1929, provides as follows:

"If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this article, in which case the costs shall be paid by the county."

Under Section 455, if the alleged insane person is discharged, the cost shall be paid by the person at whose instance the proceeding was had, unless the said person be an officer. It is apparent from Section 455 that the costs must be paid by the informant when the alleged insane person is discharged; such being true, the Probate Court, under general authority conferred in Sections 1237 and 1238, would have authority to require a bond or security according to the facts in the case. Section 724 R. S. Mo. 1929, provides

as follows:

> "Suits may be instituted in courts of record, except when the statute law of this state otherwise provides, either, first, by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action, and the remedy sought, and by the voluntary appearance of the adverse party thereto; or, second, by filing such petition in such office, and suing out thereon a writ of summons against the person or of attachment against the property of the defendant. The filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit."

Under Section 724 a suit is not commenced until the petition is filed and the defendant enters his voluntary appearance or a writ of summons is issued to the defendant. Under Section 1237, the court may require the informant, when that Section applies, to give bond before he commences a suit. Under Section 1238, however, security cannot be required until after suit has been commenced, and a suit is commenced when the petition is filed and the writ of summons issued. State ex rel v. Bates, 286 S. W. 420. The mere filing of the petition is not a commencement of the suit, but the filing of the petition plus the issuing of the writ is the commencement of the suit. It is onby under Section 1237 that bond may be required before suit is commenced. If the facts are such as bring it within Section 1238, then you as Probate Judge would not have authority to require a security until after process was issued, the process, however, need not necessarily be served because the suit is commenced by the filing of the petition and the issuance of process.

It is, therefore, the opinion of this Department that if the informant is a non-resident he may be required to give bond before the commencement of the suit. If, however, the informant is a resident of the State and security is required by an order of court because the informant is unsettled in his affairs, then he may be required to give such security after the suit is commenced by the filing of the petition and the issuance of process. In other words, if he be a non-resident he may be required to give bond before process is issued; if he is a resident, he may be required to give security for costs upon order duly made after the petition is filed and the process is issued. If he is a resident he cannot be required to give the bond required in Section 1237, and he cannot be required to give security for costs under Section 1238 until after the commencement of the suit, which is by filing the petition

and issuance of process, which gives the court jurisdiction in the case.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

Qualifications and Residence of Councilmen in Cities of the 3rd Class.

FILED
87

September 22, 1933

10-2

Mr. George A. Spencer,
Guitar Building,
Columbia, Missouri

Dear Sir:

This department acknowledges your letter as follows:

"Mayor Pollard of this city has asked me to write you for an opinion relative to the status of a councilman who has moved from the ward in which he was elected to another ward.

The particular situation is that one of our councilmen, who owns property in the third ward, has left the house furnished for use of his son and he has moved to the fourth ward and rented an apartment. May this councilman continue to serve out the remainder of his term without living in the ward in which he was elected?

If you will give this opinion, we will appreciate it very much."

Section 6736 R. S. 1929, reads:

"No person shall be a councilman unless he be at least twenty-five years of age, a citizen of the United States and an inhabitant of the city for one year next proceeding his election, and a resident of the ward from which he is elected six months next proceeding his election, etc."

In the case of State Ex Rel v. Donworth, 127 Mo. App. 1. c. 381, the St. Louis Court of Appeals had the

following to say:

> "It is true that the aldermen act for the welfare of the city generally and pass ordinances which relate to the entire city; but it is also true that they represent in an especial manner their particular wards. It is well known that in the disbursement of city funds for lighting, fire protection, water, street improvements and many other matters, rivalries and disputes often arise between the sections of a city, and it is important that a particular section be represented in the municipal assembly by its own residents. It is for this reason, we think, that the Legislature provided for representation by residents of the wards and election by their qualified voters."

In State Ex Rel Brown v. McMillan, 108 Mo. 1. c. 160:

> "Nor are we impressed with the reasons that relator seems to think actuated the legislature in refusing representation to the new wards till a general election. Taxation without representation has never been resisted in the United States. When we consider that according to the allegations of the relator's petition a new territory as large as the old city had been added to the city and that the city council might project public works that would entail burdensome taxation on this new territory, if they had no voice in the city government, we can see no sound reason why the property-owners in those new wards should be denied representation in the council. Certainly, in the absence of a very clearly expressed intention to the contrary, we will not give such a construction to the charter. We think on this point the law is with respondents."

Referring again to the Donworth case, Supra, the court further said:

> "Several incongruities arise if we accept the reasoning of defendant's counsel. If a person elected alderman is a resident of the ward on the day of the election, but immediately moves into another ward, he could serve his two year's term. And if all the aldermen of a city should happen to move into one ward during their respective terms of office, they would still constitute the board

> of aldermen. Such contingencies are opposed to the policy of the statute, which policy is to require aldermen to be residents of the ward not only when elected but during their terms of office."

While it is true the above construction relating to cities of the 4th class was what is now section 6964, yet when the two sections are compared it will readily appear that they are practically of the same verbiage.

This department therefore holds, in view of the language of section 6736 and by what the courts have said, that a councilman not only must be a resident of the ward when elected but must remain such during his term of office. If he moves out of his ward he ay be ousted from such office.

Yours very truly,

W. W. Barnes

Assistant Attorney General.

APPROVED

Attorney General.

TAXATION: CITY TAXES, Cities of the third class collected under Senate Bill 94.

FILED
87

November 29, 1933

Hon. George A. Spencer
City Attorney
Guitar Building
Columbia, Missouri

Dear Mr. Spencer:

We acknowledge receipt of a request for an opinion of this office reading as follows:

> "Due to the fact that the City Collector must begin some action to collect back taxes on city property to enforce the lien on taxes that are over four years due, and since the new tax law is somewhat confused, I am writing to get the matter straightened out so that the Collector will know how to proceed to collect such back taxes. You will note that Section 9952 of the Revised Statutes of 1929 is repealed and a new section is enacted, number 9952 on page 429 of the Laws of Missouri, 1933. This law deals with the sale of delinquent property, which provides that the Collector shall proceed to sell it. On page 465 of the Laws of Missouri, 1933, the section 9952 of the Revised Statutes of Missouri, 1929, relating to delinquent and back taxes is repealed and a new section numbered 9952 is enacted in lieu thereof, which is the same wording of the old section 9952 except one provision is added.
>
> The section on page 429 was passed on March 25th and approved April 7th, while the section on page 465 was passed April 1 and approved April 28. The section on page 429 does not provide for a tax attorney while the one on page 465 provides for a tax attorney and the land to be sold as was provided under the former statute.
>
> I would like to know under what statute the collector should proceed to enforce the lien due against the property."

I.

HOUSE BILL 44, PAGE 465, LAWS OF MISSOURI, 1933, HAS NO AFFECT AFTER JULY 24, 1933, AND IS SUPERSEDED BY SENATE BILL 94.

It is true that the acts of the 57th General Assembly respecting the collection of back taxes at first present a confusing front. Under the terms of Senate Bill 94, Section 9952, as appearing in the R. S. Mo. 1929, was repealed and a new section enacted by the same number differing in its entirety from the old section. This new section provides for an important part of the machinery for the enforcement of the payment of delinquent taxes by sale of the property taxed. It should be noted that Senate Bill 94 contains no emergency clause. By House Bill 44, we find that Section 9952 of the 1929 revision is also purportedly repealed and a new section is added. This new section reads as follows:

"COLLECTOR TO SUE FOR BACK TAXES --WHEN--ATTORNEY'S FEES -- PUBLICATION--PROSECUTING ATTORNEYS TO ACT IN CERTAIN COUNTIES. -- If, on the first day of January of any year any of said lands or town lots contained in said 'back tax book' remain unredeemed, it shall be the duty of the collector to proceed to enforce the payment of the taxes charged against such tract or lot, by suit in a court of competent jurisdiction of the county where the real estate is situated, which said court shall have jurisdiction without regard to the amount sued on, to enforce the lien of the state or such cities; and for the purpose of collecting such tax and prosecuting suits for taxes under this article the collector shall have power, with the approval of the county court, or in such cities, the mayor thereof, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury, and an additional sum not to exceed $3.00 for each suit instituted for the collection of such taxes, where publication is not necessary, and not to exceed $5.00 for each suit where publication is necessary, as may be agreed upon in writing, and approved by the county, court, or in such cities, the mayor thereof, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or

compensation for such services except as in this section provided; and it shall be the duty of the collector, when suit shall have been commenced against any tract of land or town lot on said 'back tax book,' to note opposite said tract or lot such fact, also against whom suit has been commenced; and in cases where suit is brought for the enforcement of liens as above, where summons shall have been issued against any defendant, and the officer to whom it is directed shall make his return that the defendant cannot be found, the court before whom the suit is pending being first satisfied that the summons cannot be served, shall make an order directing that notice of such action be given to such defendant by publication; and in all cases where it shall be alleged in the petition, or in an affidavit subsequently filed with the clerk, that the defendants, or any one of them, is a non resident of the state of Missouri, so that the ordinary process of law cannot be served upon them, then such order may be made, and such notice by publication given by the clerk of the court in vacation, and which notice shall be published in like manner and with the same effect as when ordered by the court; the proof of publication of the order required by this section may be made by the affidavit of the publisher of the newspaper in which the order was published, or by the affidavit of any person who would be a competent witness in said cause, filed with the court; and if the defendant or defendants fail to appear at the time and place required by said order and defend said cause of action, required by said order, judgment by default shall be rendered as prayed, which judgment shall be as binding and effectual against the property on which the lien is sought to be enforced as if therehad been personal service on the defendant; AND PROVIDED FURTHER, that in cities of thirty thousand or more inhabitants, the attorney or attorneys appointed by the collector, with the approval of the mayor of such cities, for the purpose of prosecuting suits for taxes under this article, shall be entitled to a fee in any suit, such fee not exceeding five per cent, after judgment is obtained, collected and paid into the treasury, as may be agreed upon; and if such taxes are paid before judgment is obtained, the attorney collecting the same shall

be entitled to a fee not exceeding two per cent on all sums collected and paid into the treasury. PROVIDED, HOWEVER, that in all counties of this State that now have or may hereafter have a population of not less than 80,000 nor more than 95,000 according to the last decennial census of the United States, the Collector shall have no power or authority to employ such attorneys, that the Prosecuting Attorney of such counties shall be the back tax attorney, and that all fees collected as such by the Collector shall be paid into the County Treasury; and each of the Prosecuting Attorneys in such counties shall be entitled to such additional temporary clerk and deputy hire as in the judgment of the Prosecuting Attorney and the County Court may be deemed necessary, for such time and at such salary as may be fixed by the Prosecuting Attorney and the County Court."

House Bill 44 both passed by the General Assembly and approved by the Governor subsequent to Senate Bill 94. We find these two sections 9952 as apparently valid and effective laws, the section in House Bill apparently authorizing a procedure that was repealed by and is entirely repugnant and contrary to the entire intent and purpose of Senate Bill 94. There can, of course, be no question as to the intention of the Legislature in enacting Senate Bill 94. If we can determine the legislative object of House Bill 44, we may be able to construe these acts so as to give full effect to both. The only change in Section 9952 as contained in House Bill 44 and as contained in the 1929 Revision is the addition to the proviso above underlined. This change only affected Greene County, and authorizes and requires the Prosecuting Attorney of said County to act as delinquent tax attorney. No change of any kind was made as to any other provision of said Section. Accordingly, it is a reasonable conclusion that as Senate Bill 94 repealing 9952 was not effective till ninety days after adjournment, and as said original Section 9952 was a valid and subsisting law until that time, and as House Bill 44 made no change in that section except as above pointed out, the whole intent and purpose of House Bill 44 was to effect this change in the selection of the delinquent tax attorney during the emergency clause period. An examination of the emergency clause supports this conclusion. This clause is found on page 467, Laws of 1933, and reads as follows:

> "Section 2. EMERGENCY. -- The financial condition of the counties and of the people therein, to which this act applies, and relief of the same being imperative without delay, creates an emergency in the meaning of the Constitution and this act shall be in force and effect upon its passage and approval."

As the only part of said act which was not already operative was the added proviso, the "relief" creating the "emergency" referred to must have been the added proviso. That the emergency clause may be considered in determining legislative intent is well settled. The Supreme Court in this matter stated as follows in the case of State vs. Bengsch, 170 Mo. 81, l. c. 109:

> "Now, if laws passed at remote periods, laws in pari materia, or cognate-subject laws, laws that have expired or been repealed, unconstitutional laws, may have the shell of their legislative nuts cracked by the hammer of judicial investigation, in order to extract the kernel of their intention, then a fortiori, may a similar result be reached where the shell of the legislative nut has been cracked by the legislators themselves, and the kernel of their intention extracted and spread on the platter of an emergency clause ready for immediate use. We hold the emergency clause in this instance as conclusive evidence of the legislative purpose, * * *."

Having concluded that the sole intent of House Bill 44 was to provide that the Prosecuting Attorney of Greene County also act as Delinquent Tax Attorney, we are of the opinion that House Bill 44 is only operative as enacted (subject to Senate Bill 80) up to July 24, 1933.

The foregoing construction is further supported by the rule that acts relating to the same subject, passed at the same session must be treated as part of the same act and construed together. The Supreme Court en banc stated in Gasconade County vs. Garden 441 Mo. 569 as follows:

> "Especially is it true that legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as part of the same act."

We have not overlooked the fact that House Bill 44 was enacted subsequent to Senate Bill 94, or that it is in fact a special law, but are of the opinion that any other construction would render said House Bill 44 repugnant to the intent and purpose of Senate Bill 94.

Having determined that the delinquent taxes cannot be collected for the city of Columbia under the provisions of House Bill 44 found on page 465 Laws of Missouri 1933, we pass to the question as to the manner in which these delinquent taxes should be collected by your city collector.

II.

SENATE BILL 94 DETERMINES METHOD AND MANNER OF COLLECTION AND ENFORCEMENT OF CITY TAXES.

We have heretofore held in an opinion to the Tax Commission of this State, that under the statutes in force after the effective date of Senate Bill 94, the city collectors in cities of the third and fourth classes should follow the procedure established by the general law for the collection of state and county taxes, and that therefore your city collector should proceed to the collection of the city taxes at the same time and in the same manner as the county collector proceeds to collect the state and county taxes. We are herewith enclosing to you a copy of the pertinent parts of our opinion to the Tax Commission covering this particular point. You will find a paragraph marked on the last page in which the foregoing is stated.

III.

1928 DELINQUENT TAXES NOT BARRED FROM SALE IN 1934.

The general statute of limitations applicable to actions for the recovery of taxes is Section 9961, R.S. Mo. 1929. This section was neither repealed nor amended by Senate Bill 94 but remains the same as it was prior to the enactment of Senate Bill 94. We have heretofore held in the same opinion to the Tax Commission that the statute of limitations is not sufficient to bar a sale of property for taxes under Senate Bill 94 We are enclosing to you an excerpt from this opinion covering this point so as to make unnecessary a repetition of that point in this opinion.

IV.

CONCLUSION

It is therefore the opinion of this office that your city collector is required to proceed to collect delinquent city taxes in the manner and at the time as required by Senate Bill 94 for the collection of State and County taxes, and that at the sale of property for such taxes, which cannot be held before November, 1934, he may sell property for 1928 taxes.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General

APPROVED:

_____
Attorney General

HGW:MM
2 encls.

RE; County Collector must collect penalties on delinquent taxes, and County Court has no authority to remit the penalties on taxes and school districts have no power to remit penalties on delinquent taxes.

January 12, 1933

FILED
88.

Mr. Walter G. Stillwell,
Prosecuting Attorney
Marion County,
Hannibal, Missouri.

Dear Sir:-

Your letter of January 10th, 1933 contains the following four propositions:

1st.--"Is it legal for the County Court at a special meeting called for this particular purpose to promulgate and order remitting all fines and penalties on back taxes for a limited period of time."

In answer to proposition No. 1, Section 3 of Article X provides that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

It would appear that the collection of penalties from some tax payers and not from others would be violative of this Section. The Collector of Revenue is required by law, to collect the penalties thereon, Section 9914, R.S. Mo. 1929, and upon his failure to do so is liable to the penalties provided for in Section 9928, R.S. Mo. 1929. Such penalties become revenue, and for every failure of the Collector to deposit the revenue, additional penalties are provided. Sections 9931 and 9933, R. S. Mo. 1929.

Under these statutes, it is the plain duty of the Collector to collect and account for such penalty, and for his failure to do so, may be charged with a misdemeanor. Section 3950, R.S. Mo. 1929.

There is no provision of law authorizing the County Court or any other body or person to abate or remit taxes or penalties. The only power of compromise vested in the County Court is contained in Section 9950 R.S. Mo. 1929, and then as a condition precedent to the exercise of such power it must appear to the County Court that the land in question is not worth the amount of taxes, interest and cost due thereon.

2nd and 3rd.--"In the event your answer to question No. 1 is in the negative, would the fact that the County Collector waived his commission on delinquent taxes and that every school district within the county by its

directors took like action change your answer to query No. 1.

"In your opinion, have the directors of the various school districts power or authority to waive the interests of the various districts or delinquent tax penalties."

The attempt of the County Collector to waive his commission on delinquent taxes, would not in any way affect the powers of the County Court as set forth in Item 1, of this opinion. Generally, public officers, such as school board directors are creatures of law whose duties are statutory. Corley vs Montgomery, 46, S.W. (2d), p. 283. Nowhere is there any statutory law vesting in school boards the power to remit penalties on back taxes.

4th.--"In the event the County Court, contrary to my opinion, took such action, would the collector be within his legal rights in abiding by this order of the Court, and if he did so, would the Surety Company be responsible on his bond for the delinquencies in back taxes due various County and State agencies."

As has been pointed out under Item 1, of this opinion, the Collector has certain duties to perform, and these include the collection and accounting for penalties on delinquent taxes, and further, upon the failure of the Collector to comply with such laws, certain penalties are provided as above pointed out.

Yours very truly,

FRANKLIN E. REAGAN
Asst. Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER/mh

Authority of School Boards in Consolidated, High Schools and Schools having six directors to decide the location and erecting of new buildings.

February 16, 1933

FILED
88

Hon. R. P. Stone,
Prosecuting Attorney,
Miller County,
Eldon, Missouri.

Dear Sir:-

Answering your letter of February 11th,1933 requesting an opinion on the following,

> "First:-Has the School Board of a consolidated School district, plenary power, to locate the sight of any new building or buildings that may be required by such Consolidated District; without the consent of the qualified Voters of such district.
>
> "Second:-Have the qualified Votes of a Consolidated School District the right to petition the School Board, for a re-location of any new Buildings, that may be required for such consolidated district; And if so, must the Board act on the petition and call an Election, so that the qualified Votes of such District may have a voice in the location or re-location of such building or buildings.
>
> "Third:-Where Bonds, have been voted for the Building of a HighSchool Building, in a Consolidated School District, how should the sight or location of such building be determined."

There seems to be two distinct lines of law and decisions in regard to the school matters. One is the High Schools or Consolidated or sometimes known as City Schools with the Board of Directors of six and Common schools generally referred to as County Schools with the Board of Directors of three.

In the Country Schools where the Board of Directors is three, it is my opinion the law is plain, that it would be a matter for the voters at their annual meeting to decide matters of location and the like but it is equally well settled that in High Schools, Consolidated Schools and City Schools, frequently referred to as six Directorate

see 92 84 Par 11 Governs on Moving School site in Country District see 114 S.W. 641

Schools, it is the reverse and the directors have the exclusive power in the control of such matters.

I have found by examination of the different statutes on this subject and the decisions under them that in the Six Directorate schools, the Board of Directors are supreme in the matter.

Quoting from Gladney et al vs. Gibson et al, 208 Appeal, l.c. 80, the matter is emphasized strongly as follows:

> "The language of this section (now 9330 and the kindred section 9327) clearly indicates that it was the intention of the Legislature that in a common school (three director school district) district the authority to select a schoolhouse site be vested in the resident taxpayers of the district assembled in annual meeting <u>but that in a city, town or consolidated district such authority be vested in the board of education.</u>"

And l.c. 85 of the same decision, the Court says:

> "In conclusion we may say that in view of the nature of city and town school districts, and the various statutes applicable thereto, it seems well nigh inconceivable that the Legislature intended that the question of selecting a high school site should be left to the qualified voters of such districts. As said above, elections held in such districts are required to be by ballot, and conducted as are elections for State and county officers; and the polls must be kept open from seven o'clock A.M. to six o'clock P.M. now Sec. 9341 (section 11251). No provision whatsoever is made by law for submitting at such an election the question of the selection of a schoolhouse site or the changing of such a site; nor does this appear practicable. To leave the matter entirely to the judgment of the qualified voters of the district, would mean that each voter would have the right to vote for any site that he might indicate. There is no provision in the law as to how a voter shall indicate on his ballot what site he is voting for. An effort to have each voter, of his own iniative, point out or describe the site of his choice, might well lead to utter confusion. And if the board of education should designate two or more sites, between which the voters are to choose, then the voters would be precluded from exercising their independent judgment in the matter, being confined to a choice between the sites submitted by the board. And for this there is no sanction in the law."

Therefore answering categorically, in view of my opinion of the law and the decisions;

First: That the Board of Directors has absolute or plenary powers to locate the site of any new building or buildings that may be required in the consolidated district without consent of the qualified voters of such district.

Second: Of course the voter has the right to petition on any matter but the school board is supreme and does not have to comply with the request of such petition.

Third: The location or site of such building should be determined by the Board of Directors as plainly shown by the foregoing decisions I have quoted freely from.

Respectfully submitted,

GEO. B. STROTHER
Assistant Attorney General

Approved:

ROY McKITTRICK
Attorney-General

GBS/mh

March 21, 1933.

FILED
28-33

Hon. William E. Stewart,
Prosecuting Attorney - Knox Co.,
Edina, Missouri.

Dear Sir:

You have written me as follows:

"First, some members of a telephone line were in to see me. They state that several member (shareholders) refuse to pay their switch board fees. These members or shareholders claim they have a right to use the line without going through the switchboard. The switchboard refuses to give switchboard service unless all of the members pay their dues. Can the switchboard refuse service unless all members pay their dues and if so can the members who do pay their dues cut off those who refuse to pay their dues?

Second, the Home Bank of Knox City, Mo., closed sometime ago. The night before they closed their doors they brought to the County Seat several thousand dollars of County money. They took this money to the County Treasurer who refused to accept the money. They then took the money to a bank in Edina, who accepted the money. This was all done after banking hours and after night. There is no doubt that the officers of the Home Bank were on the bond to secure the county, however, I do not know who was on the bond. Did the officers of the Home Bank violate any of the criminal laws of the State when they took this money out of the Home Bank, knowing that they were not going to open on the following morning?

Third, Knox County has two terms of court a year, June and December. Under the law we must have a Grand Jury once a year. We always have a Grand Jury in December. A Grand Jury was called in December, 1932. Paul Higbee was Judge of this Circuit and died sometime before the December Term of our Court. Phillip Fowler was appointed to serve until the first of the year. Judge Fowler adjourned the December Term of Court until the blank day of blank, 1933. The Grand Jury adjourned until the 6th day of February, was in session several days and adjourned until the 2nd day of March, 1933, then adjourned until the 28th day of April, at which time they intend to make their report. Now, I would like to know, in the event that the Grand Jury returns a true bill what term of court should

it be returned to and if they have jurisdiction? Judge Rouse, who was elected to fill the unexpired term of Judge Higbee, ruled that there was no December Term of Court, but did under Section 1852 R.S. call a special session for the 2nd day of March, 1933, and adjourned that special session until the 28th day of April, at which time the Grand Jury intends to make their report."

Telephone questions - Your letter does not state whether or not the telephone line is an unincorporated mutual county line operated by owners for their own convenience and maintaining a switch board and keeping up expenses by small monthly contributions from each owner of a 'phone and possibly having connection through the local switch board for long distance service furnished by some other company for which service fixed long distance rates are paid the company supplying the long distance service, but I will assume for purposes of this reply conditions I describe covers conditions of line your question relates to.

Assuming the telephone line you describe is unincorporated and a mutual asscciation operated for mutual service, it is apparent if the owners of the line have any Articles of Agreement or written form of contract of any kind, I could not tell you without examining whatever contracts their line owners may have, first - whether members can use the lines without going through and thereby using the switch board service; second - whether on account some members of line refusing to pay their dues switchboard service can be denied all members including those who pay their dues; third - whether the members paying their dues can cut off non-paying members. I direct your attention to the case of

> State ex rel Lohman and Farmers Mutual Telephone Co. v. Brown, et al, 19 S.W. (2d) p.1048

where the Supreme Court of Missouri said:

> "From what has been said, it is apparent that the Public Service Commission is without jurisdiction of the company, in so far as its relations with its members are concerned; its order is too broad in other respects."

From this decision it is clear the Public Service Commission could afford no relief if the telephone line you write about furnishes same kind of service to same class of patrons described in the quoted part of the above named Missouri court decision. If you supply me data above suggested, I will give you my opinion on questions hereinabove asked by you.

The question relating to criminal liability of certain officers of "Home Bank" of Knox City, Mo. - The county was a depositor in the "Home Bank" and its account was an open checking one and it had the right to have the bank pay its checks on demand. The county deposit of money the bank was entitled to possession of against every one except the county and county had right to check on it the same as any other depositor. The county money was part of the liquid assets of the bank and bank officials had custody thereof and hence lawfully in possession of the county deposit funds.

I am of the opinion if any offense was committed by bank officials by removal of county money from bank night prior to bank closing, it was embezzlement. Embezzlement is a purely statutory offense and is a kind of statutory larceny. At cannon law the crime of embezzlement did not exist.

It differs from larceny in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

State v. Burgess, 268 Mo., l.c. 415

In Hanna v. Insurance Co., 241 Mo., l.c. 401

the court said:

> "Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come."

An examination of Sections 4079 and 4080 R.S. Mo. 1929 discloses that these two sections each creating a statutory offense of embezzlement creates each two district classes of offense. On this question our Supreme Court said in

State v. Lentz, 184 Mo., l.c. 238:

> "It substantially provides that the embezzlement or conversion of money or property by an agent, without the assent of the employer, shall constitute the offense. It will be noticed in that subdivision, that the offense consists of the actual embezzlement or conversion of the money or property. The other subdivision refers to a different state of facts in order to constitute an offense by its terms. It provides, not that the offense shall consist of the actual conversion or embezzlement of the property, but the doing of certain things, that is to say, "To take, make away with or secrete the money or property, with the intent to embezzle or convert to his own use." It is too plain for discussion that the terms, "Intent to embezzle or convert to his own use," have no application to the first subdivision of the statute, which makes the offense the actual commission of the act of embezzlement or conversion to his own use. It is illogical to say with the intent to do an act when the act itself is done. ***"

What acts after the bailee receives the property will constitute embezzlement under the first division of these statutory offenses? Now, the bank officials had the possession lawfully of all the deposits in the bank, including the county money. In

Bishop's New Criminal Law, Vol. II, Secs. 372-373-379
(quoted by our Supreme Court in 184 Mo. l.c. PP.239-240)

it is said:

> "The gist of common law larceny is the felonious taking of what is another's with the simultaneous intent in the taking of misappropriating it; but in statutory embezzlement there is no felonious taking for the thing comes to the servant by delivery, either by the master or a third person, so that the question now is, by what act after it is received does the servant commit the embezzlement? The rule of law appears only indistinctly in the books. Still we may infer from the authorities and from the reasons inherent in the question, that if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing less is sufficient. Or assuming the needful intent to exist he must and need only to do what in our civil jurisprudence is termed 'conversion' defined to be any dealing with the thing, which impliedly or by its own terms excludes the owners dominion.
>
> To illustrate: If the servant instead of delivering the property to his master or another as required by his duty, pledges it for his own debt, or runs away with it, or neglects or refuses to account for it, or otherwise wrongfully diverts its course toward its destination to make it his own, he embezzles it."

And again, in defining what acts constitute embezzlement, our court said: (130 Mo., l.c. 463)

> "When the agent or servant takes his employer's money with the intent to convert it to his own use without the master's knowledge, that moment he is guilty of the criminal intent denounced by the statute. The law will not enter upon the inquiry with him as to his further intention of returning the money at a later period or making good his shortage when called to account. It suffices for the state to prove an intent on the part of the defendant to do that which the law forbids. The effort of counsel to have the court require the jury to find some other or further intent was to open the door for argument that the defendant might knowingly and intentionally do the very act, which the law denounced as criminal and yet not be guilty, provided he did not intend to keep the money permanently or intended to return it in the future. But when an act forbidden by law is intentionally done the intent to do the act is the criminal intent which imparts to it the character of the offense, and no one who violates a law which he is conclusively presumed to know can be heard to say he had no criminal intent in doing it."

Apply these rules to the facts as outlined in your letter. The money was it is true county money; but the bank had given the statutory bond for its safe return to the county. The money was in the bank and the bank held it as part of its funds against which checks could be drawn. The bank was entitled to the money as against every one but the county just the same as the bank was entitled to the possession of all the funds of all its other depositors as against every one except the owners of those deposits. The bank as a legal entity had the right to possession of the county funds as against any possession thereof personally by the bank officials. For all practical uses it was a part of the liquid assets of the bank. Now the bank entrusted the bank officials with the county money just as it did with all the money of all its other depositors.

I infer from your statement that the bank never opened its doors again for business after this money was removed. I also infer you mean to say in your letter the bank was insolvent at the time the officials of the bank removed this money.

Of course, it is true in embezzlement the money must be taken without consent of the employer, because the statute so provides and it may be suggested the officials were authorized either by virtue of their official position with the bank or may be with the assent of the stockholders to remove the money and give it to the county through the County Treasurer. If the bank had been solvent the argument would be sound. But being insolvent the statutes of Missouri applicable to insolvent banks became operative and forbids any transfer of the funds or bank assets upon insolvency accruing and makes such transfer void. Section 5318 R.S. of Mo. of 1929, provides:

> "All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any corporation or private banker, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to it, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another shall be utterly null and void. ***"

The bank officials had the custody of the bank's money. They received the bank's money in the course of their employment. The bank officials were agents of the bank. If the bank officials knew the "Home Bank" was insolvent and these officials were on the county depository bond given by the bank and under these conditions took the amount of the county money from the insolvent bank's funds and took same and attempted to give it to the county through the County Treasurer, evidence reasonably tending to show these facts would carry the case to the jury, and if the jury found these facts existed, the defendants would be guilty under the provisions of Section 4079 R.S. of Missouri, 1929, declaring:

> "If any agent *** of any person or *** any agent of any incorporated company *** shall take *** with intent to convert to his own use without the assent of his *** employer any money *** or effects whatsoever belonging to any other person which shall have come into his possession or under his care by virtue of such employment or office, he shall upon conviction be punished in the manner prescribed by law for stealing property of the kind or the value of the article so *** taken ***"

And it may be the courts might hold the facts above assumed being proven the bank officials are guilty under the first sub-division of Sec. 4079 on the ground that the moment the money was removed from the custody of the bank by the officials the conversion occurred and the dominion of the bank over the property ceased and the offense was complete.

The rule of the law is if a bank official puts the money of the bank out of the bank's control with a fraudulent intent, it is a conversion to the bank officials' own use, and the law is the state need not show the bank officials received any personal benefit from the money taken because if the bank officials take the bank's money and give it to others, the courts hold it is a conversion of it to the use of the bank officials and so if the money removed was so taken with intent to protect the bondsmen of the bank, such act was a conversion to the use of the bank officials.

State v. Meininger, 306 Mo., l.c. pp. 686-687-688

Right of Grand Jury to return indictments in April where December preceding court had been adjourned without fixing a definite day to which it was adjourned.

In your letter you state the Judge in office in December, 1932 adjourned the December term of court until "the blank day of blank, 1933". In

State ex rel v. Ross, 118 Mo., l.c. pp. 46-47

our court held only at stated times and places can court be convened, and the court said:

> "The judicial power in this state can only be exercised at the times and places prescribed by law. Accordingly the statutes have, with great particularity, specified the day on which each court, whether Circuit, County, Probate or Supreme Court, shall meet. Out of abundant caution it is provided that, if the Judge shall be detained, the Sheriff may adjourn the court till the third day when if the Judge is still absent he may adjourn to the next regular term, and it is provided that the courts may upon notice call special terms, but the whole scope of the legislation on this subject as well as the common law is to the effect that only at stated times and at the places specified can a court lawfully meet. Revised Statutes 1889, Sections 3248, 3249, 3250.

> "The mere coming together of the Judge, and the other officers of the court, unless at a time fixed by law or on a day to which the court has been lawfully adjourned, does not constitute a court under our laws. Freeman on Judgments, Section 121, and cases cited. This is so clear that we doubt whether any court or lawyer ever questions it."

The New York court holds if record shows court has no unfinished business before it and adjourns without fixing a definite day to convene, the term of court is ended.

> Reynolds v. Cropsey, 150 N.E., l.c. 30
> L & T Co. v. Roberts, 227 N.Y., 188

In State v. Brown, 195 M.A. 590, a Judge ordered a grand jury for an adjourned term, convened court on day named, organized the jury, and adjourned to court in course without discharging the jury, which continued its investigation and at the regular term reported indictments against B, who was tried and convicted before he objected to the authority of the grand jury to indict him, and the Court of Appeals held his objection was too late, but the court also held the authority of the grand jury expired when the court adjourned to court in course because that ended the term of the court and the Appeal Court said (195 Mo., lc. 591-592):

> "But the adjournment of the court for the term involves a different consideration. A grand jury is summoned to serve at a certain term of court and during that term, unless sooner discharged, its period of official life is limited to the term for which it is summoned and when that term ends, so ought the existence and organization of the grand jury."

You state a grand jury was regularly called for December Term, 1932; that the Judge of the court died; that Judge Fowler was appointed to serve until the first of the year, and he adjourned the December Term of court until the blank day of blank, 1933; that the grand jury adjourned to February 6, 1933, was in session several days and adjourned to the 2nd of March, 1933, and then adjourned until the 25th day of April, at which time they intended to make their report.

In view of these facts and the authorities hereinabove cited, my suggestion is that the court when it convenes on April 28, 1933 direct the Clerk to enter an order for convening a new grand jury and order the records of the December Term to show that the grand jury had been discharged as to the December Term of court. This procedure was upheld in

> State vs. Gowdy, 307 Mo., l.c. 360.

It is to say the least doubtful whether or not the power of the grand jury and its term of service end when the order was made by

Judge Fowler adjourning court to the blank day of blank, 1933.

I am inclined to the view that order ended the December, 1932 Term of the Circuit Court. At any rate, no chance should be taken by having a grand jury act whose authority is open to question and the course I suggest obviates all difficulty because under Section 8753 R.S. of Mo., 1929, the court has power to order the grand jury, as I suggest.

Yours very truly,

EDWARD C. CROW

APPROVED:

_____
Attorney General

ECC:AH

SCHOOLS--ORGANIZATION OF BOARD- Law requiring board to be organized within four days not compulsory but merely directory. Three members of school board, in case of division of whole board, can call in County Superintendent who shall be considered a member of board for that purpose.

May 6th, 1933

FILED
88
20

Hon. Paul Stark,
Vice-President,
Board of Education,
Louisiana, Missouri.

Dear Mr. Stark:-

Answering your questions of recent date which letter was sent to us on advice of the Prosecuting Attorney of your County, wherein you desire a ruling on the subject as related to the Board of Education of Louisiana, Missouri.

> "1. If the Board meets within 4 days after election and appoints temporary chairman but does not complete its organization within the 4 days, does it have a right to go ahead and elect a President at a later meeting after the 4 day period has expired?
>
> 2. If the man, who was President of the Board of Education prior to the election for new school directors, refuses to call a meeting for the purpose of completing the organization of the Board by electing the new officers, can the Vice-President of the Board call said meeting?
>
> 3. If the person who is presiding at the meeting refuses to put the motion for election of the new officers, can a majority of the other members proceed to election of the new officers in spite of his refusal?"

Will say in answer to question No. 1, that the statute (New Section 9329, pp. 333. Session Acts 1931) says:

> "Within four days after the annual meeting, the board shall meet, the newly elected members be qualified and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. * * * A majority of the board shall constitute a quorum for the transaction of business. * * * When there

> is an equal division of the whole board upon any question, the county superintendent of schools, IF REQUESTED BY THREE MEMBERS OF THE BOARD SHALL CAST THE DECIDING VOTE UPON SUCH QUESTION, AND FOR THE DETERMINATION OF SUCH QUESTION SHALL BE CONSIDERED A MEMBER OF SUCH BOARD. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

It is our opinion that the fact that the Board did not meet within the four days and PERMANENTLY ORGANIZE by electing a president and vice-president, is merely a failure to comply with the new Section 9329 (pp. 333-334, Session Acts 1931) of the Statute.

They could meet and organize AFTERWARDS JUST AS WELL AS BEFORE THE END OF THE FIRST FOUR DAYS as there is no penalty for failing to meet and organize within the four days; THE LAW IN THIS PARTICULAR IS MERELY DIRECTORY, NOT MANDATORY. State ex rel. Bird, 295 Mo. 344, l.c. 351-352.

It will be observed that three members can call in the County Superintendent of Schools to decide matters (in case three of the members request him) which law was enacted in Session Acts of 1931, pp. 333-334, so that (in case of a tie) he is for all practical purposes, a member of such Board.

Answering your second question if the former president of the Board of Education or the temporary chairman who was elected within the four days, refused to call a meeting of the Board for the purposes of completing the organization of the Board by electing the new officers, it is our opinion that the vice-president of the Board, if he is an old member or held over, can call a meeting of the Board. When assembled, they can elect the officers as provided in the Section above referred to.

Third, if the person who is presiding at the meeting refuses to put a motion for election of new officers, it is our opinion that the other members of the Board, if they constitute a majority of the Board may proceed to elect the president, vice-president and other officers such as secretary and treasurer.

Yours very truly,

Geo. B. Strother

GEO. B. STROTHER,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

NEPOTISM: Road overseer may not appoint sons to employment--
County Court may remove or removable by quo warranto.

May 26, 1933

FILED
88

Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We wish to acknowledge your letter of April 26th, 1933, which is as follows:

> "Several days ago a petition (the copy of which is hereto attached) was filed with the clerk of the County Court of this county. At a meeting of said Court, I was instructed to secure from your office an opinion on same. The questions being pertinent are:
>
> 1. Assuming the facts as mentioned in this petition to be true, has Richard Fry, road overseer of District One in Marion County, forfeited his right to hold office for violating the Anti-Nepotism provision of the constitution of the State of Missouri, the pertinant part of the Constitution being Section 13 of Article 14 and page 157.
>
> 2. If your answer to question one is in the affirmative and the question of the actual commission of these deeds is brought in issue, what is the proper proceedure to follow in removing Fry from office.
>
> 3. Has the County Court, the body making the appointment, the right to determine the issues of the facts involved.
>
> 4. Assuming that Richard Fry did not directly appoint his sons but that said sons were appointed either by the County Court or the County High-way Engineer, would this be a violation of the Anti-Nepotism provision of the constitution.

The Court is anxious to have this opinion and I would

appreciate receiving your usual prompt attention."

You ask four distinct questions. The first one being based solely upon the facts shown in a copy of a petition, enclosed with your letter, filed before the county court of your county. The copy of petition plainly states that the road overseer did name and appoint two sons to render service to his district, while he the road overseer was acting in that capacity.

It is our opinion, reasons hereinafter discussed, that if the facts are true as stated in the petition, then the road overseer has forfeited his right to hold office for violating the constitutional provision Section 13 of Article 14, termed Nepotism provision.

Section 13 of Article 14 of the Constitution of Missouri is as follows:

> "Any public officer or employee of this state or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

From the plain language of the above section it will be seen that necessary facts must exist before a person could be guilty of violation thereof.

The question arises as to whether or not a road overseer is a public officer or employee, and if he may name or appoint any person to render service to the State or to any political subdivision thereof, by virtue of his office or employment.

Section 7870 R. S. Mo. 1929, provides for the appointment of road overseers. And section 7872 R. S. Mo. 1929, provides for a bond to be executed by such overseers. Other sections of Chapter 42, Article 3, R. S. Mo. 1929, define the duties of overseers. In reading the statutory provisions relating to road overseers, the only conclusion logically deductible is that a road overseer is a public officer or employee of a political subdivision of the State and that such officer or employee by virtue of his employment must perform certain duties relative to the roads in his district. It must necessarily follow, although, not specifically provided for, that he would have the right to hire or appoint

persons to assist him in performing the duties imposed by said article and chapter supra.

In the case of State ex inf. Norman, Pros. Atty., v. Ellis, Circuit Clerk. Same v. Hall, Clerk of County Court of Stone County, 38 S. W. (2nd) 363, the Sup. Ct. of Mo. In Banc, held that Section 13, Article 14 of the Constitution was self-executing. The Court in its opinion at page 365 said the following:

> "The general rule is thus stated in 12 C. J. p. 729:
>
> > 'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'
>
> And Further, page 730:
>
> > 'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficiency and operation on the legislative will.'

And further from its opinion at page 366:

> "The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from Corpus Juris above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.' That was clear in the debates."

And further:

> "Section 13 pronounces a forfeiture upon the commission of the act condemned. If anything

> more is required, section 3, article 6, of the Constitution, invests the Supreme Court with power to issue writs of habeas corpus, mandamus, quo warranto, etc. There a method is provided in the Constitution for removal of an officer who has forfeited his office under section 13, and section 7 could not apply on any theory."

The court in this case also held that the prosecuting attorney has authority to institute quo warranto proceedings in the Supreme Court the same as the Attorney General.

Section 7870 R. S. Mo. 1929, among other things, provides that the road overseer shall be appointed by the county court at the February term of said court, and that his compensation is to be fixed by the county court annually in the month of March by order of record. There is nothing that provides the length of term that he shall serve.

The general rule of law as declared in 46 Corpus Juris, p. 964, with respect to an indefinite temure, is assfollows:

> "Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power at empts to fix a definite term, and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'term' of office." * * "

We therefore hold to the conclusion that the county court has the right to appoint, and such appointee holds at the pleasure of the appointing power, unless otherwise contracted, and with the right to hire goes the right to remove.

If, therefore, a road overseer has clearly forfeited his right to hold office, then the county court by virtue of its right of appointment, (no definite term fixed for the office for such overseer) would have the power to determine the facts and remove said overseer. However, let us assume that the road overseer would not surrender his office after being requested or told by the county court that his services were at an end because of violating the nepotism provision, then what steps are necessary to oust him? In such a case quo warranto proceedings should be instituted to remove him.

You have authority under the statutes to institute such action.

From the above and foregoing we are of the opinion that your first question should be answered in the affirmative. In answer to your second and third questions, we are of the opinion that the county court has the right to remove such road overseer for cause, and if the overseer does not quit his employment, then quo warranto proceedings is the proper procedure for removal.

As to your fourth question: If such overseer directly appoints his sons then, of course, he violates the constitutional provision as set out supra. The converse of this would be true if he did not appoint his sons. However, the facts surrounding the employment of his sons should be closely scrutinized for if such overseer by collusion, scheme or plan had his sons appointed by others solely to evade the constitutional provision, then he is not acting in good faith and the acts of the county court or highway engineer would be in reality his act.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM

ELEEMOSYNARY INSTITUTIONS: Counties liable for clothing of charity patients in Missouri State School.

July 18th, 1933 7-22

FILED
88
33

Hon. Walter G. Stillwell,
Prosecuting Attorney,
Marion County,
Palmyra, Missouri.

Dear Sir:

We received your request of June 22nd, 1933 requesting an opinion as to whether or not your County is liable for clothing furnished to patients in the State School at Marshall, which patients were sent there from Marion County, and whose other expenses are being paid by your County.

Patients in any State Eleemosynary Institutionsare residents of the County from which they are sent, and continue to be such residents as long as they are kept in that institution. In this connection we call your attention to the provision of Section 12950 R. S. 1929, which reads as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Sick persons, either of body or mind, come within this class of poor persons "when there are no other persons required by law and able to maintain them". Section 12951. The burden of caring for these poor peopleis placed directly upon the County under the provisions of Section 12953, which reads in part as follows:

> "The county court of each county * * * shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

We find no statutory authority and no court decision which gives a county the right to escape its duty to poor persons, who are also feeble-minded, by sending them to the Missouri State School at Marshall. The monthly charge made upon a county under Section 8696, does not cover the expense of clothing and maintenance of said

persons in that institution. The rule as to admission of patients is set out in Section 8696 as follows:

> "* * * Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, christian and surname, * * * the county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part," * * * and such county court must also certify, in each case, that such patient is an eligible and proper candidate for admission to the school. State patients, whether of age or under age, may also be received into the school upon the official application of any judge of a court of record."

Under the above statute, a person is eligible for admission to the Missouri State School when first, he is a poor person within the above statutory definition, and second, that he is feeble-minded. Prior to the admission of such persons in the Missouri State School, the county in which they reside are liable for their support because they belong to the class of poor persons as above set out in the statute. If the county desires that they be kept and treated in the Missouri State School, then the county is still liable for their support and maintenance, together with an additional fee of $5.00 per month to be paid to the Missouri State School.

It is therefore the opinion of this Office that the county court stands upon the same basis as relatives or guardians of a feeble-minded person, insofar as being liable for their support and clothing while in the Missouri State School. The county court is obligated to furnish the necessary clothing for such persons whether they are in or out of the Missouri State School.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

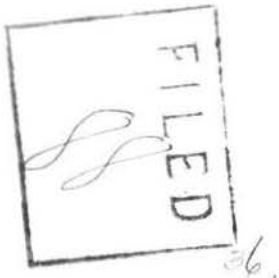
APPROVED:

ROY McKITTRICK
Attorney-General

FER/mh

ELECTIONS: Registration and special election under the Week's Bill.

July 28, 1933. 8-1



Hon. Walter G. Stillwell,
Prosecuting Attorney,
Marion County,
Hannibal, Missouri.

Dear Mr. Stillwell:

Your letter of July 18, 1933, addressed to this office in which you request an immediate opinion on the following questions, has been assigned to me for answer:

> "The County Court has requested my opinion on the following questions:
>
> 1. Under the registration law passed at the last Legislature, making it permanent at Hannibal, will not the registration matter be handled by the new Board set up under this law?
>
> 2. What, if any, order will the county court make with reference to registration at Hannibal?
>
> 3. Will not this election come under the registration law as does the Primary, General or other special election?
>
> 4. Will the County Court be required to select the usual number of judges or can they select a smaller number for each precinct?
>
> 5. Can the Court reduce the number of precincts used at the last general election?
>
> 6. Will the new absentee ballot law (passed by the last Legislature) be applicable to this repeal election?
>
> 7. Number of times in how many newspapers must the election notice be published?

> 8. How long does a newspaper have to be in operation or business to be eligible to publish an election notice?
>
> I am unable to comply with their request because I do not have at my disposal a copy of the Week's Bill or other recent legislation pertinent to these questions. For your information I will state that the population of Hannibal proper at the time of the last decenial census was approximately 23,000 and comes within the provisions of the new legislation for permanent registration. As you know, it is necessary that these questions be answered immediately and I would sincerely appreciate it if this request would meet with your usual prompt attention. If for any reason you find it impossible to prepare this opinion prior to the time necessary for us to publish notices in newspapers, I should like to know that fact immediately."

In answer to the first question: "Under the registration law passed at the last Legislature making it permanent at Hannibal, will not the registration matter be handled by the new Board set up under this law?", please be advised that according to Sec. 30, p. 249, Laws of Missouri, 1933, pertaining to registration in cities from 10,000 to 30,000 in which class Hannibal is classified, the present Board will handle the registration until 1934, said section being as follows:

> "In all cities and towns now having a board of registration, in which the registration of voters has been had in accordance to law, the board of registrars duly elected at the election of November, 1932, shall constitute the board of registrars for said city under the provisions of this article as rewritten until the general election 1934."

In answer to question #2, the only orders necessary will be found in Sec. 20, p. 247, Session Acts of 1933, which is as follows:

> "All costs of registration books and other equipment needed by the board of registration shall be furnished by the county and it is hereby provided that the judges of the county court shall order the county clerk or other purchasing agent to furnish any necessary equipment to the said board or its clerk for the purpose of carrying out the provisions of this article."

Any orders which might be necessary under the general election laws as the next section being Sec. 21, p. 247, Laws of Missouri, 1933, wherein we are referred to the chapter on elections, said section being as follows:

> "'All elections in such cities shall be conducted in all respects as provided in this article and subject to all the provisions of Chapter 61, Revised Statutes of the State of Missouri, 1929, entitled 'Elections', so far as the same do not conflict with this article.'"

As to question #3 wherein you ask "will not this election come under the registration laws as does the primary, general, or other special election", in the strict sense of the word the coming election is not a special election or an election. While it will be noted in the Week's Bill that the Governor will call a special election, "***such delegates shall be elected at a special election to be called on the date fixed by the Governor and his Official Proxlamation calling said election. ***" In other words, the people will not be voting directly on the repeal of the Eighteenth Amendment, but will vote for delegates who will convene in convention at a later date. Under the Constitution, Art. V, there are two methods of ratifying an amendment--by the legislatures of 3/4 of the states or by conventions in 3/4 of the states. In the present instance the amendment is being ratified by the conventions of the several states.

In the case of Hawke v. Smith, Secretary of State of Ohio, 253 U.S., l.c. 226-227, Mr. Justice Day speaks as follows:

> "This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the states; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.
>
> The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by

> action of the legislatures of three-fourths of the States, or conventions in a like number of States. Dodge v. Woolsey, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."

And again on pp. 228-229 Mr. Justice Day utters the following:

> "'There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article 1, Sec. 2.
>
> The constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a General Assembly consisting of a Senate and House of Representatives. Article II, Sec. 1, provides:
>
> 'The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people shall reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.'
>
> The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this--ratification by a state of a constitutional amendment is not an act of

> legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.'"

In a recent case of State ex rel Thomas J. Donnelly v. George S. Meyers, Secretary of State, the same being a decision rendered by the Ohio Supreme Court, being number 24269, decided July 12, 1933, and as yet unprinted, the court said:

> "In our opinion action in calling of such a convention is but a step necessary and incidental to the final action of the convention in registering the voice of the state upon the amendment proposed by the Congress. The action of the legislature in performing this function rests upon the authority of Article V of the Constitution of the United States. It is a Federal function, which in the absence of action by the Congress, the state legislature is authorized to perform. (Leser v. Garnett, 258 U.S. 137; Smiley v. Holme, 285 U.S. 335). The mode of assembling the convention set up in Amended Senate Bill No. 204 provides for a vote by all the electors of the state upon the selection of all the delegates. The views of the candidates for election as delegates to the convention will be known in advance, so that the final action of the convention should be truly representative of the will of the people upon the one special question involved. The intent of Article V of the Constitution of the United States will therefore be effectuated by this action of the state legislature."

In view of the foregoing authorities, we have come to the conclusion that the permanent registration law passed by the recent legislature is not applicable in this election of delegates. However, Sec. 2, p. 234, Laws of Missouri 1933 is in part as follows:

> "In all other respects, such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, insofar as such laws will apply and the judges and clerks of each such election shall be paid in the manner provided by law. ***"

The Weeks Bill does not provide for qualifications of the voters, but it is reasonable to assume that there should be some orderly procedure in this election. From the foregoing section just quoted, we are of the opinion that a person voting should be a

registered voter and should vote where registered, for the reason that said section just quoted states "shall be conducted under the provisions of the election laws of this state insofar as such laws will apply". As to the words "shall be conducted", in the case of State v. Adams, Alabama Reports, 2 Stewart 231, l.c. 242, the court in its opinion discussed the word "conducted" as follows:

> "'Does this provision, for deciding in the event of a tie, form a part of the 'manner of conducting the election?' If it does, then the relator was duly elected; if it does not, he was not. There is certainly a great distinction between the manner of conducting an election, and the election itself. By 'the manner of conducting the election' I understand the formal part of the election, viz: the mode of voting, the mode of receiving and registering the votes, of computing them, etc. The word 'manner' has never been considered as including substance, but form only, and the word 'conducting' certainly cannot be synonymous with 'effecting'. Now the giving a casting vote is clearly not a part of the 'manner of conducting', but it is effecting the election. The qualifications of the electors is substance, the manner of determining upon those qualifications is form. Under the provision which we are considering, it devolved upon the managers to determine whether the voters possessed the necessary qualifications to vote; but the law must definitely prescribe those qualifications.***"

And likewise, in the case of Blake v. Walker, 23 South Carolina Reports 517, l.c. 525, the court said:

> "It is true that the act does provide that the election should be conducted according to the law governing municipal elections in the city of Spartanburg, and it may be true that, according to a strict and literal construction of the word 'conducted', it would not embrace a declaration of the result; but if there is anything else in the act tending to show that the legislature did not intend to use this word in its limited sense, then it is the duty of the court to give effect to such intention.
>
> Now, it seems to us clear that the legislature intended to apply the same law regulating the municipal election to the election provided

> for in the local option act, and that this act must be read as if the provisions of the fifth section of the charter of the city of Spartanburg had been incorporated into it. So reading it, we think it manifest that the legislature did not intend to use the word 'conducted' in its strict and limited sense, but intended it also to embrace the declaration of the result. ***"

In view of these authorities, it is the opinion of this department that the judges for convenience sake should have at their command the registration books in order that they may determine the qualified voters and in the event there is a question of qualifications of a voter, the judges should use their discretion and if necessary, place the prospective voter under oath.

In answer to question #4, you are referred to Sec. 2, p. 234, Laws of Missouri 1933, said section being as follows:

> "For the purpose of electing delegates to any convention to vote upon the ratification of any proposed amendment to the Constitution of the United States, the Governor is hereby authorized by proclamation to call a special election and fix the date of holding thereof, which shall not be held within ninety days of the date of any primary or any general election in this state. For each such special election there shall be appointed by the county court two judges and two clerks who are in favor of the proposed amendment and two judges and two clerks who are opposed to the proposed amendment, who shall be qualified electors within their respective precinct. In all other respects such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, insofar as such laws will apply and the judges and clerks of each such election shall be paid in the manner provided by law for paying the costs of special elections, and shall perform the duties required and be subject to the penalties imposed upon judges and clerks of elections under the election laws of this state."

In answer to your question #5, you are referred to Sec. 10189, R.S. of Mo. 1929, said section being as follows:

> "The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts from time to time as the convenience of the inhabitants may require."

In answer to your question #6 as to whether or not an absentee voter can vote in this election, we herewith quote the new section, being Sec. 10181, p. 219, Laws of Missouri 1933:

> "Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which <u>questions of public policy</u> are submitted, may vote at such election as hereinafter provided."

In view of our opinion holding that this is not an election in the strict sense of the word, the reasons for which have been given under question #3, we naturally come to the conclusion that the absentee voter cannot vote in this election. The words "questions of public policy" should not apply in this election for the reasons as stated under question #3; the people are not voting directly on the question of the repeal of the Eighteenth Amendment, but for the delegates who will later assemble in conventions.

In answer to your question #7 dealing with the election notice, you are again referred to the Week's Bill, Sec. 13, p. 237, Laws of Missouri 1933, which is as follows:

> "Notice of the proposed amendment and the time and place of electing delegates to any convention called under the provisions of this act to vote upon the ratification thereof, shall bepublished by the authority and in the manner provided by law for the publication of notices of amendments to the Constitution of the State of Missouri."

"All amendments proposed to the constitution of the State of Missouri by the general assembly shall be published with the laws of the session at which they are proposed, and also in some newspaper, if such there be, in each county in the state for four consecutive weeks next preceding the general election then next ensuing, and two or more copies of such amendments, printed in Great Primer Poster Type shall be posted at each voting place for the information of voters; such copies shall be furnished by the Secretary of State to the county clerks of each county, who shall have the same duly posted at each voting place in his county on the morning of the election day on which said amendments are to be voted on."

Your County Clerk will, no doubt, receive additional information and instructions from the Secretary of State with regard to the printing of the notices.

Lastly, question #8 relates to the length of time the newspaper must be in operation to publish an election notice. Sec. 13775, p. 303, Laws of Missouri 1931 is as follows:

"All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided, that when a public notice required by law to be published once a week, for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777, 13778, 13779, 7631, 7632, and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

It is the opinion of this department that this section should be so construed as to include the present election.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

ER BILL: House Bill Number 23 does not provide a punishment for sale of beer outside of the premises described in the permit. A person having a permit under Subdivision C of Section 13139e may also have a permit under Subdivision D of Section 13139e, otherwise one person is not entitled to two permits. License can not be transferred from town to town.

August 3, 1933 8-10

FILED 88

Honorable William E. Stewart
Prosecuting Attorney
Edina, Missouri

Dear Mr. Stewart:

This Department acknowledges receipt of your letter dated July 11, 1933, as follows:

"I have a few questions I would like to ask you in reference to the new beer law.

First, can a retail malt liquor dealer sell beer to be taken away from the premises? If a car drives in front of one's place of business can he serve the occupant of the car at that place and would that be considered on the premises?

Second, Can one person have two licenses, that is, a retail and a wholesale license?

Third, Can one transfer license from one town to another in the State? That is, John Doe has a license to sell beer at Joe's Place in Hurdland, Mo. and wishes to move to Edina, Mo., can he operate under the same license?

Thanking you very much, I am,"

As of July 28, 1933, this Department issued an opinion to Dr. M. O. Raine, Food and Drug Supervisor, Jefferson City, Missouri, holding;

1. That while House Bill Number 23, known as the Beer Bill, contemplates the sale of beer on the premises where

sold and that ordinarily the premises would be within the four walls of the part of the building occupied by the permittee, yet the bill does not contain any provision making it a violation of the law to sell beer in a glass or in the open bottle to persons seated in cars at the curbing in front of the building occupied by the permittee who is entitled to sell for consumption.

2. A person having a permit under Subdivision C of Section 13139e to sell for consumption on the premises may also have a permit to sell in the original package under Subdivision D of Section 13139e, otherwise one person can not have two licenses.

3. Licenses can not be transferred from town to town. A license only authorizes the licensee to sell at the place described in the permit.

We are inclosing you a copy of the above opinion herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosure

STATE HIGHWAY COMMISSION: Salaries of Chief Counsel and legal Assistants.

8-25

August 22,1933

FILED
88

Hon. Louis V. Stigall
Chief Counsel
State Highway Department
Jefferson City, Missouri

Dear Mr. Stigall:

Your letter of August 14th addressed to General McKittrick requesting an opinion relating to the salaries of yourself and legal assistants of the State Highway Department has been handed to me for answer. For convenience your letter is quoted below:

> "By virtue of authority granted the Highway Department by statute, I desire to call upon you for an opinion as to the interpretation to be given Section 2-A of the Appropriation Bill, Laws of Missouri 1933, page 114. I do this for the reason that I do not like to pass on the matter of my own salary and those of my assistants.
>
> First: Does the section apply personally to officers and employees who were here in 1932 or does it apply to the office held by such person?
>
> I also notice a different wording in the first sentence from the wording used in the rest of the sentences, to-wit: the first sentence refers to amounts 'paid to said employees for the same period in 1932'; whereas, in the next sentence the working is 'whose salaries range'.
>
> Second: Is it correct in my case to take 20% from $6,000 if the Commission shall so desire?
>
> Third: Since my assistants were all paid different amounts during 1932, could one

> man who was here last year receiving $270 per month be now put in place of one who was receiving $297 per month and has gone away--there being no different offices known as first, second and third assistant, or would the statute apply to the employee and not to the office?
>
> Fourth: Did the section apply to those who were not here in 1932, like Mr. White, Mr. Lozier, and myself?
>
> I would appreicate your opinion in these matters."

It is the opinion of this department that Section 2a, entitled "Salaries of employees", p. 114, Laws of Mo. 1933, which is as follows:

> "The State Auditor shall not audit, nor shall the State Treasurer pay any salaries by virtue of the provisions of Sections 1 and 2 of this Act to any of the officials or employees of the State Highway Department in excess of 75% of the amount paid to said employees for the same period in 1932, when the salaries authorized and paid during such period to any of such officers or employees exceed the sum of $7500.00 per annum; 80% of such salary to officers or employees whose salaries range from $6000.00 to and including $7500.00 per annum; 85% of such salary to officers or employees whose salaries range from $4000.00 to $5999.00 per annum; 90% of such salary to officers and employees whose salaries range from $2500.00 to $3999.00 per annum; and 95% of such salary to officers or employees whose salaries range from $2000.00 to $2499.00"

applies or refers and means that the section is to govern the reduction of salaries of all employees of the State Highway Department and that it has no application personally to the employees of 1932, but rather to the position and duties of the employees. In other words, the section contemplates a reduction in the salaries of the position irrespective of the individual who holds the position and

the emolument of the position. The amount of the reduction varying according to the amount of the salary paid to the holder of the position.

The title of the section "Salaries of employees," would indicate that it relates to the various positions held by the employee and not to the employee personally or individually.

We fail to see any conflict or are we able to apply any different meaning to the phrase "paid to said employees for the same period in 1932," found in the fifth line, and the phrase "whose salaries range," which phrase is used throughout the remainder of the section. If an employee was receiving more than $7500.00 per annum in 1932, the salary of the position so held by the employee regardless of whom he might be at the present time should receive 75% of the former salary. And if an employee received, or "whose salary ranged" from six to and including seventy-five hundred dollars, he should be receiving 80% of the salary received by the employee holding the same position in 1932, irrespective of whom he might be or his salary at the present time.

Neither the constitution nor the statutes in any way contemplate that the salary is peculiar to the individual rather than to the position. There is no law which gives anyone the right in succeeding another individual where the salary or the remuneration from the position has been fixed to vary because of the individual himself.

Our statutes provide individual cases of what the procedure should be in case of a vacancy in office. Section 3233 R. S. Mo. 1929, says:

> "If any civil or military officer having any record, books or papers appertaining to any public office or any court shall resign, or his office be vacated, he shall deliver to his successor all such records, books andpapers."

Thropp on Public Officers, Section 345, p. 345, says:

> "As we have shown in a previous chapter, in this country an office is not regarded as property nor has the officer any vested right therein. * * * *"

We note by the above authorities that the office or position is not peculiar to the individual but that rather the individual is to fit into the office or the position. Therefore, you and the members of the legal staff are to be guided in the amounts of your salaries solely by what your predecessors in the positions were receiving in 1932. And to arrive at the amount of the compensation, there should be deducted from the salaries which your predecessors were receiving in 1932, the percentage in the amounts as the various salaries ranged in Section 2a, Laws of Mo. 1933.

Regarding your personal salary, we find under Section 8098 R. S. Mo. 1929, that youare selected and the salary is to be fixed by the commission not to exceed $6000.00. Said section being as follows:

> "The state highway commission shall select and fix the salary, which salary shall not exceed $6,000 per year of a chief counsel who shall possess the same qualifications as judges of the supreme court and who shall serve at the pleasure of the commission and shall appear for and represent the commission in all actions and proceedings under this article or any other law administered by the highway commission, or in any decision, order or proceeding of the commission, or of the chief engineer and shall commence, prosecute or defend all actions or proceedings authorized or requested by the commission or to which the commission is a party, and shall advise the commission or the chief engineer, when requested in all matters in connection with the organization, powers and duties of the chief engineer. The chief counsel shall, with the consent of the commission, appoint such assistant attorneys as the commission may deem necessary and their salaries shall be fixed by the commission. The legal department of the commission shall be furnished offices in the state highway building."

That Section 8094 R. S. Mo. 1929, creating the Highway Commission, which is as follows:

> "There is hereby created a state highway commission, which shall be vested with the powers and duties specified in this article, and also all powers necessary or proper to enable the commission, or any of its officers or employees, to carry out fully and effectively all of the purposes of this article."

places all the power over all employees in said commission and that they are the officers and the remainder of the positions in the highway department are held by employees.

In the case of yourself, construing Section 2a, as we have heretofore, as applying to the position held by the employee in 1933, and not to the employee personally or individually, it is the opinion of this department that you should receive in salary 80% of the amount your predecessor was receiving in 1932, providing he was receiving the maximum sum of $6000.00. If he wasreceiving less than $6000.00, then you should receive as compensation 80% of the amount he so received. This should govern the amount of your salary at the present time.

You state "is it correct in my case to take 20% from $6000.00 if the commission shall so desire?"

Under Section 8098 quoted supra, it would appear that the commission can fix your salary at any amount not to exceed $6000.00, and until the commission should meet and fix your salary at $6000.00, it is the opinion of this department that you could not take 20% from $6000.00 and receive the same in salary but that your salary should be governed entirely by the amount your predecessor received. As we construe the section, it was the legislative intent to reduce all the salaries of every employee ranging over $7500.00 per annum, down to $2000.00 per annum, and if it is possible to abrogate this section in one instance it would be possible to abrogate it as to all employees and thereby overthrow the intent of the legislature.

As to your assistants, you desire to know whether or not one man who was in the department last year receiving $270.00 per month, could be placed in a position which last year paid $297.00 per month, as the former occupant has now left the department. Having held in this opinion that the salary goes with the position and not with the individual, it is the opinion of this office that you could place the assistant in the position paying $297.00 per month. In other

words if the position paid $297.00 per month in 1932, you could place any assistant you desire in the position but he would be subject to the reduction as set forth in Section 2A, according to the range of the salaries.

Answering your fourth question, "would the section apply to those who were not here in 1932 like Mr. White, Mr. Lozier and myself?" Repeating that the salaries under Section 2a, follows the position and not the individual, it is the opinion of this department that it applies to all of you. If Mr. Lozier and Mr. White have succeeded certain former legal assistants and have assumed the position and duties of the former assistants, then the compensation should be the same as the compensation of the former assistants less the percentage of reduction as set out in Section 2a. But if Mr. White and Mr. Lozier have succeeded no one, and if either or both have been added to the legal staff or if either or both are occupying entirely new positions, that is, formerly held by no one, then their salaries would have to be fixed by the commission. In the case of an assistant who was an employee in 1932, he should receive in salary the same amount less the percentage reduction in Section 2a, providing he is now holding the same position, otherwise the salary of his predecessor, less the percentage of reduction.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

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Attorney General.

OWN:MM

ELECTIONS AND REGISTRATION:

Cities of between 10,000 and 30,000 population are required to have registrations, under the provisions of Laws of 1933, pages 239-249.

9/1

September 1, 1933.

FILED
88
42

Mr. Walter G. Stillwell,
Prosecuting Attorney of Marion County,
Hannibal, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I recently advised the County Court that the new law concerning permanent registration in cities of 10,000 to 30,000 inhabitants required that we have a complete new registration in Hannibal. I based this opinion on Section 2 of the New enactment being found on Page 240 of the Laws of Missouri, 1933. An opinion has been expressed to the County Court that a new registration is not necessary and my opinion came as a result of this information. I would appreciate knowing the attitude of your office concerning that opinion."

Section 2 of the Laws of 1933, page 240, provides as follows:

> "There shall be a registration of all the qualified voters in the cities of this State, now or hereafter having a population of 10,000 and less than 30,000 inhabitants, except in cities in counties which now have or hereafter may have 150,000 inhabitants or more and in which registration is now provided for by law, whether organized under general law or special charter, which registration shall be had under the provisions hereafter set forth; and the population of cities within the State containing such population shall for the purposes of this article be ascertained from and determined by the last decennial census taken by the Federal government."

The above Section specifically provides that "there shall be a registration of all the qualified voters in the cities of this State, now or hereafter having a population of 10,000 and less than 30,000 inhabitants * * * which registration shall be had under the provisions hereafter set forth * * *.

It is apparent from the foregoing language that it was the intention of the Legislature that all cities with the population of between 10,000 and 30,000 inhabitants shall have a registration under the provisions of the Laws of 1933, page 240. If it were within the contemplation of the Legislature that prior registrations in such cities would be sufficient, then it would have been useless for the act to provide that "the registrations shall be had under the provisions hereafter set forth."

The Laws of 1933, page 239-249, repeal the old Sections regulating registrations in such cities. It provided a new scheme of regiatration according to the requirements of that act. We have carefully examined all of the Sections of this law and fail to find anything therein that would indicate that the old registration may be used. On the other hand, Section 2 specifically provides that there shall be a registration in such cities under the provisions set forth in the Laws of 1933. If any meaning be given to the provisions of that Section, it must be that there must be a new registration within the provisions of those Laws, and that prior registrations under the repealed Sections would not suffice.

It is therefore the opinion of this Department that there shall be a new registration in cities of population between 10,000 and 30,000, under the provisions of Laws of 1933, pages 239-249.

Very truly yours,

Frank W. Haynes

Assistant Attorney General.

FWH:S

APPROVED:

_____

Attorney General.

SHERIFF: Duties and fees
(1) Duty in regard to meetings of Co. Board of Equalization;
(2) " " " " summoning appraisers;
(3) Fees for bringing prisoners from other counties;
(4) " in extradition proceedings;
(5) " " transferring prisoners from Co. jail to penitentiary.

September 1, 1933.

9/2

FILED

88

4/2

Hon. Walter G. Stillwell,
Prosecuting Attorney,
Marion County,
Hannibal, Missouri.

Dear Walter:

Your letter of August 12, 1933 addressed to Attorney General McKittrick relating to certain questions on which you desire an opinion has been handed to me for attention.

As your letter contains five different questions, we shall herewith quote each paragraph of same separately and undertake to render an opinion thereon. The first paragraph states:

> "Should the sheriff attend all meetings of the County Court setting as a Board of Equalization? If your answer to this be in the affirmative is he entitled to the same compensation as he receives for attending meetings of the County Court?"

Under Sec. 9811 R.S. of Mo. 1929, which is as follows:

> "There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization: provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

it will be noted that the sheriff in counties having adopted township organization is a member of the board; however, Marion County has not adopted township organization and the sheriff is therefore not a member. Section 9818, R.S. Mo. 1929, which is as follows:

> "The judges of the county court, the county surveyor, the county assessor, the sheriff, and the county clerk shall receive $5.00 per day for each day they shall act as members of the county board of equalization: Provided, that this section shall not apply to boards of equalization who are paid a salary,"

mentions that the sheriff shall receive his per diem the same as the other members. However, in our opinion, this section refers to Sec. 9811 R.S. Mo. 1929 and he is only a member when the county is under township organization. The only section in which the sheriff is mentioned as having any connection with the County Board of Equalization is Sec. 9815, R.S. Mo., 1929, which is as follows:

> "The said board of equalization shall have power to send for persons and papers and compel the attendance of witnesses in relation to any appeal before them, and it shall be the duty of the sheriff of the county to execute such process as may be issued to this end. A majority of said board shall constitute a quorum, and a majority of them present shall determine all matters of appeal or revision."

Upon consulting Sec. 11518, R.S. Mo. 1929, which enumerates the general duties of the sheriff, and Sec. 11789 R.S. Mo. 1929, which sets forth the fees of the sheriff, we do not find any mention of his duties pertaining to the County Board of Equalization. We therefore conclude that it is not his duty to attend the meetings of the County Board of Equalization, but he is subject to his duties under Sec. 9815, R.S. Mo. 1929.

It is well settled law in this state that all fees and all duties of the sheriff are purely statutory, and if the statute does not set out his duties and expressly fix his fees, there is no manner by which he may obtain fees. In the case of State ex rel v. Brown, 146 Mo., the court said (l.c. 406):

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. **** The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services."

It is therefore the opinion of this department that the sheriff is not required to attend the meetings of the Board of Equalization, and if he does, he is not entitled to any compensation.

Paragraph 2 of your letter is as follows:

> "Is it the duty of the sheriff to act in the appointment of Appraisers in Eminent Domain proceedings where the county is a party and when it is necessary to condemn private property for public use?" (Your letter 8/12/33)

> "In road condemnation matters where the Circuit Judge appoints appraisers, is it the duty of the Sheriff to summons into court these appraisers for the purpose of taking the usual oath, and if so is the Sheriff entitled to the same fee and mileage as when serving a subpoena in a civil case?" (Your letter 8/29/33).

Under this question, as stated in the prior question, the sheriff is governed entirely in his duties and fees by statutory provision. There is no provision for his receiving his mileage and fees for serving notice as outlined above unless it be found under the general section relating to his fees, which is Sec. 11789, R.S. Mo. 1929, the portion of which we think might be applicable being as follows:

> "For each mile actually traveled in serving any venire summons, writ, subpoena, or other order of court, when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip .....$.10."

We assume that this is a condemnation wherein the procedure is the same or is made referable to "condemnation proceedings by corporations". We think that the statutes are silent with reference to the duties of the sheriff in the appointment of commissioners or appraisers in any method of procedure in eminent domain. Sec. 1342, R.S. Mo. 1929 provides for the manner of appointment of commissioners as follows:

> "The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, ****"

It is the opinion of this department that if the Court, in his order appointing said commissioners, should include in the order that the sheriff notify the commissioners of their appointment, then the sheriff of the county, under the provision quoted in Sec. 11789, R.S. Mo. 1929, if the commissioners live five miles or more, would be entitled to his fees. But if the Court did not include in his order of appointment of the commissioners that the sheriff notify said commissioners of their appointment but directed the Circuit Clerk to do so, as has been my observation in Missouri in many condemnation proceedings of this character, then the sheriff would not be entitled to any fees or mileage. We repeat that he must come within the statutes before receiving any fees.

Paragraph 3 of your letter states:

> "In the event the sheriff goes to another county and returns a prisoner to his own county for which he has a warrant, is he entitled to additional compensation other than his mileage and fees for serving a warrant? This question is being asked

> because some sheriffs have the idea that they are entitled to additional compensation in lodging up to the date of the arraignment."

We are at a loss to understand how a sheriff would be entitled to any additional compensation for lodging or boarding a prisoner which he has returned to his own county. Sec. 11794, R.S. Mo. 1929 provides the maximum amount for boarding prisoners, said section being as follows:

> "Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

If the county court of your county fixes the amount of board the sheriff shall receive for each prisoner confined in the jail, it matters not if the prisoner is awaiting trial, awaiting arraignment, awaiting preliminary examination, or when or how he was apprehended and brought to the county; the amount he shall receive for boarding said prisoner should not vary from the amount he receives for boarding any other prisoner. In other words, if a prisoner is confined in jail, the sheriff receives a stipulated amount for boarding him irrespective of why or how he is confined. This is our conclusion, if we understand your question correctly. Under Sec. 11791, R.S. Mo. 1929 we find the following portion of the statute relating to additional fees the sheriff shall receive when transporting a prisoner from the county in which he has been apprehended to the county of the crime:

> "****The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one

> dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, ****"

and the sheriff is entitled to the above mentioned fees. We repeat that in the absence of any statutory provision, and we fail to find the same, the sheriff is not entitled to any additional fees under circumstances as outlined in your letter.

Paragraph 4 of your letter is as follows:

> "In extradition proceedings if the Sheriff is appointed messenger of the State of Missouri, is he entitled to any compensation other than actual and necessary expenses in returning the prisoner to his county?"

Under Sec. 3588, R.S. Mo. 1929, expenses of the messenger are always within the discretion of the Governor of the State, said section being as follows:

> "The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

This section does not make it mandatory on the sheriff to be the messenger. The Governor could appoint any other person he desired; therefore, the various fees which the sheriff in his official capacity might claim are not applicable. In the case of State ex rel v. Allen, 180 Mo. 27, the Court said:

> "Under the statute quoted (Sec. 2744 R.S. 1899) the duty of determining the question of the compensation and expenses of such messenger is vested solely in the Governor and he is the head of a coordinate branch of the government, and all his acts as such are in that capacity; hence, he cannot be interfered with in the discharge of his duties by the courts."

In making out the expenses incurred by the sheriff as messenger, it is the opinion of this department that he should include the number of miles traveled, claiming said mileage, the expenses

of the prisoner, his own expenses, the number of miles by rail, and any other legitimate expenses and fees which the conscience of the sheriff or messenger might prompt him to include. In the last analysis it will not matter what the sheriff or messenger wishes to charge, but it will be wholly within the discretion of the Governor as to what amount he shall receive.

Your last question, No. 5, is as follows:

> "In transferring a convicted felon from the county jail to the penitentiary at Jefferson City, on what basis is the sheriff's mileage computed and is he entitled to have a guard with every prisoner?"

We are not rendering you an opinion on this question, as our records show you were recently mailed two former opinions relating to the subject matter, and it will be needless for us to repeat the same.

We thank you for the last paragraph of your letter, but we do want you to feel that you are not in any wise imposing on this department by asking any question which might be a perplexing problem to you. This department is ready at all times to render you any assistance possible, and please feel at liberty to write us at any time.

With best regards,

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

Roy McKittrick

OWN:AH

STATE HIGHWAY DEPARTMENT: Supplemental opinion of salaries of Legal Department.

September 12, 1933

FILED
88

Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri

Dear Mr. Stigall:

This Department acknowledges receipt of your letter of September 7, 1933 requesting a supplemental opinion as to the salaries of the Legal Department of the State Highway Commission. Your letter is herewith quoted:

> "With reference to the recent opinion regarding salaries of appointees in the Legal Department for the State Highway Department, I beg leave to ask one additional point.
>
> Mr. John Mather is as a matter of fact not appointed to fill the place of any one who has left the service. He was Chief Counsel and has now been employed as an assistant counsel under the provisions of the statute which gives the Chief Counsel authority to appoint such assistants as he may deem necessary with the approval of the Commission. I could employ eight or ten or twenty-five men if agreeable to the Commission and if they were necessary. It seems to me that in such case no salary limit has been fixed by the Legislature. When I was appointed there were only five assistants. Mr. Collet had left the employment and likewise his office went with it. It could not be said there was a vacancy because we had never definitely set on six assistants in the Department.

There were no definite number of places. When Casky Collet perished from the Department his place and appointment, or office, or what have you, perished with him. Therefore, when we took up the matter of employing Mr. Mather as an assistant, we merely followed the statute which said we could take such assistants as we might desire. And at that time we happened to desire to increase the number of our assistants from five to six.

Under this statement of facts, I respectfully submit that there is no legal objection to our paying Mr. Mather, if the Commission so desires, a salary which will be in excess of 85% of what may have been paid any assistant during the year 1932. I further would like to submit somewhat outside the scope of this particular inquiry, that no appropriation bill, by tying a condition upon the expenditure of that particular appropriation, can be regarded as having changed the statute governing the appointment and salaries of officials. In other words, although we may not be able to pay our people out of this appropriation the salaries to which they were legally entitled, nevertheless there is considerable question in my mind but that we will owe to them the difference in their such salaries which will some day be paid out of another appropriation, voluntarily or involuntarily. However, this may be disregarded. For the present purpose, I respectfully request that the Attorney-General will give me an opinion upon the John W. Mather matter herein submitted."

The sole authority and power for the appointment of legal assistants is Section 8098 R. S. Mo. 1929, which omitting the parts which are not pertinent, is as follows:

> "***The Chief Counsel shall, with the consent of the Commission, appoint such assistant attorneys as the Commission may deem necessary, and their salaries shall be fixed by the Commission."

According to the above section, this Department therefore agrees with you when you state that "I could employ eight or ten or twenty-five men if agreeable to the Commission and if they were necessary." Assuming that you could, and that you did employ that number of legal assistants, what would be their compensation? It is true that the Legislature only fixed the salary limit for the Chief Counsel and is silent as to the compensation of the legal assistants; but are we to assume that because no compensation was fixed by the Legislature for the legal assistants, the Commission has the power and can arbitrarily fix the compensation of an assistant at any amount, and even in excess of the amount of salary paid to the Chief Counsel? We think not.

Under Section 2a, Laws of Missouri 1933, p. 114 (which we are not quoting here, as you are thoroughly familiar with the same) the Legislature undertook, and did place a blanket reduction on all salaries from $2,000 and more than $7500 per annum, the percentage of reduction in each instance being according to the range of the salaries.

In an opinion heretofore rendered you we held that the reduction applied to the salary of the position that the employee was holding in 1932 and not to the employee personally. Therefore, we cannot agree with you when you say in essence that when Mr. Collet left the Department his office was banished and that he carried away with him all title to the office. It is our opinion that when Mr. Collet resigned and left the office, there was thereby created a vacancy and that the same was subject to being filled by yourself by and with the consent of the Commission. In other words, Mr. Collet's position is subject to being filled, and if the same has been filled, the person placed in the position must accept the same salary Mr. Collet was receiving, less the percentage of reduction as set out in Section 2a.

The same applies to all other vacancies or changes in the Legal Department. As to Mr. Mather, if he is not Chief Counsel he must therefore take one of the subordinate positions, it being optional with you as to which position you desire him to fill.

You have stated heretofore that there is no such official designation as first, second and third assistants, but the assistants are receiving different salaries, and therefore each is holding a distinct position; but you state you now have six assistants, whereas in 1932 there were only five, and indicate that Mr. Mather is going to be the sixth one. If such be the case, then you have the right to place Mr. Mather in a new position or in a position "formerly held by no one in 1932", but the spirit of the law or intention of the Legislature should not be violated in fixing his salary.

It is the opinion of this Department that the Commission could fix his salary at a figure ranging between the lowest paid assistant and the highest paid assistant. The salaries of the legal assistants of 1932 should at least be a guide for the Commission in fixing the salary of additional assistants irrespective of how many, as it was clearly the intention of the Legislature to reduce the salaries of the assistants, and the Commission should at least be morally bound and guided in arriving at the salary of the new or additional assistants by the amount of salary that is being paid to present assistants doing similar work.

In rendering you this opinion we are not undertaking to pass on the constitutionality or unconstitutionality of Section 2a, but we are assuming and will continue to assume that said section is constitutional until declared by a court of competent jurisdiction to be otherwise.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

PUBLIC SCHOOLS: Any pupil between ages of 6 and 20 has right to do eighth grade work over after having received diploma and has right to use of free text books.

October 14, 1933.

10-14

FILED
88
57

Mr. J.E. Stoops,
Clerk and Member of School Board,
District No. 90,
R. F. D. #9,
Springfield, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 30, which reads as follows:

> "As Clerk of the School Board I am asking an opinion on the following question, which is before the Board at present.
>
> We have a girl who was given a diploma last year from the eighth grade. It is her desire, as well as her parents, for her to take the grade over again this year. Our County Superintendent has advised us it is contrary to law to allow her to do so. I contend the State Constitution gives to every child the benefit of the public school from 6 to 20 years, and the fact she has been given the diploma from the eighth grade does not deter her from the school for the purpose of taking the work over again. The County Sup't. says the State Sup't. has ruled the Board can not allow her the use of the free books which are furnished in our school or any funds of the district cannot be used for her benefit after she is given a diploma.
>
> Is she not entitled to the public school so long as she does not ask for any additional course of study than is taught in the eighth grade work?"

The Constitution of Missouri, Sec. 1, Art. XI, p. 146 entitled "Free Schools--School Ages", provides as follows:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

Sec. 9433 R.S. Mo. 1929 makes it compulsory for a child to attend school between the ages of six and fourteen years, but contains no provision prohibiting a child attending school after attaining the age of fourteen years.

In the case of Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, l.c. 488, the Court refers to the above section of the Constitution as follows:

> '"The provisions of the 1st and 6th sections of article 11 of the Constitution of the State, taken together, are conclusive on this point. The 1st section in effect declares that all persons in the State between the ages of six and twenty shall be gratuitously instructed in the free public schools therein provided for, and the 6th section in like manner declares that the 'public school fund' therein mentioned, shall be faithfully appropriated for establishing and maintaining the 'free public schools' provided for in said article, and for no other uses or purposes whatsoever. The two sections, taken together, amount to both a requirement and a prohibition. By the first, free public schools for the gratuitous instruction of all persons in the State between the ages of six and twenty are required, but by the sixth, the funds thus dedicated to that use are prohibited from being expended for any other uses or purposes whatsoever.'"

In view of the constitutional right which a child has of attending school from six to twenty years of age, the child mentioned in your letter has the right to attend school and again take the eighth grade work.

As to the question of furnishing the child free text books, we refer you to Sec. 9506, R.S. Mo. 1929, the pertinent part being as follows:

> "The qualified voters of any school district in the state may at any annual or special school meeting, fifteen days'notice having been given as required in section 9283, vote to authorize the board of directors or board of education of such district to purchase from the incidental fund and furnish free all the textbooks for all the pupils in the public schools of said district. A majority vote of those voting upon this proposition shall be sufficient to decide the question. In the event the incidental fund is not sufficient to supply all the books during the first year, then the board shall supply as many grades of their school or schools as possible beginning with the lowest grade and shall furnish free textbooks to all the pupils of all the elementary grades within a period of three years from the date of the school meeting at which it was decided to furnish free textbooks. Such books shall be the property of the district, but shall be furnished free of charge to all public school pupils for use in the public schools of said school district, under such rules and regulations as the board of directors or board of education shall prescribe. ****"

The above section contains no provision prohibiting a child who has finished the eighth grade from the use of free text books, the same being "for all the pupils in the public schools of said district", and the other provision is that the Incidental Fund must be sufficient.

It is the opinion of this department that the child in question is entitled to the use of the free text books the same as any other student who is attending the school and who has not finished the eighth grade.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

SCHOOLS: A contract with a bus company for free transportation of students is illegal because it does not conform to Section 9197, R.S. Mo. 1929.

10-24

October 23, 1933.

FILED
88
53

Hon. H.L. Stolte,
Representative Gasconade County,
Hermann, Missouri.

Dear Sir:

Your letter of October 14, 1933 addressed to General McKittrick has been handed to me for reply. The facts as set out in your letter are as follows:

> "The facts are that in the summer of 1932 the Board of Education of Hermann, Missouri entered into a contract with several bus lines for free transportation of students from outlying districts to the High School here in Hermann, Mo., the Board having agreed to pay all expenses out of the general revenue for such transportation without any charge on the student whatsoever and without submitting the matter to the voters of the district here in Hermann, and have since issued vouchers on the incidental fund of the district.
>
> Please advise me here at Hermann and give me your opinion whether such action on the part of the Board of Education is permissible and in accordance with law."

I.

A contract with a bus company for free transportation of students is illegal because it does not conform to Section 9197, R.S. Mo. 1929.

Section 9197, R.S. Mo. 1929 provides the method by which free transportation may be obtained, said section being as follows:

> "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 9228. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

From the foregoing section we glean that the following conditions must be carried out: (1) ten taxpayers must request the Board of Directors by a petition to provide for free transportation of pupils; (2) The Board of Directors or Board of Education must submit the question to the qualified voters of the district at an annual or special meeting called and held for that purpose.

From your letter we assume that neither condition was complied with at the time the contract was entered into with the bus lines.

Section 2962, R.S. Mo. 1929 deals with contracts by school districts and is as follows:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

Under this section the School Board has no power to enter into a contract unless the same shall be within the scope of its powers or be "expressly authorized by law."

We are unable to cite any Missouri decisions wherein the question of transportation has arisen on a contract, but in the case of Terry v. Board of Education, 84 Mo. App. 21, l.c. 25, the general principle of law is embodied. In this case the Court said:

> "The two charters under which the defendant has existed since 1833, created it a public corporation and school district, charged with the duty of educating the children residing within its territorial limits. State ex rel. O'Connell v. Board of Pub. Schools, 112 Mo. l.c. 218. In 1874 the legislature passed a law restrictive of the power of school districts and other corporations of a like character. By this act to make any contract of such corporation valid, it must first appear that it is within the scope of their corporate powers, and it must next be shown that the contract in question arises upon a consideration to be rendered subsequent to its making, and that it was in writing and duly executed. R.S. 1889, Sec. 3157; Acts of 1874, page 44. The legislature had full power to prescribe this mode of authenticating the contracts of school districts, and also to condition the enforcibility of such contracts upon compliance

> with these requirements. It has done so. Hence the contract of plaintiff not being in accordance with the statute, imposed no obligation upon the former school board, nor upon the defendant as its successor, in duty, as well as in right."

Likewise, in the case of Miller v. Alsbaugh, 2 S.W. (2d) 208, l.c. 211-12, the Court said:

> "Under this statute no valid contract could be executed by which the school district would be bound to employ any person to drill a well unless the school board should authorize the well to be drilled and should also authorize the employment of a certain designated person to do the work. The board could, by order of record, appoint an agent to execute a contract as provided in the latter part of the section, but the members of the board, when the board was not in session, could not employ a party to drill the well unless the board as a board in a meeting lawfully held had first authorized them to do it. If we concede that the meeting held in April, 1915, before the work was done, was a legal meeting of the school board, and admit that, although no record was made of what was done at that meeting, its proceedings could be proven by parol, which we do not concede, yet all that was done at that meeting was to determine to have a well drilled. Not a word about who should be employed to drill it nor a word about the terms of the contract to be entered into nor the person to be employed nor who should execute the contract on the part of the school board. Certain it is that nothing was done that could confer any authority upon the two members of the board, Miller and Ragland, to employ Mr. Edwards or any other person to drill the well. That being true, the oral agreement they made with Mr. Edwards was a nullity and could not be used as a basis for recovery for the agreed price of the work. *******Neither could the school district be held for the value of the work after it was done. No recovery can be had against a school district upon quantum meruit nor upon an implied contract. The fact that the school district got the benefit of

the work and continues to use the well does not give any right of action against the district. Taylor v. School District No. 3, 60 Mo. App. 372; Perkins v. School District, 99 Mo. App. 483, 488, 74 S.W. 122."

From the foregoing decisions, and after applying the same to the facts as stated in your letter, it is the opinion of this department that the contract with the bus lines for free transportation of students to the High School at Hermann is invalid.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

HIGHWAYS: Authorization of state officials to take necessary steps to secure federal aid.

11-B

November 10, 1933.

FILED 58

Honorable Louis V. Stigall, Chief Counsel,
Missouri State Highway Department,
Jefferson City, Missouri.

Dear Sir:

A request under date of October 31, 1933 has been received from you for an opinion, which request is in the following terms:

> "As you are aware, at the present time the State Highway Commission of Missouri is bending every effort to let as many contracts for road construction in the various counties of the State in order to relieve unemployment and secure Missouri's share of Federal funds under the National Industrial Recovery Act. Under the provisions of Section 204 of this Act regulations have been made by the Bureau of Public Roads concerning the advancement of funds by the Federal Government to the various states where the states do not have funds which are readily available for the purpose of expediting the work.
>
> It is the desire of the State Highway Commission of Missouri that an application for an advancement of $2,500,000 of Federal funds be made at this time in order that the work under this program may proceed more rapidly. I would, therefore, like to respectfully request your opinion concerning the authority of the State Treasurer and the State Auditor to cooperate with the State Highway Commission in securing this advancement; and also to comply with the rules and regulations of the Federal Government under which this advancement is authorized.
>
> In order that you may have the full information concerning the subject, I am attaching hereto sample forms of the request for advance of funds issued by the United States Department of Agriculture, Bureau of Public Roads, the certificate to be executed by the State Treasurer covering the funds advanced, and a memorandum of procedure and accounting requirements for advances of National Industrial Recovery highway funds, all issued by the Federal Government and which are necessary to procure an advancement of funds.
>
> In this connection I believe Section 8106, R. S. Mo. 1929 will aid you in your investigation as to the validity of this procedure. May I also say that under the procedure outlined by the Federal Government some additional accounting will be made necessary, and the Commission will be glad to cooperate fully with the Auditor and Treasurer in working out the details of this work.
>
> I would appreciate your early consideration of this matter."

The Federal Highway Act was enacted by Congress in 1921 (23 U. S. C. A. Sections 1-25) and it provided a scheme for federal aid to states for road building. At the first extra session of the Missouri General Assembly in 1921 certain statutes were enacted setting up machinery and granting powers to appropriate officials to make funds from the United States under the Federal Highway Act available to the State of Missouri (such statutes being now Revised Statutes of Missouri, 1929, Sections 8093-8121; Laws 1921, First Extra Session, page 131). Before 1921 the General Assembly had already indicated its policy to make it possible for Missouri to receive federal aid for road building by the enactment of what is now Revised Statutes of Missouri 1929, Section 8092, which provides as follows:

> "Sec. 8092. Assent to act of congress for aid to state roads.- That assent is hereby given to an act of the congress of the United States, entitled: 'An act to provide that the United States shall aid the states in the construction of rural post roads and for other purposes."

Of the 1921 statutes Section 8106 leaves little doubt of the intent of the Legislature to authorize Missouri state officials to do whatever is necessary to secure aid under the Federal Highway Act, Section 8106 providing in part as follows:

> "The commission is hereby directed to comply with the provisions of any act of congress providing for the distribution and expenditure of funds of the United States appropriated by congress for highway construction, and to comply with any of the rules or conditions made by the bureau of public roads of the department of agriculture, or other branch of the United States government, acting under the provisions of federal law in order to secure to the state of Missouri funds allotted to this state by the United States government for highway construction. The commission is authorized to pay the state's proportion of the cost of roads constructed with federal and state funds out of the state road fund. Any money due to the state of Missouri from the United States, under the provisions of such acts of congress, relating to highway construction, shall be received by the state treasury and deposited in a separate fund, and paid out by the state treasurer on requisitions drawn by an officer of the state highway commission on a warrant of the state auditor. Said funds being the funds of the federal government allotted to the state of Missouri no appropriation of the general assembly for the expenditure of such funds shall be necessary."

The case of Logan v. Matthews, 52 S. W. 2d, 989 (1932), decided by the Supreme Court en banc shows the attitude of this court toward Section 8106. That case was a suit by citizens and taxpayers to enjoin the State Highway Commission from locating and constructing Highway No. 65 so as to miss certain towns when Revised Statutes Missouri 1929 Section 8120 provided that this highway should pass through such towns. The issue in the case was whether

or not Section 8106 above quoted should prevail against Section 8120, when the federal aid was conditioned upon the highway following the route adopted by the State Highway Commission, and when the State Highway Commission had resolved to comply with such condition even although such compliance violated Section 8120. The court held that the suit could not be maintained, a part of the opinion being as follows:

> "Section 8120 provides that the road in question shall run through the towns of Avalon and Tina. The federal government refused to allow federal aid on the road unless the routing thereof was changed so as to run on a direct north and south line between the towns of Chillicothe and Carrollton, which change would locate the road two miles west of the towns of Avalon and Tina. Section 8106, supra, directs the commission to comply with any act of congress and with any rules or conditions made by the Bureau of Public Roads of the Department of Agriculture or other branch of the United States government in order to secure to the state of Missouri funds allotted to this state by the United States government for highway construction. It appears clear from the provisions of this statute that the purpose of the Legislature was to secure all of the funds allotted to the state by the federal government for road construction, and in order to accomplish that result it directed the state highway commission to comply with any of the rules or conditions made by the federal government." * * * * * *
>
> "If the Secretary of Agriculture is authorized by the Federal Highway Act to require a change in the location of the road as a condition to granting federal aid, of which there is no doubt, and the state highway commission would refuse to comply with the requirements made, and thus lose federal aid on the road, then the intention of the Legislature would be defeated, because by section 8106 it specifically directs the highway commission to comply with any condition made by the federal government in order to secure federal aid. A reasonable construction of the Federal Highway Act justifies our conclusion." 52 S. W. 2d, 992.

Section 8106 shows the intention of the General Assembly as to its eagerness to secure for Missouri federal aid for its roads, and Logan v. Matthews, supra, shows a similar attitude on the part of the Supreme Court because that case goes so far as to authorize the Highway Commission even to violate another state statute to comply with the federal conditions imposed. Under these authorities there can be no doubt that the State Highway Commission itself could comply with any federal regulations or requirements laid down under the Federal Highway Act, and the liberal attitude of the General Assembly and the Supreme Court would seem to indicate a liberality in construing the powers of state officials in securing such federal aid under the Federal Highway Act.

The Federal Industry Control Act commonly known as the National Industry Recovery Act (H. R. 5755, 73rd Congress, approved June 16, 1933) in Section 204 thereof provides an enlarged and supplemental scheme for federal aid to states

for road building. The importance of the above analysis of the legislation in effect prior to the Federal Industry Control Act lies in the fact that such act seems to be supplemental to and to follow the general scheme of the Federal Highway Act. Section 204 of the National Industry Control Act begins as follows:

> "Sec. 204. (a) For the purpose of providing for emergency construction of public highways and related projects, the President is authorized to make grants to the highway departments of the several States in an amount not less than $400,000,000, to be expended by such departments in accordance with the provisions of the Federal Highway Act, approved November 9, 1921, as amended and supplemented, except as provided in this title, as follows:"

The whole of Section 204 under analysis shows that it does not purport to place any heavier exactions or obligations upon states seeking federal aid for road building but, on the contrary, manifests a clear intent to relax the requirements upon states of the Federal Highway Act and to make it easier rather than more difficult for a state to secure federal aid, so that if the appropriate officials of Missouri were authorized to take the necessary steps to secure federal aid under the Federal Highway Act then a fortiori they should be able to take the less onerous steps to receive the same type of aid under the National Industry Control Act.

As has been pointed out above, there seems no doubt that the State Highway Commission could do whatever is necessary to comply with federal requirements. As to the other state officials, particularly the treasurer and auditor mentioned to in your request, we have found no authority prohibiting the execution and performance by them of the necessary documents and steps required by the federal authorities, and it is our opinion that the various statutes governing their powers would, in the light of the favorable attitude of the Supreme Court toward expediting federal aid for roads, probably be construed as authorizing them to the necessary compliance. It is not the policy of this state to evade proffered gifts as can be observed from R. S. Missouri 1929, Section 643, which provides as follows:

> "Sec. 643. Commission created to accept devises, bequests, donations, gifts, etc., made to the state. - - Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the governor, attorney-general and state treasurer, constituting a commission for that purpose, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said commission, so that the right and title to shall pass to and vest in this state; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated

for educational purposes, or for such other purposes as the legislature may direct."

As to the action which will be necessary on the part of the state auditor, Revised Statutes of Missouri 1929, Section 11404, might provide of itself the proper authorization where it provides, in specifying the duties of the state auditor, that "he shall * * * keep an account of all debts and credits between the state and the United States, or any officer or person with whom the state may have dealings, and of every separate fund in the treasury authorized by law;". The state treasurer could certainly receive the grant (Section 11425) and he could and probably would be required to put it in a special fund (Section 11471; Laws of Missouri 1933, page 415) and require security from the depositary (Chapter 72, Article II (Sections 11465-11477,)) and he could pay out the interest thereon as required by law (Section 11465). As to the matter of interest it being legal and proper for the state to accept gifts on such conditions as the donors might impose under Revised Statutes Section 643 above quoted, unless, of course, some positive provision of law should be violated by such conditions, then no reason is perceived why the state treasurer and auditor should not comply with such conditions one of which might be that the interest on such fund be paid to the United States. If the state under Section 643 can accept gifts on certain conditions then this section should of itself by implication authorize such state officials as would be required under such conditions to comply with them on behalf of the state to take the necessary and incidental steps required on the part of the state to keep its side of the bargain.

For the above reasons it is our opinion that no legal objection exists to prevent the State Highway Commission, the state treasurer and the state auditor from executing such documents and performing such acts as are now necessary under the Federal Highway Act and Section 204 of the National Industry Control Act to enable the State of Missouri to apply for and receive federal aid for road building under such enactments.

Yours very truly,

EDWARD H. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.

In Re:--School Districts--Limit of levy for maintenance.
Constitution, Sec.11, Article X.

April 7th,1933

FILED
89

Hon. E. L. Sutherland,
House of Representatives
Jefferson City, Missouri.

Dear Mr. Sutherland:-

I In response to your oral request for an opinion on the paragraph of an "Annual School Meeting" notice, reading as follows:

> "A levy of one dollar on the one hundred dollars assessed valuation for the maintenance of a nine month's school."

I advise you as follows:

The constitutional limitation on the amount of taxes leviable for school purposes is found in Section 11 of Article X, Constitution of Missouri. The pertinent parts of such section read as follows:

> "Taxes* * * for school purposes in districts composed of cities * * * and in other districts forty cents on the hundred dollars valuation: Provided, the aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on a condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase."

The notice clearly states that the proposed increase is "for the maintenance" of the school. Accordingly, if your district is "formed of cities or towns", the limit is one dollar on the one hundred dollars assessed valuation. If an "other district", sixty-five cents would be the limit.

This is a proper proposal to be submitted to the tax-payers of the district under Sections 9125, 9283 and 9284, R. S. of Mo. 1929.

I trust that this fully answers your inquiry.

Respectfully submitted,

HAROLD G. BALTZER, Jr.,
Assistant Attorney General

HGB/mh

APPROVED:_____
ROY McKITTRICK
AttorneyGeneral.

FEDERAL CHECK TAX: Does not apply to County warrants.

August 25, 1933.

9/9

FILED

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Hon. Edward D. Summers,
Prosecuting Attorney,
Crawford County,
Steelville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of July 31, 1933, which is as follows:

> "I would like to ask your opinion as to whether or not the tax on checks levied by the Federal Government is binding upon a County or subdivision of this State. In this County there has been no allowance made for the payment of this tax and apparently the treasurer is out of money and has no funds with which to pay it.
>
> They are still auditing the Crawford County Farmers Bank and expect that the auditing will be completed within the next three weeks. I expect then to ask the Judge of this Circuit to call a Grand Jury for the investigation of its affairs and I shall let you know at the earliest time possible as to the date of its convention."

The Section to which you refer is Section 3751, found in Title 26, U.S. Code Annotated, Part 6, entitled "Tax on Checks, etc." Said section is as follows:

> "****(a) There is hereby imposed a tax of 2 cents upon each of the following instruments presented for payment on or after the 15th day after the date of the enactment of this act and before July 1, 1932; checks, drafts or orders, for the payment of money drawn upon any bank, banker or trust company, such tax to be paid by the maker or drawer.

> (b) Every person paying any of the instruments mentioned in subsection (a) as drawer of such instrument shall collect the amount of the tax imposed under such subsection by charging such amount against any deposit to the credit of the maker or drawer of such instrument, and shall on or before the last day of each month make a return, under oath, for the preceding month, and pay such taxes to the collector of the district in which his principal place of business or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such a manner as the commissioner with the approval of the Secretary, may by regulations prescribe. Every person required to collect any tax under this section is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section."

In the foregoing section you can readily determine that counties, or subdivisions of the State are not subject to such tax. Further than that, the Treasury Department, which has the power to make the rules, has expressly exempted warrants of the character to which you refer. Article 36 being as follows:

> "The regulations state that checks, drafts and orders drawn by officers of the United States, or of a state, county or municipal or of a foreign government in their official capacity, against public funds, are not subject to tax."

It is therefore the opinion of this department that the tax on checks is not applicable to warrants issued by the county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

IN RE: **PROPOSED AGREEMENT BETWEEN WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY OF PITTSBURGH, PENNSYLVANIA, AND SUPERIOR ELECTRIC PRODUCTS CORPORATION OF SAINT LOUIS, MISSOURI, TO THE ANTI-TRUST LAWS OF MISSOURI.**

9/2

September 1, 1933.

FILED
89
42.

Superior Electric Products Corporation
1300-1310 South Thirteenth Street
Saint Louis, Missouri.

Gentlemen:

Replying to your letter of August 31, beg to say this department construes your letter of the 31st to mean that Westinghouse Company controls the patent on all thermostatic controls you use and that was the point of the inquiry we made with reference to Article II, paragraph (a).

This department assumes from the correspondence the fact to be that in all your transactions with the Westinghouse Electric Company, you are acting as a manufacturing licensee.

The law is, that while a patentee may not fix the price at which the vendee shall sell the article he has sold him, yet it is a very different question when fixing the sale price where there is a grant of a license under the patent to manufacture an article and sell it when manufactured. Where a patentee grants a license under the patent to manufacture an article, the patentee may fix the price at which the article under the said license shall be sold by the said licensee. The object of these laws is monopoly and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee, and agreed to by the licensee for the right to manufacture and use or sell the articles will be upheld by the courts. The fact that the conditions of the contract keep up the monopoly or fix prices does not render them illegal.

The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent

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may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee charge a certain amount for such article. (Bement v. National Harrow Company, 186 U. S. page 70; 46 Law Ed. page 1058).

Upon the facts stated in the above cited case, it is still the law and it has not been in that respect overruled. It will be found frequently cited but not where the facts involved are identical with those in the Bement case. (Thornton on Combinations to Restrain Trade, Section 544, page 894.) There is an unbroken line of authorities in this country supporting the above legal proposition.

The authorities cited above gives you ample power to legally enter into the proposed contract, a copy of which you have submitted to this department insofar as the manufacture and sale of the said article by yourself, in accordance with schedules "A" and "B" attached to said contract, are concerned.

With respect to your Article IV, relating to price maintenance, this department desires to say that if Article IV is used simply for the purpose of a price maintenance as between your company and the owners of the patent, the Westinghouse Electric Manufacturing Company, then said Article IV is legal and is not a violation of either the Federal or the State Anti-Trust Laws. The question as to whether or not you may enter into contracts for maintenance of price with other manufacturers licensed by the Westinghouse Company to use the same patent as your company in accordance with schedules prepared by the Westinghouse Company, under the proposed agreement you have submitted, is one which must be answered with qualifications.

The law, as this department understands it is, agreements which transcend what is necessary to protect the use of the patent and restrain trade amount to a violation of the Missouri Anti-Trust Law; and if the operations under such agreement are carried on between different States or with a foreign country, then the Federal (Sherman) Anti-Trust Law is violated.

This was so decided in the case of Standard Sanitary Manufacturing Company v. United States, 226 U. S. page 20. In that case there was involved an agreement of all the parties thereto to use one certain patent which covered the manufacture of Standard Sanitary Manufacturing Company's products of enameled iron ware such as bath-tubs, wash-bowls, drinking fountains, etc., and the signers of the

agreement produced more than fifty per cent of that class of commodities in this country. The defense was set up that under the patent, the validity of which was in question, such combination was legal but the court held otherwise and decided the contract between the manufacturers was a violation of the Sherman or Federal Anti-Trust Law. This opinion, insofar as this department has been able to ascertain, has never been overruled nor has the effect thereof been legally narrowed by any subsequent decisions.

In the case of United States v. Pacific and Arctic Company, 228 U. S. page 87, Steamship Companies and Railway Companies combined to control transportation rates between Seattle in the State of Washington and Skagewa, Alaska, one of the defenses set up among others was that the agreement amounted to nothing more than fixing of a through rate and that under the Interstate Commerce Law, the defendants had a right to do that. The facts in the case developed, however, showed that for all carriers, not signatories to the agreement, there was a higher rate charged than that paid by the signers of the contract. The Federal Supreme Court held that this contract was in violation of the Federal Anti-Trust Law.

In a recent case, decided in March of 1931, the soundness of the two above cited cases was affirmed. The case we refer to is Carbice Corporation of America, v. American Patents Development Company and Dry Ice Corporation of America, 283 U. S. page 27; 75 Law Ed. page 819; and in this case, the court said:

> "The present attempt is analogous to the use of a patent as an instrument for restraining commerce which was condemned under the Sherman Anti-Trust Law in the Standard Sanitary Manufacturing Company v. United States, in 286 U. S. page 30."

Your correspondence gives no idea of the extent of the business of the Westinghouse Manufacturing Company

and all we can say to you is that if agreements are made by you with other licensees of the Westinghouse Company as to maintenance of price, such action would be a violation of the Missouri Anti-Trust Statutes, unless the agreements are such as Federal Supreme Court decisions sanction. This department is not prepared to say, considering the above cited cases in the Federal Supreme Court and considering our own Missouri Anti-Trust decisions, that your company would be legally authorized to make agreements with any other licensee of the Westinghouse Company for maintenance of price of the patented articles which you and such other companies or corporations may manufacture under the same license from the Westinghouse Company.

It is true that, in Rubber Tire Wheel Company v. Milwaukee Rubber Works, 154 Fed. page 358, decided April 16, 1907, in the Circuit Court of Appeals of the United States for the Seventh Circuit, that court held:

> "That it require in a license contract that a licensee joins other licensees in a combination or pool to control the price and output of a patented article was not in violation of the Sherman Anti-Trust Act (Federal Anti-Trust Law)",

and the court held in that case that patented articles, unless and until they are released by the owners of the patent from the dominion of a monopoly, were not articles of trade or commerce among the several states within the meaning of such act because they are not articles in which the people are entitled to freedom of trade; and the same court, on the same day held in Indiana Manufacturing Company v. J. I. Case Threshing Machine Company that where the owners of a number of patents, relating to straw stackers, licensed manufacturers of threshing machines giving said companies the right to use all inventions covered by such patents and authorized them to sell the straw stackers at a certain price and to pay royalty on each stacker so made and sold, also giving such threshing machine companies the right to use inventions covered by any other patents relating to the art which should thereafter be acquired by the owner of the patent, and the owner did afterwards acquire the ownership of all patents relating to said stackers, the court held that such contracts were not in restraint of competition and in vidation of the Sherman Anti-Trust Act. Both of these cases were taken on appeal to the Federal Supreme Court but both were dismissed on stipulations by the parties before being

argued and submitted to the court and so far as we can ascertain those cases were never passed on by any other court except the United States Circuit Court of Appeals. As to the stacker case, the one last mentioned, that case might be upheld on the theory that it did not go beyond what was necessary to protect the rights of the owner of the patent. As to the other case, in the United States Circuit Court of Appeals, it could only be sustained on the theory that it did not go beyond what was necessary to protect the rights of the patentee; but, in view of the Standard Sanitary Manufacturing Company's case, and the United States v. Pacific and Arctic Company, and the Carbice cases, heretofore cited, it is the opinion of this department that it is very doubtful if the Rubber Tire Wheel Company v. Milwaukee Rubber Works case in the United States Circuit Court of Appeals would be sustained by the Federal Supreme Court.

In the recent case of the Standard Oil Company v. United States, 283 U. S. page 163; 75 Law Ed. page 937, the Federal Supreme Court held:

> "Where domination of an industry exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product is beyond the privileges conferred by the patents and constitutes a violation of the Federal Anti-Trust Act."
>
> "While manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or fix the price of goods entering into interstate commerce, or which have been executed for that purpose are within the prohibitions of the Federal Anti-Trust Act."

The principle behind the federal decisions holding owner nor licensee of patent cannot, in guise of furthering use of the patent, make agreements restraining commerce is that the patent privilege given patentee to control price of his patented article when he licenses manufacturer to make same does not authorize a license contract restraining trade.

The proposed contract, unless it is protected by virtue of being a patent, is a clear violation of the Missouri Anti-Trust Statutes. If the contract is within the protection extended by the decisions of the United States courts to owners of patents, the State could not legally hold it invalid for the reason the subject of patents is within the control of the Federal Government and the rights under patents flow from a Federal Statute.

Therefore, this department has in this investigation kept steadily in mind the opinions of the Federal Supreme Court on what contracts are valid or invalid when made between patentee and licensee for manufacturing and sale under a patent.

Respectfully submitted,

EDWARD C. CROW
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney-General.

ECC/AJ

PAYMENT OF PAST)
INDEBTEDNESS OF)
A COUNTY.)

County Courts cannot pay criminal cost incurred in past years from current revenue.

11-3

FILED
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October 18, 1933

Mr. Edward D. Summers,
Prosecuting Attorney,
Steelville, Missouri

Dear Sir:

Your letter of September 22, 1933, has been received in which was contained a request for an opinion as follows:

> "I wish to request your opinion upon the following questions:
>
> I. Can criminal costs incurred during the year 1932, which have not been allowed by the County Court of a County during that year, be paid out of the revenues collected for the year 1933. If not, please advise how the order allowing them for this year may be made by the County Court so as to prevent their payment by the Treasurer in the order in which warrants are protested.
>
> 2. Are the warrants issued during December of 1932 to be paid out of the County Revenues for 1933."

Section 9874 R. S. 1929 reads as follows:

> "The county courts of the several counties of this state are hereby authorized and empowered, at the first regular term of such court after the taking effect of this chapter, and at the May term every year thereafter, to appropriate, apportion and subdivide all the revenues collected, and

to be collected, and moneys received and to be received, in the various counties in the state, for county purposes, in the following order:

I. A sum sufficient for the payment of all the necessary expenses that may be incurred for the care of paupers and insane persons of such county.

II. A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county.

III. A sum sufficient for the payment of the salary of all county officers, where the same is by law made payable out of the ordinary revenues of the county.

IV. A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of the county.

V. A sum sufficient for the payment of the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as the contingent fund of such county; which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year."

It is clearly seen from the foregoing statute that the County Court is required to appropriate the County revenue, contemplated for the ensuing year, to certain funds to which it is solemnly pledged.

The fourth appropriation required to be made under said section relates to fees of grand and petit jurors, judges and clerks of elections and fees for witnesses.

MUNICIPAL INDEBTEDNESS LIMIT OF.

The Constitution of Missouri, Article X, Section 12, provides in part as follows:

> "No county, city, town, township, school district, or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, etc."

The above cited and quoted constitutional and statutory provisions make clear the following proposition:

That a County Court cannot contract beyond the contemplated revenue in any of the various funds for any one year.

> "Our present Constitution and laws mean that there came a time in the history of this State when the power (theretofore abused) to create a binding indebtedness upon a county in any one year beyond the revenue of that year levied for county purposes, was taken away from county courts--that is, in administering the business affairs of the county the 'credit system' was abolished and the 'cash system' was introduced--the latter, however, with flexibility and play enough to allow a county court in any one year to contract, by way of anticipation, with reference to the county revenue for that year. To this end it will be found that old statutes were modified and new enacted which, in connection with the old, were intended to present a complete and harmonious scheme for administering the affairs of the county, and at one and the same time put on foot and keep going the cash system." Decker v. Diemer, 229 Mo. l. c. 330.

> "The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit systems and establish the cash system by limiting the amount of tax which might be imposed by a county

> for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it." Book v. Earl, 87 Mo. l. c. 252.

It therefore follows, from the reasoning of the Supreme Court in the above cases, that if the County Court may take the revenue collected in a given year, where there is not more than sufficient revenue to defray its current obligations against said funds, and absorb said funds in that way, the result would be there would be no funds with which to pay the current demands upon said funds and the consequence would be a suspension of the business affairs of the county relative to said particular fund.

It is our opinion that the county is not legally obligated to pay demands beyond its contemplated revenue for the year in which the debt was created and it follows that the criminal cost accruing against a county in the year 1932 must be paid out of the funds set apart by the County Court for that purpose for the year 1932, and if the taxes collected or to be collected, belonging to said fund for said year, are exhausted, then no obligation rests upon the county.

We further hold that if the expenditures already paid out of said funds for the year 1932 do not absorb the contemplated revenue of said funds, then the County Court may issue its warrant

against said fund, to be paid when the treasurer's books show the funds are in the treasury, belonging to said fund from the revenue of 1932.

Answering question two (2) embraced in your letter, I quote from State ex rel v. Allison, 155 Mo. l. c. 333-5:

> "It thus appears that it is not until the May term that the county court knows exactly what the aggregate assessment of the county is, and it is not until then that the rate of taxation is fixed and the exact amount of revenue to be levied is ascertained. And in view of that condition and of the constitutional provision that forbids a county to incur debts in any one year to exceed its income and revenue provided for that year (sec. 12, art. 10, Constitution), the relator contends that it conclusively follows that the fiscal year for the county begins on May 1st. The argument is not without persuasive force to show that it would be a convenient provision if the legislature should see fit to so enact, but it does not demonstrate that the statutes in their present form must receive that construction or fail of their purpose. And we must be forced to that result before we would be justified in giving to the word 'year' an artificial meaning in the face of the rule of construction and definition laid down in the contemporaneous statute above quoted. But really whilst there is some uncertainty it is not very serious. True, from January to May, one-third of the year, the county court can not know the exact amount of revenue that the taxpayers will be called on to furnish. This uncertainty exists because the exact valuation of the taxable property in the county is then unknown, and the rate of taxation has not then been fixed, yet expenses are necessarily incurred in carrying on the county government and maintaining its duty to the State. But is certainty to that degree necessary? Can not the revenue for the ensuing year be estimated on the first of January with sufficient approximation for the purpose of putting reasonably safe limits to the debts to be incurred? Even after May 1st, there must be an element of uncertainty in the amount of the county's income because all may not be collected that is assessed. Ordinarily there is not such a difference between the aggregate assessment of the county for one year, and the following, as would put the county judges to sea, and if any unusual event had taken place since the last assessment likely to produce an extraordinary diminution or increase in the value of the county's property, the county judges

> would be apt to know it. The economic problem for them to solve is the amount of indebtedness it will be prudent to incur for the county for four months in view of the probable income. As a common sense business problem there is nothing very difficult about it, and if county judges are not to be accredited with sufficient discretion to determine a matter of that kind, then our whole system is wrong. The county court can keep safely within the constitutional limitation, and follow strictly the provisions of the statutes above quoted, and still count the fiscal year as beginning on January first, and ending December thirty-first. We have followed the learned counsel for the relator in his brief but we see no reason to question the soundness of the decision in Wilson v. Knox County, supra, or in State ex rel. v. Appleby, supra, to the same effect. Upon a review of the whole subject, we again conclude that the fiscal year for the county as well as the State, begins January first, and ends December thirty-first."

It follows from the foregoing case that warrants issued by the County Court in December 1932, are chargeable to the revenue of 1932. The fiscal year of the county, as well as the state, begins on January first and ends December 31st.

Very truly yours,

W. W. Barnes
Assistant Attorney General

APPROVED:

ATTORNEY GENERAL.

NEPOTISM: Applies to officials and employes of cities of all clases in the State of Missouri.

FILED
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April 26, 1933

Honorable Joseph T. Tate
Prosecuting Attorney
Owensville, Missouri

Dear Mr. Tate:

This Department acknowledges receipt of your letter dated April 21, 1933, as follows:

> "I will appreciate it very much if you will give me an opinion regarding the application of the nepotism law as relating to cities of the 4th class."

Section 13 of Article XIV of the Constitution of the State of Missouri reads:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office of employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree either by consanguinity or affinity, shall thereby forfeit his or her office of employment".

Putting it in plain words the above section of the Constitution prohibits any public officer of the State or of any political subdivision thereof, whether elected or appointed, from exercising his right to name or appoint any person to render service to the state or to any political subdivision of the state who is related within the fourth degree, either by consanguinity or affinity to such public officer when such public officer shall have the right to name or appoint any person to

render such service by virtue of the office held by such public officer. The public officer violating this provision of the Constitution subjects himself to having the office so held by him forfeited.

The above section further prohibits an employe of this State or an employe of any political subdivision of the State, when by virtue of the employment so held such employe has the right to name or appoint any person to render service to the State or to any political subdivision thereof, from naming any person who is related within the fourth degree, either by consanguinity or affinity to such employe. The penalty for such prohibited act being that the employment of such employe may be forfeited.

Therefore if the elected or appointed officials of a city of any class in this State are public officials or if a city of any class in this state is a political subdivision of the State, then such officers of a city of any class in the state, whether elected or appointed, and the employes of a city of any class in this state, when such employe has the right of appointment as above outlined, fall within the meaning and prohibitions of Section 13 of Article XIV of the Constitution of the State of Missouri. An answer to either of the above questions will answer your question.

In attempting to arrive at the meaning of the above quoted provision of the Constitution and in a construction thereof, the mischiefs intended to be eliminated and the evils sought to be eradicated should be kept in mind in order to determine the scope of the provision that was intended by the writers of such constitutional amendment. As to the rules of construction to be applied to constitutional provisions the Supreme Court of this state in State ex rel Carthage v. Hackmann, 287 Mo., 184, 190, 191, said,

> "There are certain well-understood rules laid down by the courts for the construction of constitutional provisions, and they are the same as those governing legislative enactments.

> It was said in State ex rel. v. McGowan 138 Mo. l. c. 192, in discussing the general rules of construction of constitutional provisions that: "The organic law is subject to the same general rules of construction as other laws, due regard being had to the broader objects and scope of the former, as a charter of popular government. The intent of such an instrument is the prime object to be attained in construing it".
>
> In 12 Corpus Juris,700, it is said: "The Court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied",
>
> And also in 12 Corpus Juris, 702, it is said: "If a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning". "

A public office and public officer is defined in State ex rel Zevely v. Hackmann, 300 Mo., 59, 67, in language as follows:

> "In the most general and comprehensive sense a "public office is an agency for the State and a person whose duty it is to perform this agency is a "public officer". Stated more definitely a "public office" is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law. (State ex rel.Smith v.Theus,38 So.870-72,114 La.1098; cited in State ex rel.v.Maroney,191 Mo.l.c.545)."

To the same effect see Hasting v. Jasper County, 314 Mo., 144, 149.

The duties of the various city officials and employes as provided in Chapter 38 of the Revised Statutes of Missouri, 1929, are similar is most respects. The statutory provisions applying to cities of the different classes unless the city is operating under a special charter, is the charter and contains the powers, duties and authority of the respective officials and employes of the cities of each particular class. Referring particularly to Article VIII, of Chapter 38 Revised Statutes Missouri, 1929, which is the charter of cities of the fourth class, we find that a general election shall be held for the election of certain specified elective officers. Many duties are imposed on the mayor, board of aldermen and appointive officers. The mayor has the power to appoint certain officers of the city, with the consent and approval of a majority of the members of the board of aldermen. Unless a police judge is provided for the mayor sits as a quasi court in the trial of the cases for the violation of city ordinances. The mayor may cast a vote on any proposition before the board when a vote among the members of the board results in a tie. The mayor may approve or veto ordinances enacted by the board of aldermen for the government of the city. Section 7018 Revised Statutes Missouri, 1929, provides as follows:

> "The mayor and board of aldermen of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Then follows various sections authorizing the board of aldermen to enact ordinances for the regulation of peace and order in the city, to secure the general health of the inhabitants thereof and to cause certain street and sidewalk improvements to be made, sewer districts to be established and sewers constructed and many other like powers and duties are given the mayor and board of aldermen. All of the foregoing to be carried into effect by the mayor, board of aldermen, officials and employes of the city.

There is a line of cases in this state, commencing with Kansas City v. Neal, 122 Mo. 232, holding that municipal corporations, not including the city of St. Louis, in this state are not political subdivisions within the meaning of Article VI, of Section 12 of the Constitution of the State of Missouri, with reference to the appellate jurisdiction of the Supreme Court, but in all of those cases the writers of the opinions have been careful to point out that the holding that the city was not a political subdivision of the state was only within the meaning of the constitutional provisions last referred to.

That a city may be considered a political subdivision of a state in some instances is held in other cases. In Jefferson City Gas Light Company v. Clark, 95 U. S. 644, 654, 24 L. Ed. 522, the Supreme Court of the United States said:

> "A city is only a political subdivision of the State, if made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public and which may be increased or repealed at the will of the Legislature".

And in Ford v. Delta and Pine Land Company, 164 U. S. 662, 41 L. Ed. 594, the Supreme Court of the United States again said:

> "A city is a municipal corporation, a political subdivision of the state, charged with certain specified duties of government within its territorial limits, and for the full discharge of those duties it is authorized to levy taxes".

The Supreme Court of this state in Morrison v. Morey, 146 Mo., 543, held that a levee district constituted a political subdivision of the state within the meaning of the provisions of the constitutional limitation as to the extent to which a political subdivision of the state may become indebted.

At page 561 of the opinion the court said:

> "It is a public political subdivision of the state which the state has the power to create, under its police powers, and as such subdivision it exercises the prescribed functions of government in the district".

In reasoning out the question as to whether or not a levee district was a political subdivision of the state, the court in the last named case at page 562 of the opinion said:

> "The power to construct drains and sewers, to open and improve streets, to regulate the uses of private property so as to prevent nuisances, to establish fire limits in large and populous cities, to establish quarantine, to remove and isolate persons affected with smallpox and other contagious diseases in order to stop the spread of disease, is all dependent upon the police power of the State, exercised for the benefit of the health and well being of the people. In every case there must be the impress of a public purpose upon the law to make it constitutional. It is not enough that private interests will be subserved, or that private property will be enhanced in value. There must be a public interest applicable to a community of persons to be benefited. The health of the people is the substrata upon which the prosperity of the State rests, and laws conducive to health have always been upheld".

Many of the powers of a levee district and the effects of its organization given as a reason for the holding that a levee district is a political subdivision of the state applies with equal force to the powers and duties of officials and employes of the respective cities of this state as well as the effects of the chartering of such cities and the results of the discharge of the duties of the officials and employes thereof.

The case of Sorenson v. The Superior Court, 254 Pacific 230, defining the characteristics of a political subdivision, at page 231 of the opinion quoted with approval the following:

> "These distinctive marks are, I think, that they embrace a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions, and that to the electors residing within each is, to some extent, committed the power of local government, to be wielded either mediately or immediately, within their territory, for the peculiar benefit of the people there residing. Bodies so constituted are not merely creatures of the state, but parts of it, exerting the powers with which it is vested for the promotion of those leading purposes which it was intended to accomplish, and according to the spirit which actuates our Republican system".

From the foregoing definitions of a "political subdivision" of a state in the light of the duties and authority of the officers and employes of the respective classes of cities in Missouri, we reach the conclusion that the officers of the cities of all classes in this state are public officers and that the employes of such cities are employes of a political subdivision of the state, within the meaning and intendant of Section 13 of Article XIV of the Constitution of the State of Missouri, when such officials or employes have the authority to name or appoint, as provided in such section.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

Attorney General.
GL:LC

BUILDING AND LOAN:
A - Power of Directors to amend by-laws.
B - Power of Directors to amend by-laws when present by-laws specifically give Board such power.

April 27, 1933.

FILED
90

Mr. E. S. Tesdell,
General Counsel
Federal Home Loan Bank
Des Moines, Iowa

Dear Mr. Tesdell:

In your letter of April 12, 1933, you request an opinion, (1) as to whether or not the Board of Directors of the Missouri Building and Loan Association has power to amend the Association's by-laws; (2) whether the Board of Directors has power to amend their by-laws if the present by-laws specifically give the Board such power.

Sec. 5590, Laws Mo. 1931, under the heading "Building and Loan Associations" provides:

> "The shareholders of such corporation may make and adopt all necessary by-laws for the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state. A copy of such by-laws shall be filed with the supervisor of building and loan associations, and such by-laws, and any amendments thereto or changes therein, shall not be in force and effect, and no action shall be taken thereunder until the same are approved by the supervisor of building and loan associations as being practically and financially sound and in the best interest of the shareholders."***

Sec. 4553, R.S. Mo. 1929, under the heading "Corporations" provides:

> "By-laws to direct a manner of taking the vote of the stockholders on the question of increasing or diminishing the number of directors or trustees, of changing the cor-

porate name, may be made by the directors of the corporation for the time being."

It will be noticed therefore that neither under the general incorporation laws or under the sections of the Statutes dealing specifically with building and loan associations are the directors of a corporation, given the power generally to make, amend or repeal by-laws.

The directors under section 4553 supra can only make by-laws concerning the matter stated; Brinkerhoff Co. vs. Lumber Co. 118, Mo., 447; 24 S. W. 139; and even these exceptions are not included in Section 5590 supra referring to building and loan associations.

Indeed as will be noticed by reference to Section 5590, Laws Mo., 1931, these duties are specifically intrusted to the shareholders of such corporations.

In the case of Klix et. al. vs. Polish etc. Parish, 137, Mo. App., 347; 118 S.W. 1171, the Court held:

"By-laws of the corporation must be adopted by the members of the corporate body and cannot be changed by the directors unless the charter or fundamental law so provides."

In Endlich on "Building Associations", Sec. 271, the author says:

"Ordinarily this power (to make by-laws) resides in the corporate meeting of the stockholders to be exercised by them in the same manner in which the charter directs them to exercise other powers or to transact other business.

"It is only by express charter provision that this power can be delegated to particular officers or body of members, e.g. the Board of Directors."

In the case of Garlick et. al. vs. Mutual Building and Loan Association, 139, Ill. A. Reports 402 l.c. 412, the Court held:

"Such associations can under the statute only adopt by-laws at a meeting of the stockholders."

Examination of the statutes has not brought to light any provision whereby directors have the authority to make by-laws or to amend them after they are made and adopted. The general rule of law applicable in such cases is that the power to alter, amend, and repeal the by-laws is vested in the same body in which is vested the power to enact them in the first instance, that is the shareholders and in such body only, 14 Corpus Juris 358.

It may be contended, however, that even though the statute vests the power to make by-laws in the shareholders, nevertheless if the shareholders see fit to delegate that power to the Board of Directors and do so, then the Board of Directors may properly exercise such power. In answer to this contention, we quote from 14 Corpus Juris 354,

> "The power to make by-laws cannot be delegated to a Subordinate Board or Officers by the body in which it is expressly and exclusively vested by the charter or governing statute; and it has been held that a by-law which surrenders to the directors the exclusive power to alter or amend the by-laws is unreasonable, illegal, and ultra vires."

To the same effect, see Alters vs. Journeymen, etc., "Association" 19, Pa. Super. 272.

The above point has been passed on by this office in reference to the ratification of by-laws in connection with other savings and loan associations, in both instances in which the by-laws providing the Board of Directors may amend or repeal by-laws has been held inconsistent with the laws of Missouri because such power is vested in the shareholders only.

From the foregoing it is the opinion of this office that the Board of Directors does not have the power to amend the association's by-laws even though the present by-laws specifically give the Board such powers, this power being vested in the shareholders of the association.

Very truly yours,

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JOHN W. HOFFMAN, JR.
Assistant Attorney-General.

JWH:AJ

NEPOTISM:

Section 13 of Article 14 of the Constitution not violated because teacher marries daughter of director, or because daughter of director is elected by other directors when the related director was not present, had no knowledge and does not participate in her election.

September 13, 1933.

9-20

FILED
90

Dr. H. E. Tatum,
Brunswick, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am enclosing you an article from the Brunswicker in which our friend Clayton takes two of us school directors to task for remaining on the board after relatives had been employed as teachers.

In regard to Mr. Humo to whom Mr. Clayton refers, he was elected as music teacher before he became Mr. Merrill's son-in-law. In regard to my daughter, --Elizabeth was not an applicant for a teaching position here. She was elected to fill the vacancy occurring by the unexpected resignation of Miss Marjorie Merrill. However, she nor I knew nothing of the vacancy until she was notified of her election to fill it.

As you see, Mr. Clayton's basis for criticism was the decision rendered by Judge Gantt in the case of Otto Whittle, school director, who was ousted for casting the deciding vote to employ his relative, which was considered a violation of the anti-nepotism amendment. From the opinion Judge Gantt rendered, I did not feel that I was violating the anti-nepotism law by remaining on the Board as I was not present when my daughter was elected.

As Attorney General, what would be your opinion as to how the anti-nepotism law applies to a school director who takes no part in voting for a relative for teacher."

You inquire first whether or not a director is disqualified because a music teacher previously employed by the board afterwards becomes the son-in-law of the director. Second, whether or not you are disqualified as a director because of the election to office of your daughter when you were not present at the meeting of the board and did not in any way name or select her as a teacher. You inquire whether or not the fact that both of you have remained on the board since

the transpiring of these events would make you guilty of violation of the nepotism provision.

Section 13, Article 14 of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or any political subdivision thereof who shall, by virtue of said office or employment, have the right to name of appoint any person to render service to the State or to any political subdivision thereof, or who shall name or appoint to such service any relative within the fourth degree, either by consanguinity of affinity, shall thereby forfeit his or her office or employment."

The mandate of the foregoing constitution provision is that no public officer having a right to name or appoint any person to render service to the State shall name or appoint to such service any relative within the fourth degree. Under the Constitution, it is the exercising of the right "to name or appoint" a person within the prohibited degree that is a violation of the provision. If, by change of circumstances or because of the actions of others, a relative of a member of the board holds a position, the related member does not necessarily forfeit his office.

In State ex rel. Roy McKittrick.v. Otto Whittle (not yet reported), the court says as follows:

> "It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, may officials appointed relatives to positions and thereby placed the names of said relatives upon the public payrolls. The power was abused by individual officials and by members of official boards, bureaus, commissions and committees with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the State and its political subdivisions. * * * As between the district and the teacher, the power to employ is lodged with the board. However, as between the public and a director 'the right to name or appoint' a teacher is not determined by reference to the Statute. To hold that said 'right' is so determined would convict the people of intending to eradicate only a small part of the evil. Furthermore, to so hold would be absurd. Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The

amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

It is apparent from the above decision that if a member of the board exercises his right to name or appoint in favor of a relative within the prohibited degree, he thereby violates the constitutional provision. We believe, however, that it is necessary for him to so exercise the right, and if through means over which the director has no control, a relative is selected by the board, the director has not forfeited his office. To be more explicit, it appears that Mr. Humo was elected a teacher of the Brunswick High School at a time when he was not related to any member of the board. Afterwards, however, it appears that Mr. Humo married the daughter of Mr. Merrill, one of the directors. At the time that Mr. Humo was elected as a teacher, it does not appear whether Mr. Merrill voted for him or not. If he did vote for him, there was no reason why he could not properly do so because at the time of his election, he was not related to Mr. Merrill in any degree. However, if it could be established that there was collusion between Mr. Merrill and Mr. Humo whereby it was necessary for Mr. Merrill's vote to elect him in order that he might be elected before the marriage to Mr. Merrill's daughter, that, we think, would raise a different proposition. Leaving out the question of collusion, which does not appear to exist, according to your inquiry, it is the opinion of this Department that the mere fact that a director happens to become related to a teacher during the course of the ordinary vicissitudes of life, that does not impose upon the director a forfeiture of office under the constitutional provision. The constitutional provision does not prohibit the director from remaining on the board where it happens that a child afterwards marries a teacher employed by the board, and we do not believe it was the intention of such constitutional provision to impose a forfeiture of office upon the director simply because his daughter should marry an employe of the board; there being no collusion to avoid the constitutional provision.

As to your second inquiry, we believe that the constitutional provision and the Whittle case both require that before a forfeiture of office can be declared, that the director exercise his "right to name or appoint" an employe, or failing to exercise the right, he has achieved the same ends by reason of con-

spiracy between the other directors. It does not appear from the inquiry that there was any conspiracy between yourself and the other directors that you should remain away from the meeting or fail to vote in order that you would be relieved from the injunction of the constitutional provision. It appears affirmatively, however, that your daughter was elected to the position by the other members of the board at a meeting when you were not present and neither you or your daughter knew of the vacancy until notified of her election. From the facts given in your letter, you are not guilty of any conspiracy or bad faith in not being present and failing to vote, and the sole question remaining is whether or not the fact that your daughter was elected by the other members of the board without your participation in the election makes you holding office a violation of the constitution.

It is our opinion that you have not violated the constitutional provision. You did not exercise your right "to name or appoint" your daughter, nor did you conspire with others that they should exercise their right to name or appoint her during your absence. Had you been present and had voted in favor of the election of your daughter, or had you been present and acquiesced in her election, we believe you would have been guilty of the violation of this amendment. However, not being present and not taking any part in the election, we are of the opinion that you are not guilty of violating the constitutional provision.

It is, therefore, the opinion of this Department that Mr. Merrill is not guilty of violating Section 13 of Article 14 of the Constitution by remaining upon the board simply because his daughter married one of the teachers after his election to office, and we are of the further opinion that you personally are not guilty of violating said Section by remaining upon the board when your daughter was elected to office by the remaining members of the board, and you did not in any way participate in her election. In answering both of these questions, we are assuming the utmost good faith of both parties and that no collusion existed.

Very truly yours,

Frank W. Hayes.
Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

LEGISLATURE: Power to designate Supervisor of Food & Drugs administrative head of Liquor Control Acts.

November 3, 1933

FILED
10
56

Hon. John D. Taylor
House of Representatives
Jefferson City, Missouri

Dear Mr. Taylor:

I acknowledge receipt of your request for an opinion of this office. Your request reading as follows:

> "I wish you would furnish me not later than Monday morning by ten o'clock an opinion on the following question:
>
> Certain liquor control bills are pending in both the House and the Senate, some of these bills provide for the appointment of a special commission, others provide that the power to enforce shall be lodged in the office of Food and Drug Supervisor, a subdivision of the Department of Public Health.
>
> The question has been raised whether or not the head of a subdivision could be legally designated as the proper person to enforce the law." * * *

I.

SUPERVISOR OF FOODS AND DRUGS NOT A STATUTORY OFFICE.

By the terms of Senate Bill 16, found on page 255, Missouri Laws 1933, the office of Commissioner of Foods and drugs was abolished. This act reads as follows:

> "The office of food and drug commissioner is hereby abolished, and all the rights,

> duties and powers heretofore vested by law in said food and drug commissioner are hereby transferred to and vested in the commissioner of health. Where any law refers in any way to or imposes any right, duty or power upon the food and drug commissioner or his assistants, such law shall be construed as referring to and imposing such rights, duties and powers upon the Commissioner of Health or his assistants. The words "Commissioner" and "food and drug commissioner," as used in this Chapter, shall be construed to mean the Commissioner of Health, and the words "department" and "food and drug department" as used in this Chapter, shall be construed to mean the State Department of Health."

As a matter of necessity and to promote efficient administration, it is my understanding that an assistant has been appointed by the Commissioner of Health who has been designated as the supervisor of Food and Drugs. An examination of the laws on this subject reveal that this office is not a statutory office but is simply a convenient designation, for the Assistant to the Commissioner of Health, having direct charge and supervision of the administration of the Food and Drug Laws. There being no statutory office designated as the supervisor of Food and Drugs, it would be our first suggestion that such an office be created, which office to be consistent with the purpose of the foregoing law of the regular session , should be under the jurisdiction of the Department of Health.

II.

SUPERVISOR OF FOOD AND DRUGS MAY BE CLOTHED WITH ADMINISTRATIVE DUTIES OF LIQUOR CONTROL LAW.

After having constituted the supervisor of Food and Drugs a statutory officer, it is our opinion that he may be designated the head or administrative agent for the liquor control law. It is to be kept in mind that the legislature has full power to enact all laws not contrary to or inconsistent with the Constitution of the State. The Commissioner of Health is not clothed with any Constitutional powers in respect to Food and Drugs or intoxicating or non-intoxicating liquors, and accordingly the legislature is free to enact any measure as it may deem necessary to the efficient administration of these laws. As a precedent for this legislative

action we refer you to the Motor Vehicle License Act as found in Article 1 of Chapter 41, R. S. Mo. 1921. This Act provides for the appointment of "Commissioner of Motor Vehicles" by the Secretary of State. The act then directly confers powers and duties upon such commissioner. As another example we refer to Chapter 92, R. S. Mo. 1929, wherein the Athletic Director of the University of Missouri is made also chairman of the Athletic Commission, and statutory powers and duties are likewise conferred upon him.

It is therefore the opinion of this office that there is nothing inconsistent or beyond the power of the Legislature in the designation of the Supervisor of Food and Drugs as the administrative head of the liquor control acts.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM

SCHOOL FUND MORTGAGE - State is not affected by the laches of its agents in the management and care of school funds.

March 13, 1933.

FILED
91

Hon. J. W. Thurman
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Thurman:

We acknowledge receipt of your letter dated March 6th, which letter is as follows:

"The County hold a School Fund Mortgage against a certain tract of land, and of course has a personal bond in connection therewith. The bond was executed in 1914, in the amount of $1000.00, and was permitted to run along without any payments of interest until it reached the total of $1474.00 at which time the debtor was permitted to make a new bond for the first principal amount plus the interest of $474.00, making a total mortgage of $1474.00.

"In 1928 one of the signer on the Bond was Bankrupt, and the County Court had due notice thereof, in 1929, another of the Bondsmen died. The County Court also had notice of this and another one of the bondsmen asked that the mortgage be foreclosed, also the maker of the mortgage asked that it be foreclosed.

"The total amount of the mortgage and interest at this time is, something over two thousand dollars. It is my contention that the County has lost their right against the Bondsmen since they have permitted this thing to drag after they have had notice of all the transaction that I have enumerated to you."

The law covering the situation presented by your letter has been determined by the Supreme Court of this State in Johnson County v. Gilkeson, 70 Mo. 645, the court saying:

> "This was a suit against Gilkeson and Brammer, securities for one Swan on a bond given the county for the use of school township number 44, range 28, in 1866. The defense on the part of Brammer was, that he gave notice to the plaintiff to sue or to foreclose a mortgage on Swan's property, and by reason of the neglect of the county to do either within the thirty days after the notice, the debt was lost so far as the principal was concerned by his insolvency after the notice. Another defense was, that the name of Ends, another security on the bond when it was signed, had been erased. In regard to this last defense the court found, as a matter of fact, that it was not true, and the evidence authorized the finding. And the only question here is as to the first defense. As this court has already decided this question in two cases, (Cedar Co. v. Johnson, 50 Mo. 225, and Jasper Co. v. Shanks, 61 Mo. 332,) it is useless to look into the long list of authorities elsewhere cited by the counsel for appellant. Whether this right claimed here is under our statute or at common law, the result is the same, since the court has declared that 'one who becomes a surety on such public bonds must hold himself ready to pay it, if the principal fails, and if he fears his insolvency, he should pay the obligation and collect it, if he can, of his principal; but he will not be discharged on account of the neglect of public officers.' Judgment affirmed. The other judges concur.";

also in the case of Ray County, to Use of Common School Fund, v. Bentley, 49 Mo. 236, the court held that,

> "The rule that a surety will be discharged whenever the creditor commits acts which operate to his injury or disadvantage does not apply where the creditor is the state or its agents, and the state is not affected by the laches of its agents in the management and care of school funds, and so a surety for a loan thereof can claim no relief on account of such laches."

It is the opinion of this office that the county has not lost its right against the bondsmen.

Yours very truly,

WILBUR C. BUFORD
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

WCB:EG

RIGHT OF INSURANCE COMPANY TO LOAN MONEY ON BANK STOCK AS COLLATERAL

March 28, 1933

FILED
91

Honorable Joseph B. Thompson
Superintendent of Insurance
Jefferson City, Missouri

Dear Mr. Thompson:

I am in receipt of your letter dated March 28, 1933, in which you state and inquire as follows:

> "I am enclosing herewith a letter addressed to me today by Charles G. Revelle, Vice-President and General Counsel for the Continental Life Insurance Company of St. Louis, Missouri.
>
> You will observe from this communication that the Continental Life Insurance Company proposes to loan $360,000 to the Continental Securities and Holding Company and assign as security therefor the capital stock of the Wellston Trust Company and sufficient stock of the Grand National Bank to adequately secure the said loan and its payment. Please give me your opinion as to the legality of this proposed loan and also advise me whether or not such loan, if made, should be treated as an admitted asset of the said Continental Life Insurance Company."

It is my opinion that the Continental Life Insurance Company has the legal right to make the loan in the manner and under the conditions stated in the letter of Charles G. Revelle, Vice-President and General Counsel of the Continental Life Insurance Company, dated March 28, 1933, copy of which you have attached to your letter.

That the loan, in my opinion, would not only be lawful but if and when made the Continental Life Insurance Company will be entitled to include and carry such loan as a lawful asset to the extent that the Superintendent of Insurance of the State of Missouri may find the same is adequately secured.

Very truly yours,

ROY McKITTRICK,
Attorney General.

RM:LC

INSURANCE DEPARTMENT: CORPORATIONS:

Insurance companies may increase capital stock and issue preferred or common stock therefor and fix the priorities, preferences and voting power of such stock.

May 11, 1933

FILED
91

Honorable Joseph B. Thompson
Superintendent of Insurance
Jefferson City, Missouri

Dear Mr. Thompson:

This Department acknowledges receipt of your letter dated May 5, 1933, in which you inquire as follows:

> "Will you therefore kindly give me your opinion as to whether or not a fire company organized under section 5793, R. S. 1929, for the purpose of doing a fire insurance business may increase its capital stock and let such increase be represented by preferred stock or by both preferred and common stock."

Section 11, Article XII of the Constitution of the State of Missouri defines a corporation as follows:

> "The term corporation, as used in this article, shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships".

The same definition of a corporation is set forth in Section 4526 Revised Statutes Missouri, 1929.

Section 5793 authorizes the formation of a corporation for certain purposes, among which is to make insurance on certain specified properties against loss

or damage by fire, lightning, hail and windstorm and earthquake. In so far as Article VI, Chapter 37, R. S. Mo. 1929, fails to provide the details for the incorporation authorized by Section 5793, such details are to be found and followed as provided in Article I of Chapter 32, R. S. Mo. 1929.

Section 10 of Article XII of the Constitution of Missouri, provides that:

> "No corporation shall issue preferred stock without the consent of all the stockholders".

By implication at least, authority is given to issue preferred stock in a corporation if all the stockholders therein agree thereto.

Further authority for the issuance of preferred stock in the original formation or incorporation of a corporation is found in Section 4933 R. S. Mo. 1929.

Section 4952 R. S. Mo. 1929, authorizes the increase of capital stock, provides for the issuance of preferred stock covering such increase of capital stock and the stockholders at the meeting called for the purpose of increasing the capital stock, may determine the priorities, preferences and character of such preferred stock.

In the case of State ex rel Frank, et al v. Swanger, 190 Mo. 561, the Supreme Court had under consideration the question of the right of a corporation organized under the laws of this state, to issue preferred stock and to control the voting power of such preferred stock. At page 570 of the opinion the court quoted with approval the following:

> "At common law it was and is legal, upon issuing preferred stock, to impose a condition that such stock shall not have a right to vote. There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power". (2 Cook on Corporations (5Ed.), sec.622b; Clark & Marshall, Private Corporations, p. 1320.) "

After reviewing the cases on the subject the court at page 577 of the opinion stated its conclusion to be:

> "In view of these principles we think that the General Assembly of Missouri, in the enactment of the amended sections 1312 and 1332 (Laws 1901,pp.91 and 92), did not act beyond the pale of its constitutional authority in permitting the stockholders themselves in their articles to issue preferred stock and fix "its preferences, priorities, classification and the character thereof", and that the petitioners in this case had the power in defining character of the preferred stock to be issued by the corporation to provide that it shall be non-voting".

We, therefore, are of the opinion that a fire insurance company organized under Section 5793 Revised Statutes Missouri, 1929, may increase its capital stock and that such increase may be represented by preferred stock or by both preferred and common stock, when all of the stockholders of the corporation at a meeting legally called therefor agree thereto, and that such stockholders may at such meeting fix the priorities, preferences, character and voting power which such preferred stock or common stock may have.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

Attorney General.

GL:LC

INSURA[illegible]EPARTMENT: What constitutes an insurance contract and the doing of insurance business in this state. Penalty for transacting insurance business in this state without authority.

May 12, 1933

FILED
91

Insurance Department
Jefferson City, Missouri

Gentlemen:

Receipt of your letter dated April 12, 1933, is acknowledged. The letter is as follows:

> "A number of unlicensed companies are attempting to do business in Missouri both by mail and through representatives. The literature of two of these companies, The National Aid Association and Lincoln Aid Association, is enclosed.
>
> We should like your opinion as to whether the business transacted by such companies is insurance within the meaning of the Missouri Statutes. If it is insurance, what steps can be taken to prevent solicitation of members in this state.
>
> Is it permissable for unlicensed insurance companies to advertise and solicit business through radio stations located within the state?"

Attached to your letter is a purported application for certificate of membership in Lincoln Aid Association of Wilmington, Delaware; also copy of purported form of certificate or contract presumed to be in use by the Lincoln Aid Association; also attached to your letter in connection with the foregoing are various promotion circulars; a letter of the president of the company with

reference to prospective salesmen for the company and also magazine advertising used by the Lincoln Aid Association. Also attached to your letter are substantially the same application, certificate and literature of the National Aid Society, said to be incorporated under the laws of the State of Indiana.

The purported application for certificate of membership in the Lincoln Aid Association states that it is:

> "Application for Certificate of Membership in
> Lincoln Aid Association of
> Wilmington, Delaware",

then follows space for name and address of the applicant, name and address of beneficiary.

It is further stated in the application that the application shall be considered a part of the contract for membership.

It is further stated in the application:

> "It is also agreed that there will be no liability on the part of the Association unless and until the certificate of membership is issued and delivered to me, while I am alive and in good health, free from disease and that no liability shall exist against the Association if any of the answers to the above questions relative to my health on the date below are found to be untrue".

The application further appoints and constitutes the board of directors or a majority thereof as attorney in fact for the applicant, to cast the vote of the applicant at any meeting.

The form of certificate or contract states that the Lincoln Aid Association agrees that for the consideration of a membership fee of $4.00 and a registration fee of $1,00, the application executed by the member and the further payment of all amounts required to be paid under the conditions of the certificate during its continuance, the person named in the certificate (thereinafter to be called the member) is entitled to all benefits as provided in the by-laws of the

association and in the event of the natural or accidental death of the member, the beneficiary named in the certificate or contract is entitled to the benefits designated in a schedule set out on the face of the certificate, to-wit:

"Persons from 1 to 10 years inclusive, $500.00;
11 to 55 years inclusive, $1,000.00;
56 to 65 years inclusive, $750.00;
66 to 70 years inclusive, $500.00;
71 years and over, inclusive, $250.00."

Provision is made for the payment of disability benefits when such disability is suffered through violent, external and purely accidental means and a schedule of the amounts to be paid for such disability is set out on the face of the certificate or contract; then is provided a space for the name of the Company, its registrar and president.

Certain purported by-laws are printed on the certificate. Section 2 of Article I of the by-laws states:

"Section 2. Purpose - To unite reputable men and women who are wage earners, for the purpose of giving aid to the widows, creditors and those dependent on its deceased members."

Section 4 of Article I of the by-laws provides as follows:

"Section 4. Certificates - When an application is accepted by this association and the membership fee in advance is paid, the association will issue to such applicant a certificate, but no liability shall arise thereon against the association, nor any benefit be due to the applicant until the issuance of such certificate and its delivery to and acceptance by the applicant, while such applicant is alive and in good health".

Article IV provides for the amount of benefits to be paid members under certain contingencies.

Article V of the by-laws provides in part as follows:

"Section 1. When a death or permanent disability shall occur to a member to whom this contract is issued and the association is liable therefor,

> it shall be the duty of each member to make a contribution, if the directors deem it necessary, which contribution will be $1.00. This is the only time a contribution is required, except for expenses".

The purport of Article V is explained at the close thereof by the following:

> "Guaranteed costs: The above section provides that in no case can the directors call on the members to contribute more than $1.00 a month for death claims, making the guaranteed cost for death claims not to exceed $12.00 yearly. There is absolutely no other contributions called for, except expenses and even that is limited to an amount not to exceed $4.00 during any twelve month period".

Section 1 of Article VI of the by-laws provides for the giving of notice to the secretary of the association in case of death of a member.

Article VII of the by-laws provides that upon death or permanent disability of a member of the association, who is a member in good standing the secretary shall mail the beneficiary blank proof of claim which shall be completed and filed with the association and if the claim is approved by the directors of the association, the secretary of the association shall notify the members of the fact that a contribution is due, if a sufficient amount is not already in reserve to pay the claim and it is further provided in such Article VII that:

> "Every member of this association shall, within thirty days after the mailing of any notice, of contribution, pay the amount thereby requested from him or her, and the failure so to do shall ipso facto suspend the member so failing from all rights and benefits in this association".

Section 2 of Article VII of the by-laws reads as follows:

> "Section 2. All payments made by any member now or hereafter are voluntary contributions for the purpose of aiding members of this association, and to take care of expenses of said association".

Section 4 of Article VII of the by-laws reads:

> "Section 4. It is the purpose and object of this association to furnish protection to the beneficiaries of the members hereof. Before a person is eligible to become a member, it is absolutely necessary that they be in good health, free from dny disease or disability".

Section 5 of Article VII undertakes to fix the time within which suits may be brought against the association on account of matters arising out of the certificate or contract.

The certificate or contract recites that the Lincoln Aid Association is chartered by the State of Delaware. We take it therefore that it is a corporation organized under the laws of the State of Delaware. The liabilities provided for in the certificate or contract are the liabilities of the Lincoln Aid Association. It is recognized in the certificate that suits may be brought against the association growing out of the certificates issued by it. While it is stated in the certificate that the payments made by the members are voluntary contributions, yet it is also provided that members who fail to pay these contributions lose all of their rights of membership in the association. There is nothing in the certificate or contract which bears any resemblance to reciprocal or inter-insurance between persons who voluntarily band themselves together to insure each other.

A contract of insurance is defined in Words and Phrases, Volume 4, page 348, as follows:

> "An ordinary 'contract of insurance' is defined as an agreement to pay a given sum on the happening of a particular event, contingent on the duration of human life in consideration of the immediate payment of a smaller sum or a certain equivalent periodical payment".

The foregoing is the general definition of a contract of insurance accepted by all of the authorities in this country. See

Pirics v. First Russian Slavonic Greek Catholic Benevolent Society, 83 N. J. Eq. 29;

Tourtlott v. Insurance Company, 126 Me. 118;

Baltimore Life Insurance Company v. Floyd, (Del.) 91 A. 653, 655;

Attorney General v. Osgood, 144 N. E. 377.

It is our opinion that the foregoing certificate if and when issued to an insured by the Lincoln Aid Association, would be an insurance contract and if applied for in and delivered to a resident of the State of Missouri would constitute a transaction of insurance business within the meaning of the Missouri statutes.

If such business is conducted in this state without authority from the Superintendent of Insurance, any agent or solicitor for the company who acts for them as agent or solicitor in this state, could be prosecuted by virtue of Section 5908, Revised Statutes Missouri, 1929.

Any person or persons acting as agents or solicitors for any such company not licensed to do business in this state where such agency or solicitation is carried on or made by means of a radio located in this state, would be guilty under the provisions of said Section 5908.

The purported application and certificate in use by the National Aid Society, submitted with your letter, are in substance the same in character, form and meaning as the application and certificate of the Lincoln Aid Association and what is said as to the Lincoln Aid Association application and certificate applies equally to the application and certificate of the National Aid Society.

We are returning you herewith the files and exhibits transmitted to us with your letter of April 12, 1933.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

_____
Attorney General.

GL:LC

Supplementary.

INSURANCE DEPARTMENT: CORPORATIONS: Any insurance company incorporated under Section 5793 R.S. 1929, may increase its capital and issue common or preferred stock therefor and fix the priorities, preferences and voting power of the preferred stock.

(Ch. 3 379 R.S. 1929)

May 19, 1933 5-20

FILED
91
23

Honorable Joseph B. Thompson
Superintendent of Insurance
Jefferson City, Missouri

Dear Mr. Thompson:

This Department acknowledges receipt of your letter dated May 19, 1933, as follows:

> "I have the opinion of your office dated May 11th written by Mr. Lamb holding that fire companies organized under section 5793 R. S. 1929, may increase their capital stock and let such increase be represented by preferred stock or by both preferred and common stock.
>
> Will you now kindly furnish me with a supplemental opinion as to whether or not any other companies mentioned in said section may likewise issue preferred stock".

We think what we said in our opinion to you dated May 11, 1933, replies to the inquiry contained in your letter of the instant date.

Accordingly, we are of the opinion that any company organized and incorporated under and by virtue of Section 5793 Revised Statutes Missouri, for the year 1929, may increase its capital stock and that such increase of capital stock may be represented by preferred stock or by both preferred and common stock, if and when all

of the stockholders of the corporation at a meeting legally called therefor agree thereto, and that such stockholders at such meeting may fix the priorities, preferences and voting power which such preferred or common stock shall thereafter have.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

GL:LC

TAXATION OF INSURANCE COMPANIES: Insurance Company, though purporting to be organized as an assessment company in foreign states, is taxable under section 5979, where it does business in this State.

June 1, 1933.

FILED
91

Mr. Joseph B. Thompson,
Superintendent of Insurance
Jefferson City, Missouri.

Dear Mr. Thompson:

We are in receipt of your letter of May 22, 1933 as follows:

"A controversy has arisen between the Mutual Benefit Health & Accident Association of Omaha, Nebraska and this Department as to whether that Association is liable for a premium tax on its business transacted in Missouri under section 5779 or section 5979, R. S. Mo. 1929.

I enclose herewith statement and brief prepared by Mr. Fred Boxley of Kansas City on behalf of the Association contending against the tax; an opinion by Mr. Weatherby holding that said Association is taxable under section 5979, supra; also Mr. Boxley's reply to Mr. Weatherby's opinion.

Up until 1933 this Association has been licensed in Missouri as an assessment company. In 1933 shortly before their license was renewed the question arose as to the character and form of policy they were selling in Missouri and after considerable discussion, more as a matter of compromise than anything else, it was agreed that they should be licensed as a stipulated premium company thereafter and that they should pay a premium tax of 1% under said section 5779.

This year, however, the association through Mr. Boxley protested against the payment of any tax whatever and thus the question is before us again.

It will very likely result in a suit unless your office is of the opinion that Mr. Weatherby is wrong in his conclusion. It is almost certain that they will refuse to pay any tax and will drive the Department to an action for its recovery. This being true I feel that the matter should be submitted to you for your opinion. Will you therefore kindly give us your opinion on the subject involved."

Section 5745 R. S. Mo.-1929, provides as follows:

"Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized corporations which shall be subject to the provisions and requirements of this article."

Section 5779 R. S. Mo. 1929, provides that a foreign insurance company shall pay a tax of 1% on gross premiums received in this state on account of business done in the state.

Section 5979 R. S. Mo. 1929, provides that every insurance company not organized under the laws of this state shall annually pay tax upon premiums received at the rate of 2% per annum.

Under your inquiry the question arises, first, whether or not the Mutual Benefit Health and Accident Association is engaged in business in the state of Missouri as an assessment company. If the company is do engaged, then under Section 5745, it isnot subject to any excise or license tax. If this company is not engaged in Missouri as an assessment company, then the question arises under which section of the Statutes is the company to be taxed.

The Mutual Benefit Health and Accident Association is a foreign corporation, organized under the law of the state of Nebraska. Article IV of the Articles of Incorporation provides as follows:

"The business of this association shall be conducted upon a mutual assessment plan. The board of directors may levy such assessments in such amounts and at such times as may be provided in the certificate of membership."

The sample policy of insurance, which we assume is identical in general terms with all policies issued by this company, fixes definite monthly benefits and definite death benefits. The sample policy provides for a death benefit of $2,000.00, which may be increased upon by the payment of 20 full annual premiums in which event the death benefits increase to $4,000.00 and the policy thereafter may be continued in force at a yearly cost of $4.00 per year. The policy provides that it is issued in consideration of the payment in advance of $22.00 as the first payment, and for payment in advance of quarterly premiums of $12.00. The policy also contains the following provision in regard to premiums:

> "The acceptance of any premium on this policy shall be optional with the association. Should the premium provided for herein be insufficient to meet the requirements of the association, the company may call for the difference as required."

Section 1 of the Standard Provisions provides that the endorsements and attached papers to the policy constitute the entire contract of insurance. At no place in the policy is any reference made to the by-laws being a part of the contract of insurance, and no part of the by-laws are copied in the policy.

The first question to be solved is to determine whether or not this company is doing business within the state of Missouri as an assessment company.

It is apparent from the articles of incorporation that the company was incorporated as an assessment company. Under the articles of the association the directors could levy assessments in such amounts and at such times as may be provided in the certificate of membership. The certificate of membership apparently is a policy of insurance issued by the company. The policy of insurance does not contain any language providing for levying of assessments at times or according to stated amounts. If it can be urged that the articles of association determine its character as that of an assessment company, it must be admitted that the articles of association are in conflict with the terms of the policy in that connection. Where there is a conflict between the articles of association and the terms of the policy, the terms of the policy must prevail.

In Elliott v. Safety Fund Life Association, 76 M. A. 562, 566, it is said:

> "It is argued, however, that the by-laws of the company cover the points which have been suggested above and that they provide for assessments upon all policy holders in such manner as to fix the amount each should pay in order to meet mortuary expense as each death may occur. It is sufficient to say of this that the contract of insurance does not make the by-laws of the company a part of the contract. The policy provides that certain provisions on the back thereof shall be a part of the contract and these provisions while embodying terms we have set out omit any reference to assessment of members. On the other hand the policy, front and back, is complete in itself and excludes the idea that it is controlled by matters aliunde."

Again in Miller v. Missouri State Life, 194 M. A. 265, 276, the Court says:

> "We may concede for argument that in this roundabout manner the by-laws mentioned in the application were made a part of the contract of insurance, but we do not share the view of counsel for defendant that by-laws not mentioned or even suggested in this reference were brought into the contract. The only by-laws referred to were those relating to the time and place for the making of the fixed quarterly payments and the application is silent about the by-laws which made provision for the levy and collection of assessments."

It is evident, therefore, from the above decisions that whether or not the policy in question was issued by an assessment company must be determined from the provisions of the policy. The only by-law making any reference to assessments is article IV, which says that the board of directors may levy such assessments in such amounts and at such times as is provided in the certificate of membership. The certificate of membership, which in this case is the policy, makes no reference to the levying of any assessment. The policy itself contains no reference to the by-laws, but contains provisions to the effect that the entire contract is evidenced by the policy issued. We must, therefore, take the view that in determining the kind of business this company is doing within the state of Missouri, that reference must be made only to the policy of insurance, and that the by-laws must be excluded. It is necessary, therefore, to examine the policy to ascertain the kind of business being done by this company. The policy provides definite benefits both for death and accidental indemnities, also for sickness. The consideration of the policy is the payment in advance of $22.00 as the first payment and a quarterly payment of $12.00 thereafter. The policy contains no provision for the levying of an assessment, or any statement to the effect that the fixed sum specified in the policy is dependent upon the collection of the assessments from the other persons holding similar contracts. No where in the policy is the word "assessment" used, but throughout the policy the word "premium" is used. Under the Standard Provisions, section 3, the words "agreed premium" are used. The only clause in the policy which would indicate that the agreed premium might be changed is contained in the following words, "should the premium provided for herein be insufficient to meet the requirements of the association, it may call for the difference as required."

We believe that this latter provision only gives the right to the company to increase the premium called for under the policy in the event such increase is necessary. A similar policy was construed in the case of Aloe v. Fidelity Mutual Life Association, 164 Mo. 675, where the Court says at page 689,

> "In other words, each contract with each insurer is a separate unto itself, wholly independent of any other contract made with any other insurer. Translated into plain words, the

contract is that the company will pay five thousand dollars to the beneficiary of the insured at his death; provided, every year or every quarter during his life the insured will pay the company a fixed premium; provided, further, that if experience shows that the company hasnot charged the insured enough premium it may increase it at any time so as to keep the company solvent. Such a contract lacks the essential elements to bring the defendant company within the meaning of an assessment company under our laws."

In Jacobs v. Life Association, 146 Mo. 533, 538, the court says:

"The primary and controlling principle of the statute is that the benefit is to be paid out of a fund raised by assessment upon other persons holding similar contracts, by which they are made liable for the payment of such assessments. No scheme of life insurance can come within this principle and become insurance upon the assessment plan, unless somewhere along the line of its operations provision is made for such an assessment, and liability for its payment created. The right to have the assessment made must be given to the insured, the duty to make it must be imposed upon the corporation, and liability for its payment upon its members."

Another test laid down in Wall v. Commonwealth C. Co. of Philadelphia, Pa., 39 S. W. (2d), 441, 445, is as follows:

"A policy clearly indicating that payments necessary to continue the same are to be collected wholly or in part from assessments on holders of certificates of like class is one upon the assessment plan. One providing for a fixed regular premium is held to be an old line policy. (Citations omitted). To bring a policy within this section, it must show on its face an understanding that the insurance was to be gathered by assessments."

In Howard v. Missouri State Life Insurance Company, 238 S. W. 863, 864, it is said:

"This policy lacks the essential elements of a contract of insurance on the assessment plan. It nowhere gives the assured the right to have the benefit collected in whole or in part by an assessment upon persons holding similar contracts. Lacking this element, it cannot be classed as an assessment policy, but must be held to be an old-line policy."

It will be seen from the tests laid down in the above cases that the amount to be paid under the policy must come from assessments on members holding similar contracts; that each contract holder shall have the right to require such assessment from other contract holders and shall be under duty to pay assessments for

the benefit of other members. No such provision can be found, either directly or by implication, in the policies of this company. The amount to which he is entitled to recover is fixed, and upon the payment of the initial premium, without more, he is entitled to be paid according to the amounts specified in the contract of insurance. Its premiums are specific amounts specified to be paid at regular intervals, subject, however, to the provision that they might be increased.

The rules announced in the above cases announce the tests made by the courts of this State in construing policies. However loath we might be to follow the holdings of the above cases, we are compelled to adopt such holdings in view of the fact that the Kansas City Court of Appeals in the case of Wollums v. Mutual Benefit Health and Accident Association, 48 S. W. (2d), 259, has construed the policies of the company in question. In construing policies of this company the court holds that it is not doing business as an assessment company and says at page 264 as follows:

> "However, the policy upon its face conclusively shows that this insurance was not issued upon the assessment plan. It is held that the liability of an insurance company is determined by the character of its contracts of insurance and, in order for a contract to be upon the assessment plan, the payments must, in some degree, be dependent upon the collection of assessments upon persons holding similar contracts. Aloe v. Fidelity Mutual Life Association, 164 Mo. 675, 55 S. W. 993; Williams v. St. Louis Life Ins. Co., 189 Mo. 70, 87 S. W. 499. There is nothing in the policy in suit tending to show that the payments are so dependent. The fact that the policy provides that: 'The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for the difference as required,' does not make it an assessment company in the issuance of this policy."

The court held in the above case that the provision giving the company the right to increase the premium did not make the policy one issued by an assessment company. That provision, however, was the only provision in the policy which distinguished it from the regular old-line companies, and since the Kansas City Court of Appeals has held that that provision will not make it a policy by an assessment company, all doubt is resolved against the contention of the insurance company. This Department is bound by that decision in construing a policy of the company in question, and must hold that the Mutual Benefit Health and Accident Association is not doing business within the state of Missouri as an assessment company.

The fact that this company was chartered in Nebraska as an assessment company, is not material in determining its liability under these taxing statutes. The court in Aloe v. Fidelity Mutual

Life Association, 164 Mo. 675, says:

> "The fact that an insurance company was chartered by another state as an assessment company, and was licensed to do business in this State under its laws as an assessment company, does not make it such, nor in anywise change its character or status under the Missouri law. Nor is the liability of the company in anywise affected by its name. That is determined by the character of its contracts of insurance, and by those contracts the law places the company in its proper class, and determines whether or not it is an assessment company."

Neither the fact that heretofore the company has been licensed as an assessment company determines the character of the company in this State. In McDonald v. Life Association, 154 Mo. 618, it is said:

> "The certificate of the State Superintendent of Insurance, authorizing a company to do business as an assessment company, does not determine the character of insurance the company actually does. The policy determines that."

Following the holdings of the above cases, therefore it must be held that the kind of insurance issued determines the character of the company. The test is not how the company was incorporated in its home state, nor the view of the Insurance Commissioner in licensing the applicant, but the test is the nature of the business done in this State. The Kansas City Court of Appeals in the Wollums case above, has held that this company is not doing business within the state of Missouri as an assessment company and, therefore, under all tests, can be taxed for the privilege of doing business not on the assessment plan within the state of Missouri.

It appears that this particular company for years past has been licensed as an assessment company and we are aware of the rule that where a statute is ambiguous, that the construction placed thereon by the Departmental heads is persuasive in construing the statute. There is nothing ambiguous, however, in section 5745. That section merely lays down the test which must be complied with in order to become an assessment company. We do not believe there is anything ambiguous in the contract of insurance. We are aware of the rule that where a taxing statute is ambiguous, that the ambiguity must be resolved in favor of the taxpayer. We are of the opinion, however, that these two maxims cannot be invoked to relieve the insurance company from paying the tax in question. There is another rule which must be recognized in dealing with officers of cities and states, regarding taxes. Such rule is announced in Senter v. Lumber Company, 255 Mo. 590, 607, where it is said:

> "The city is a body corporate, clothed with extensive powers for the management of her municipal affairs. She can only

> act through her officers and agents; and if those officers, in violation of her ordinances, do unauthorized acts to her prejudice, it would be hard that she could be bound by them. - - - The State has delegated to St. Louis the powers necessary for her municipal government, thus imposing on her an obligation that would otherwise devolve on the State. The city, in the discharge of this duty, is compelled to act by officers. Now, if the State, acting through her officers, is not bound by their unauthorized acts, we can see no reason why the city, in the exercise of functions pertaining to the State and for the performance of which she is substituted in the place of the State, should not stand, in relation to the agents she may employ on the same ground that the State would to her officers. - - - We must all see the numberless frauds the sanctioning of the principle insisted on would produce. The argument confounds the city with her officers and assumes that they are the city."

It is the opinion of this Department that section 5745 is not ambiguous. It is plain under that section that before a company can be an assessment company that the payment of the benefits in some manner and degree must be dependent upon the collection of assessments from other policy holders. It is equally plain in the policy that the policy itself does not contemplate an assessment within the provisions of section 5745. There is nothing ambiguous in the contract of insurance or in section 5745 which would justify the invoking of the rule regarding the prior construction by the executive officers. As a matter of fact, the Kansas City Court of Appeals, in construing the policies of this company, and the other appellate courts in construing similar policies, have clearly laid down rules destroying any doubt as to the character of the business being done by this company in this state.

It is the opinion of this Department that the fact that this company was heretofore licensed as an assessment company will not prevent the taxing of the company at this time. It is said in State ex rel v. Y. M. C. A. 259 Mo. 233, 238,

> "The neglect of lawfully constituted authorities to assess taxes against defendant's property would be pursuasive evidence that said property is not taxable, if the law were susceptible of more than one construction. However, the mere neglect of public officers, or others, to obey a plain constitutional provision or statute will not effect its repeal."

In Folk v. St. Louis, 250 Mo. 116, 141, the court says:

> "The actual and practical interpretation placed upon constitutions and statutes by public officers charged with their execution is very pursuasive upon the court. When a constitutional provision or statute is unambiguous the acts of citizens of officers in violating its provisions for any

length of time, however long, cannot work its repeal."

The rules regarding construction by executive officers must be that the construction of executive officers is pursuasive where the constitutional or statutory provision is ambiguous, but such construction will not be pursuasive when it is clearly erroneous. There is no ambiguity in the statute under construction, and the courts must construe the statute according to its true meaning, and prior construction by executive officers to the contrary will be of no weight. The statute and the policy in question not being ambiguous, we do not believe that the present construction of those instruments should be influenced by prior interpretation of the Department.

Section 5779 applies to insurance companies on the stipulated premium plan. This company is not on a stipulated premium plan, according to its method of doing business in this State, but comes under section 5979, the general section which applies to other foreign insurance companies. It is, therefore, our opinion that the company should be required to pay a license fee of 2% on premiums received on account of business done within this State, since under the decisions of this State the company is not doing business in this State as an assessment company.

Very truly yours,

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

INSURANCE DEPARTMENT: What constitutes an insurance contract and the doing of insurance business in this state. Penalty for transacting insurance business in this state without authority.

June 8, 1933 6-8

FILED
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26

Honorable James K. Coolidge
Counsel Insurance Department
Jefferson City, Missouri.

Dear Mr. Coolidge:

This Department acknowledges receipt of your letter dated June 2, 1933, with reference to the New Era Benefit Society with the file of your office attached.

An inspection of the contract issued by the New Era Benefit Society of Springfield, Missouri, reveals that it is not substantially different in form, substance or effect from the certificate forwarded to us by your Department April 12, 1933, issued by Lincoln Aid Association of Wilmington, Delaware.

For the reasons stated in our opinion to your Department of May 12, 1933, we are of the opinion that the New Era Benefit Society above referred to by the issuance, sale and delivery in this state of the character of contract attached to your letter, is engaged in the transaction of insurance business in this state for which authority is required from your Department and in the absence of which authority we are of the opinion that those transacting such business are guilty of a violation of the insurance laws of this state.

The statute does not authorize this Department to take direct action in case of a prosecution.

We suggest, if you think it advisable, that you forward the information you have to the prosecuting attorney of Greene County, Missouri, for

his consideration and action thereon. Should the prosecuting attorney of that county see fit to request assistance from this office in the prosecution of the case, and upon being notified so to do by the Governor, this Department will assist in the prosecution for the violation of the law growing out of the transaction of the above insurance business.

I am transmitting to you with this letter your file forwarded with your letter of June 2, 1933.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures

INSURANCE DEPARTMENT:

Insurance Company, right to reduce capital stock under Section 5915, by surrendering stock and distributing surplus assets.

June 8, 1933.

FILED
91

Mr. Joseph B. Thompson,
Superintendent of Insurance,
Jefferson City, Missouri.

Attention: Mr. James K. Coolidge, Counsel.

Dear Sir:

We are acknowledging receipt of your letter of June 2, 1933, in which you inquire as follows:

> "Enclosed are certified copies of the meetings of the stockholders and directors of the American Automobile Fire Insurance Company whereby the capital stock of the company was reduced from $500,000 to $300,000. Will you please advise as to whether or not the proceedings thus reducing the capital stock of the company are in conformity with the laws of the State of Missouri and are not violative of the constitution of the United States or of the State of Missouri? We are also enclosing a letter from the attorneys which explains how the reduction is to be handled."

Attached to your letter is a letter from the firm of Bryan, Williams, Cave and McPheeters, counsel for the American Automobile Fire Insurance Company, and resolutions by the directors and stockholders of that company from which we deduce the following facts. The American Automobile Fire Insurance Company is now incorporated for $500,000, consisting of 5,000 shares at $100.00 per share par value. The company has a present surplus of $1,663,630.78. The company seeks to reduce its capital stock from $500,000 to a capital structure of $300,000 consisting of 3,000 shares of the par value of $100.00 each. To that end it is proposed that the company purchase 2,000 shares of its capital stock at $200.00 per share, and that one-half of the purchase price be paid out of the surplus now on hand. No provision is made for the payment of the other one-half of the purchase price so, consequently, will have to come out of the capital of the company. The board of directors of the company have passed a resolution approving this proposition, and have submitted it to the stockholders of the company who, in turn, have passed a resolution approving this plan of reducing the capital. It appears that all of the stock is held by the American Automobile ~~Fire~~ Insurance Company. You inquire whether the proposed proceedings are in conformity with the laws of this State and in answer thereto we submit the following:

It appears from your correspondence that the company desires to reduce the capital stock to $300,000 and withdraw $200,000 of assets from the assets of the company. That being true, it appears that the capital stock of the company must be paid up. We call your attention to this in order that we may determine which section of the Statutes the proceedings must be under. Section 5914 R. S. Mo. 1929, provides that an insurance company incorporated under this State, the capital stock of which has not been fully subscribed, may reduce its capital stock by following a certain procedure. We are assuming from the information before usthat the capital stock of this company has been fully subscribed and that, therefore, Section 5914 does not apply, but that Section 5915 will regulate these proceedings. Section 5915 R. S. Mo. 1929, is as follows:

> "Any insurance company incorporated under the laws of this state may increase or reduce its capital stock for the purposes, in the manner and to the extent prescribed by law: Provided, the board of directors of any company desiring so t increase or reduce its stock shall file with the superintendent of the insurance department a certified copy of the proceedings, both of the stockholders' and directors' meetings, at which it was determined to increase or reduce such stock, and upon being satisfied that the law has been fully complied with, that the proceedings were regular, that the condition and assets of the company justify the increase or reduction, and that the same will not be prejudicial to the interests of the policyholders, the superintendent shall issue a certificate authorizing said increase or reduction, and showing that the stock of said company has been increased or reduced, the amount to which it is increased or reduced, the par value of the shares; and such certificate shall be filed and recorded as in this chapter is provided for filing and recording the certificates of incorporation; and thereafter such company shall, with such increased or reduced capital, be subject to the same liabilities that it possessed or was subject to at the time of the increase or reduction of its capital; and the charter or certificate of incorporation of such company shall be deemed to be amended in respect to the amount of capital and the par value and number of shares, so as to conform to such increase or reduction."

Section 5924 R. S. Mo. 1929, provides, among other things, as follows:

> "No insurance company shall, directly or indirectly, purchase or hold, either absolutely or as collateral, its own stock, after the same has been once issued: Provided, however, that this shall not prevent a company from buy-

> ing in its own stock, if the same shall be forfeited and sold to the company for non-payment of assessments thereon, in which case it shall be treated and issued as part of the original stock, - - - - - ."

The proceedings contemplated by this company contemplate a purchase by the company of its own stock and provides for the payment for said stock by using part of the surplus and part of the capital of the company. The resolutions adopted by the directors and the stockholders do not in words provide that said capital stock shall be retired and cancelled, although the resolutions might so imply. It is, however, the opinion of this Department that under Section 5924 the company would have no authority to purchase its own stock out of its surplus and capital structure. The section provides that the company shall not "purchase or hold." We do not believe that the word "or" can be construed to mean "and," as the section further provides one instance in which the company may purchase its own stock. The rule generally is that a corporation can not purchase its own capital stock and the reason for the rule is aptly stated in Chrisman-Sawyer Banking Company v. Independence Manufacturing Company, 168 Mo. 634, 645, where it is said:

> "If the incorporators or stockholders could be allowed, as soon as the incorporation was completed, to sell out their stock to the company, and thereby escape liability for unpaid subscriptions, or in case the stock was fully paid, to receive back from the company the amount paid in, and to turn back to the company the stock subscribed the doors for great frauds upon the creditors would be thrown wide open, and the consequences would not only be disastrous to creditors, but would also be fatal to the corporations themselves, inasmuch as no one would deal with corporations under such conditions."

It is, therefore, our opinion, based upon Section 5924 and the great weight of authority in the United States, that it would be illegal to permit the American Automobile Fire Insurance Company to purchase its own stock by using a portion of its surplus and a portion of its capital.

However, it is the opinion of this Department that the reduction in the capital stock may be legally accomplished with the consent of the board of directors and the stockholders of the company, subject to the approval of the superintendent of insurance, as required in Section 5915. The proper way to reduce the capital structure in our opinion is to have the stockholders surrender and cancel 2,000 shares of the outstanding capital stock, thereby reducing the capital structure to 3,000 shares of $100.00 par value. After the cancellation of the stock and the reduction of the capital, there may be a distribution of the surplus assets if, as a matter of fact,

there is an excess of surplus assets remaining after the reduction of the capital has been consummated. Such legal proposition is supported by the great weight of authority and is announced in the case of Benas v. Title Guaranty Trust Company, 267 S. W. 28, 29, where the St. Louis Court of Appeals says as follows:

> "Nor is the rule questioned that a surplus arising from a lawful reduction of the capital stock is available for dividend purposes and may be lawfully distributed as such. (Citations omitted)."

However, the application of the above rule does not mean that because the company reduced its capital stock $200,000 that it may distribute $200,000 from its capital structure in all events. It only has the right to make a distribution of the sum equal to the amount of its capital reduction when the actual value of surplus assets equals the amount of the capital reduction. Benas v. Title Guaranty Trust Company, 267 S. W. 28, and in arriving at the amount which may be actually distributed in diminution of its capital, actually existing values at the time of the reduction must control and not the values as carried upon the books of the corporation.

In the Benas case above it is held, "Books of the corporation and its statement of proceedings for reduction of the capital stock may not be contradicted or impeached by parol evidence of the actual values of the assets in determining whether the surplus was sufficient for distribution of dividends without impairing the capital stock as reduced."

In Fletcher's Clyclopedia of Corporations, Section 3472, the rule is stated as follows:

> "When the amount of capital stock of a corporation is lawfully reduced under Legislative authority, the corporation is not required to keep the excess of its actual capital over the amount of its nominal capital as reduced, nor has any right to do so; but the stockholders have the right to have the excess divided among them, as in the case of a dividend, in proportion to their shares. In making such distribution, however, regard must be had for the present value of the property and the company, instead of distributing money or property equal in value to the excess of the original nominal capital, and the reduced nominal capital must retain property equal in present value to the reduced nominal capital, after deducting its debts. In other words, the surplus, if any, which a corporation may pay to its stockholders on reducing its capital stock, must, in every case, be ascertained, and depends upon the result of an examination into its affairs and not upon

> the difference between the original amount of capital stock and the reduced amount. Where a corporation reduces its capital stock and the surplus which thereby results is invested in the stock of railroad corporations, the stock itself may be distributed. It is not essential that the stock be reduced to cash and distributed in that form. Whenever, by sales of property, or by means of earnings, or otherwise, the corporation comes into the possession of funds which are in excess of the amount of its reduced capital stock, it can distribute that amount among the stockholders."

The reason for that rule, of course, is apparent and is that while corporations may have lawful authority to reduce their capital structure, they may not do so at the expense of its creditors, and if, in reducing the capital structure, a sufficient amount of it is withdrawn as would impair the capital as reduced, then the reduction is illegal, and if the reduction of the capital stock and the resulting dividends to the stockholders impairs the capital of the corporation as reduced, then it is a fraud upon the creditors of the corporation and illegal. Coleman v. Boothe, 186 S. W. 1021.

Section 5915 provides that the capital reduction may be consummated on obtaining a certificate to that effect from the superintendent of insurance; that the superintendent shall be satisfied that the proceedings are regular and the condition and assets of the company will justify the reduction, and that the reduction will not be prejudicial to the interest of the policyholders. The decision, therefore, as to whether or not the reduction of the capital of this company shall be permitted, depends upon whether the superintendent of insurance is satisfied that the assets of the company will permit such reduction, and that the interest of the policyholders will not be injured by permitting the reduction. In arriving at whether or not the reduction shall be permitted and at the amount of surplus assets which may be distributed, the superintendent shall base his decision upon the present actual value of the assets and not upon the book value, and should satisfy himself that the reduced capital structure has not been impaired by the reduction. It is, therefore, the opinion of this Department that the proposed method of reduction should not be approved for the reason that the corporation seeks to illegally purchase its own stock by using its surplus and its capital, and that it seeks to pay to the stockholders an amount of assets equal in amount to the amount of the capital reduction without regard as to whether a present actual valuation will permit the distribution of that amount of assets.

However, it is the opinion of this Department that the company may lawfully reduce its capital stock by its stockholders surrendering 2,000 shares at $100.00 par value. If,

after the reduction, there exists an excess of assets so that a distribution may be made without the impairment of the capital after the reduction, then such distribution of the excess may lawfully be made. In arriving at the amount which may be distributed, the actual value of the assets should be determined by examination. It does not appear that the proposed reduction in this case would reduce the capital structure below the limit required by the Statute.

In summarizing, it is our opinion that this company may reduce its capital consistent with the views expressed herein, and subject to the requirements of Section 5915, the fulfillment of which requirements is left to the judgment of you as superintendent of Insurance.

Very truly yours,

Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

INSURANCE CORPORATIONS:

Insurance Company organized under article 4, chapter 37, R. S. Mo. 1929, may incorporate for perpetual term.

June 15, 1933. 6-24

FILED 91

Mr. Joseph B. Thompson,
Superintendent of Insurance,
Jefferson City, Missouri.

Attention: Mr. A. C. Martin.

Dear Sir:

We are acknowledging receipt of your letter of June 9, 1933, in which you inquire as follows:

"We are enclosing herein Articles of Incorporation of the Public Service Life Insurance Company in duplicate, and will ask that you please examine same and if found satisfactory, kindly approve both copies and return them to this Department.

There is one item in these articles to which we desire to call your attention, and that is Item 5,

'The company shall continue for a perpetual term.'

The article under which this company is incorporated says that they shall specify the time."

The Articles of Incorporation of the Public Service Life Insurance Company are drawn under article 4, chapter 37, R. S. Mo. 1929. The articles conform to the requirements of sections 5759 and 5760 R. S. Mo. 1929. You should, however, ascertain that the name "Public Service Life Insurance Company" is not being used by any other incorporated company and is not such an imitation of such a name as will mislead the public.

You call our particular attention to the fifth paragraph of the Articles of Incorporation, "The Company shall continue for a perpetual term" and inquire whether or not that is in compliance with the Statute.

The sixth requirement of Section 5760 R. S. Mo. 1929, is as follows: "The number of years the corporation is to continue." Under this chapter, there is no provision limiting the number of years during which a corporation may exist. All that the provision requires is that the corporation, in its articles, shall specify the period of its corporate existence. Article 4, chapter

37 is a special law relating to the organization of particular corporations, and if in conflict with the General Corporation Laws, Article 7, chapter 32, would modify the General Corporation laws in that respect. However, the General Corporation Laws, requirement 6 of Section 4933 R. S. Mo. 1929, provide: "The number of years a corporation is to continue which may be any number or perpetual." There is nothing, therefore, in the General Corporation Law which would prohibit a corporation from having perpetual existence, if its charter so provides, and there is nothing in article 4 of chapter 37 which would prohibit this particular corporation from providing in its charter for perpetual existence.

In State ex rel v. Lesueur, 141 Mo. 29, the question arose as to the length of the corporate existence. The General Corporation Law in effect at that time provides that,"every corporation as such has power: First, to have succession by its corporate name for the period limited in its charter, and when no period is limited, for twenty years." The court at page 32 says; "

> "The law in force in 1868, when the institute was incorporated, intended, neither in letter nor spirit, to forbid the extension of corporate organizations beyond twenty years. That term was named as a limit only in event the fundamental articles of any particular corporation did not otherwise provide. Whether the articles do otherwise provide in a given case, is a question of law to be determined in each instance by a due consideration of the language used in the act of incorporation."

In State ex rel v. Road Company, 207 Mo. 85, it was held that the specific act of 1851 created the Toll Road Company and was its charter. Such act did not provide for the term of existence of the corporation, and the court said in the absence of the charter providing for the term of corporate existence, that reference must be made to the General Corporation Laws then in force, which, at that time, limited the life of corporations to twenty years, if their charter did not otherwise provide.

In State ex rel v. German Mutual Insurance Company, 224 Mo. 84, the Attorney General contended that the corporation was doing business after its corporate life had expired. The special legislative act creating the corporation uses the term "perpetual succession." The General Corporation Laws in effect at that time provided that in the absence of some provision to the contrary, the corporate existence should be for twenty years. The court, at page 91, said;

> "The general rule is, as contended for by the Attorney General, that where a special act creating a corporation

> uses the term 'perpetual succession' in connection with the charter, it implies nothing more than a continuance of succession during the existence of the company, which, in the absence of some special provision to the contrary, is for a period of twenty years, as provided for by the general corporation law which was then in force."

The court, however, found that the charter of the company contained language which evidenced a legislative intent that the existence of the corporation should not be limited to twenty years, and in so holding, aptly said at page 96:

> "It may be truly said that life insurance companies are not founded with a view of being maintained for a brief period only, or for any limited time. Their nature and purpose denote perpetuity, and without which it would not be reasonable to suppose men of affairs would organize such companies or invest their money in the same as a protection for their families if they thought such companies might, and in all probability would, be dissolved long prior to the time when their policies would mature and become payable."

From the foregoing it is seen that article 4, chapter 37 does not prohibit a corporation from having perpetual existence. No limitation as to its existence is contained in that chapter. The proposed Articles of Incorporation, however, do distinctly specify that the corporation shall exist for a perpetual term. Such provision in the Articles is not only not repugnant, but is absolutely consistent with the requirements under the general corporation laws found in article 7, chapter 32. Even if reference be made to the general corporation laws, as was done in the above decided cases, it will be seen from the foregoing that there is nothing in the general corporation laws which prohibits this company from having perpetual existence, but, as a matter of fact, the general laws specifically provide for perpetual existence.

It is, therefore, the opinion of this Department that since the Articles of Incorporation provide for perpetual existence, that this Company may incorporate for such a period; that there is no prohibition against such existence contained in article 4, chapter 37, or in article 7, chapter 32, or the decisions construing those provisions.

We call your attention to the fact that this corporation, even though it has complied with the above sections, shall not be permitted to commence business until it has complied with section 5761 R. S. Mo. 1929. This section provides that the corporation shall not commence the business of life insurance until at least 200 persons eligible under the proposed plan shall

have subscribed in writing to be insured in the aggregate amount of at least $250,000.00, and shall have each paid in cash the amount of one annual stipulated net premium, nor until the Superintendent of Insurance and the Attorney General shall have further certified that the company has complied with the provisions of the article and is authorized to transact the business of insurance, and shall deposit with the Superintendent of Insurance securities in the sum of $5,000.00.

We are returning the original and one copy of the Articles of Incorporation.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

TAXATION AND REVENUE:

County Courts may compromise "back taxes" under the requirements of Section 9950 R. S. Mo. 1929.

June 17, 1933. 6-20

FILED 91 29

Mr. J. W. Thurman,
Prosecuting Attorney,
Centerville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter of June 5, 1933, in which you inquire as follows:

> "Will you please advise me as to whether or not County Courts are empowered to compromise taxes under Section 9950 R. S. Mo. 1929, which have been reduced to judgment?
>
> Also if they are empowered to compromise the taxes after suit has been filed but before judgment?
>
> Thanking you in advance for this favor and for your prompt reply, I am."

You inquire whether under Section 9950 R. S. Mo. 1929, the County Court has authority to compromise taxes after suit and before judgment, and after judgment. This Section applies to back taxes and reads as follows:

> "Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said "back tax book" is not worth the amount of taxes, interest and cost due thereon, as charged in said "back tax book," or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a cretificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said "back tax book;" and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said "back tax book," it shall be the duty of said court or other proper

officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot: Provided, the county court or other proper tribunal may order that no suit be brought on any specified tract, if in the judgment of said court or other proper tribunal such tract is not worth or will not bring the taxes, interest and costs; nor shall suit be brought for taxes accrued on property used exclusively for religious worship, or for educational or charitable purposes, for the years previous to 1875, during which it was so used; and provided further, that the county court of any county may direct that any tax or fund, the validity of which is being contested in the courts, may be omitted from any suit or suits brought under this chapter, but the judgment rendered in any action where such tax is omitted shall not bar or affect any subsequent action for such tax so omitted, whenever the county court may direct an action to be brought for such omitted tax."

Under the foregoing Section, the county court has power to compromise the taxes against any tract of land or town lot contained in the "back tax book" when the land is not worth the amount of the taxes, interest and cost due thereon, as charged in said "back tax book," or when the same would not sell for the amount of such taxes, interest and cost. It appears, therefore, that the county court in the two instances specified in the Statute may compromise taxes on lands or lots which appear in the "back tax book." The Section further provides that the county court "may order that no suit be brought on any specified tract, if, in the judgment of said court or the proper tribunal, such tract is not worth or will not bring the taxes, interest and cost."

The foregoing Section, therefore, authorizes, under certain circumstances, the compromising of back taxes, and empowers the court to withhold the bringing of suit under such conditions. The tax is the obligation. The court may compromise the tax before suit. It is not required to bring suit if, in the judgment of the court, the property is not worth or will not bring the taxes, interest and cost. If, after suit is brought, or after judgment is rendered, it should appear to the county court that the property against which suit is brought is not worth or will not bring the taxes, interest or cost, we believe that the court, under the above Section, may compromise the judgment.

The court has the power to compromise before suit and has the authority to refrain from bringing suit under the circumstances. If, after it brings suit and before it obtains

judgment or after it obtains judgment, the court believes that the property is not worth or will not bring the taxes, interest and cost, no reason appears why they may not at that time compromise the taxes. The liability is created by reason of the tax. The judgment simply affords the means by which the liability, which has already been created, may be enforced against the will of the property owner. Since the court has the right to compromise and partly discharge the liability, we do not believe that it loses such right by reason of the fact that it has started suit.

In St. Louis, Iron Mountain v. Anthony, 73 Mo. 431, a suit was instituted to enjoin the collection of certain taxes. The plaintiff recovered judgment, which was reversed and remanded by the Supreme Court and later the disputed claim for taxes was compromised. The court said at page 434:

> "It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary."

The court in the above case announced that doctrine as being a power existing in the county which had the right to sue and to be sued. While the facts in that case did not involve the compromising of back taxes, yet the reasoning therein, as quoted above, should and does apply. Section 9950 gives the county court the right to compromise taxes or to refrain from suit, as specified in the section, and with those specific powers given to the county court, it would be not consistent with the spirit of said section if the county court could not compromise the judgment into which the taxes were merged. To hold that they could compromise said taxes if said information came to them before suit was brought and could not compromise said taxes where the taxes were merged into a judgment and the information came after the obtaining of the judgment would violate the spirit of the Section.

We believe that the rule as announced in Haggler v. Kelly, 103 N. W. 629, where the court says at page 631, is the proper one:

> "It must be conceded that the board had power to abate or compromise the tax which became merged in this judgment if, in the fair exercise of its discretion, such action was advisable. It is clear that this same power continued after the judgment was obtained. The duty of the county commissioners, with respect to the collection of the taxes merged in this judgment, was the same <u>after</u> as before the

entry of judgment."

In Oakman v. City of Eveleth, 203 N. W. 515, it was held that the city involved had a right to compromise taxes after as well as before judgment.

From the foregoing it is, therefore, the opinion of this Department that the county court may compromise back taxes under Section 9950 R. S. Mo. 1929, either after suit and before judgment or after judgment.

We call your attention to the fact that the Legislature in 1933 amended Section 9950. In as much as said amended Section has not yet become a law, we do not deem it covered by your inquiry.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

IN RE: COMMITMENTS AT INTERMEDIATE REFORMATORY TO COMMENCE WHEN?

4-4

June 30, 1933.

FILED
91
30

Mr. John Thornberry
Superintendent
Algoa Farms
Jefferson City, Missouri

Dear Mr. Thornberry:

Your letter requesting an opinion from this office is in words and figures as follows:

> "We have a certified copy of a commitment which reads as follows: '... ... the said defendant, Arnett Perkins, having entered his plea of guilty as aforesaid, be confined in the Intermediate Reformatory of the State of Missouri, for a period of two years from the 16th. day of September 1932,.....'
>
> "The record then shows that he was given a bench parole, 'upon his good behavior'. The record further shows that on the 12th. day of May, 1933,' ....the parole heretofore granted be and the same is hereby terminated .... that the Sheriff deliver said Arnett Perkins to the Superintendent of the Intermediate Reformatory at Algoa, Missouri, to serve the sentence heretofore received'.
>
> "Please advise me whether this boy's sentence time of two (2) years runs from September 16th. 1932 or whether it runs from the date he was received at this institution which was on the 19th. day of May, 1933."

The sentence to which you refer was imposed under the provisions of Section 8474, R. S. Mo. 1929,

which reads as follows:

> "If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons. (Laws 1927, p. 365, Section 9.)"

In the case of State v. Hedrick, 296 S. W. 1. c. 154, the Supreme Court said:

> "It is said that the verdict of the jury is illegal, because it fixed the date of the punishment. The verdict is as follows:
>
> > 'We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at ninety days in the county jail, beginning April 25, 1925.'
>
> "This is a general verdict, notwithstanding the fixing of the date of punishment. Pursuant to the trial, the jury returned the verdict, and, after allocution, the court pronounced judgment, and sentenced defendant to serve three months in the county jail from this date, all of which occurred on April 25, 1925. Section 4111, Revised Statutes 1919, provides, in substance, that no judgment shall be reversed or set aside by an appellate court because it was erroneous as to time or place of imprisonment; but in such case it shall be the duty of

> the court or officer hearing the case to sentence such person to the proper place of confinement and for the correct length of time from and after the date of the original sentence. We treat the words in the verdict beginning 'April 25, 1925,' as surplusage; thus rendering the verdict in effect regular, and without error.

In the case of Ex Parte Mounce, 269 S. W. 387, the Supreme Court said:

> "A parole is a matter of grace or favor to a convicted defendant, and, when he accepts such parole, he does it subject to all the provisions fixed by the statute, and subject to all other conditions which may be imposed upon him by the authority granting such parole, which are not illegal, immoral or impossible of performance. Such, by all the authorities, is the rule where a parole or conditional pardon has been granted by the executive or other constitutional pardoning power, and the rule applies as fully and as reasonably to paroles by trial courts under our statute.
>
> *
>
> "Petitioner's contention also seems to be that, where the parole has been terminated within the term during which the paroled person would have been in the penitentiary had he not been paroled, the time during which he was at large under his parole must be regarded as part of his sentence, and, as a logical consequence, that, if the term of imprisonment to which he was sentenced had entirely elapsed but for such parole, he cannot be required to serve any part of such term of imprisonment, if such parole is thereafter terminated. Such contention is directly in the face of section 4158, and is utterly without merit.

In the case of State v. Hockett, 139 Mo. App.

l.c. 644, the Appellate Court said:

> "We feel fortified in the position that the power, as exercised in this case, does not exist in this State, from the consideration that we have a statute regulating parole, which is in effect a suspension of punishment. (Art. 14, chap. 16, R. S. 1899.) But it cannot be exercised by the court or judge until there has been a judgment or sentence of punishment."

Thus we see in the instant case that the imposition of the sentence on the 16th day of September, 1932, was a condition precedent to the parole which was subsequently granted. The order granting the parole would have been untimely without the record showing the sentence of the court. Such is the holding in the Hockett case. The records showing a sentence "for a period of two years"and then adding "from the 16th day of September, 1932" is definite enough in setting out the term of imprisonment to which the prisoner was sentenced. The words "from the 16th day of September, 1932" do not affect the duration of the two years sentence but are mere surplusage to the sentence proper, which was for two years confinement in the Intermediate Reformatory. In the Hedrick case, where the verdict of the jury contained words of similar import, the Supreme Court treated them as surplusage;and,with the same logic, we treat the words in the record in the instant case as surplusage. And, when the court, on the record, revoked the parole on the 12th day of May, 1933, and passed judgment "to serve the sentence heretofore received" there was no force added to that portion of the sentence which was surplusage in its origin. Hypothetically, should the Superintendent of the Intermediate Reformatory date a commitment back to a fictitious beginning merely because some court record so indicated, such procedure might result in a given case where the term of imprisonment to which a convict be sentenced to imprisonment was entirely lapsed before there was occasion to revoke the parole and hence the convict not required to serve

any part of a sentence for imprisonment which the law required the judge to make before the parole was granted.

It is the conclusion of this office that the prisoner's commitment in the instant case should be dated from the date that the prisoner was received at the Reformatory.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

WOS/AJ

9-16-64 See Letter Attached

STATE TREASURER: Right to collect interest on state deposits after closing of state depository.

FILED
92

January 31, 1933

Hon. Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Dear Mr. Nacy:

This office is in receipt of your letter dated January 30, 1933, in which you make inquiry as follows:

> "I wish you would kindly give me your opinion as to where interest should be figured to on closed depositories, the time the bank is closed or up to the time that the securities are realized on".

Section 11465 Revised Statutes Missouri 1929, provides for the depositing of state moneys in depositories approved by the Governor, Treasurer, and Attorney General, for the re-payment of which deposits satisfactory securities shall be given, such depository to pay a bonus for the use of such state deposits. The original deposits with interest and profits that accrue thereon to be disbursed by the treasurer for state purposes.

Section 11467: The interest or bonus provided for in Section 11465 shall be paid by the state depository on the average daily balances of state money and shall be paid and credited to the state monthly, on the first day of each month.

Section 11468: Bids for state moneys shall state the interest such bidder bank will pay on average daily balances to the credit of the State Treasurer in such bank.

Section 11469: (Amended Laws 1931, page 378) For the security, safe keeping and payment of the deposits aforesaid the depository bank shall deposit its obligation in the form of a bond and in addition thereto it is required to post certain bonds of the United States, Missouri, etc., and under Section 11474 such depositories may be required to give a personal bond in addition to the foregoing for the safe keeping and prompt payment of the state moneys held in such depositories.

The form of contract submitted herewith, I take it, is the form in use and executed by the depository giving rise to the question embodied in the foregoing letter.

The contract recites the making of a bid for the safe keeping and payment of certain state funds and payment of interest thereon; that the depository agrees to pay interest on the daily balances for such deposits at a rate to be specified. In the third paragrpph on the second page that if the depository shall fail to pay the check or checks of the State Treasurer, then the Treasurer is authorized to forthwith convert the securities collaterated to insure the payment of the state deposits, or to sell so much of such securities as may be necessary to pay the whole amount of the deposits made by the State Treasurer and disburse the proceeds of such securities according to law.

It was the evident intention and purpose of the foregoing sections of the statutes, as well as the intent of the submitted form of contract, that interest on the deposits when accrued and credited would become as much a part of the state's deposits as was the original deposit. The statutes and the contract constitute a continuing obligation against the securities for the payment of interest at the specified rate, until such time as the State Treasurer shall forthwith, - that is, - promptly and without delay, sell the securities collaterated which securities, it must be assumed, are in compliance with the statutes and for which there would be a ready market. For instance, if a depository closed on the 31st day of January, 1933, the bank would not have credited the thirty days' interest for the month of January, to the account of the State Treasurer because the first day of February had not arrived; nevertheless under the statutes and the contract, after the Treasurer had drawn his check on the depository and the same had not been paid, the State Treasurer would be entitled to retain from the sale of the securities the original deposits with interest thereon according to the contract, until the lapse of the time in which prompt sale of the securities should have been made. If a bank closed on the first day of the month, being the date on which the interest was required to be credited, and if such credit had not been made to the account of the state, notwithstanding the fact that such credit had not been made, the state would be entitled to retain from the sale of the securities sufficient to pay the interest on the deposits from the date

the interest was last credited thereon until the Treasurer's check had been refused and the time had elapsed in which the Treasurer should have promptly sold such securities, and that would be after February 1st.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

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Attorney General.

GL:LC

Assessors: Fees for assessment lists; authority to make in absence of return
Sec 9760

Tp 2/11 R

February 7th, 1933

FILED
92

Hon. C. P. Turley,
Prosecuting Attorney,
Van Buren, Missouri.

Dear Sir:

We have your letter of January 28th, requesting an opinion of this department upon the following facts:

> "Sec. 9806, R.S. Mo. 1929, fixes compensation of Assessors. Ours is a county of a population of less than 30,000. This entitles assessor to 35¢ per list, and 3¢ per entry for making real estate and personal assessment books.
>
> The practice here during the past few years, and that is supposed to be based on direction of experts in State Auditor's Office and on opinions from the office of the Attorney-General, is for the assessor to make the usual assessment of the residents of the county, and, in addition to that, to then go to real estate tax books and make a personal assessment list for each non-resident of the county or state who has paid taxes that year. The contention is that he could make out a personal assessment list from each of the entries on the real estate book, whether taxes were paid or not, and that as a favor to the county the Assessor is confining this list to the residents of the county and to those names on the real estate tax book who have paid taxes.
>
> Since in this county of 506 square miles there are approximately 10,000 separate tract of land on the real estate book and many of that number are paid on, the practice above is quite a burden to this county.
>
> I want to know if the practice above referred to is founded on law. We had always understood that personal assessment lists were confined to parties with personal property in the county."

Section 9760, R. S. Mo. 1929, provides that whenever there shall be any taxable property in any county and from any cause no list therefor shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view or on the best information he can obtain, and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary and may examine any person upon oath touching the same..

Hon. C. . Turley-2 2/7/33

Section 9760, R. S. Mo. 1929, among otherthings,provides for the making up of the assessment books and the compensation to be paid the assessor therefor. Section 9806, R. S. Mo. 1929, provides for the manner of payment of the fees allowed the assessor in connection with his duties, one-half to be paid by the county and the other half by the state.

The lists of real estate taxable in the county and owned by non-residents or by persons from whom the assessor is unable to procure a list, when prepared by the assessor entitles him, in our opinion, to compensation therefor at the rate of fees authorized by law for taking assessment lists.

Whether or not the assessor makes out a list in accordance with the provisions of Section 9760, supra, is a question of fact to be determined by the county court. If the assessor did not in fact make out such lists of real estate in the county, then the compensation for entering such real estate on the land list would be three cents for each tract under Section 9760,supra, and he could not make a charge for lists that he did not prepare, based upon his information and investigation as Section 9760 provides.

Very truly yours,

Carl C.Abington,
Assitant Attorney-General

CCA/H

County Clerk's deputy hire - Sec 11811
Counties over 7 thousand and less than 40 thousand

Op 2/11 R

February 7th, 1933

FILED
92

Hon. C. P. Turley,
Prosecuting Attorney,
Van Buren, Missouri.

Dear Sir:

We have your request for an opinion, under date of January 28th, concerning the amount of salary which may be allowed county clerks for deputy hire under Section 11811, R.S. Mo. 1929, in which you state the following facts:

> " According to the election of 1928, the population of Carter County was less than 7,000, which put the office of County Clerk on fee basis. According to the election of 1932, the population of Carter County is more than 7,000 and less than 15,000, which puts the office of County Clerk back on a salary basis.
>
> The question is: When does the change from fees to salary go into effect? The date of the election? The end of the year 1932? Or the end of the Clerk's term in 1934?
>
> Now, assuming that county clerk is on a salary basis, the question arises; is he entitled under the law to a deputy as a matter of right and course, or is the appointment conditional on the County Court's finding and determination that the work in the Clerk's office requires a deputy. I refer of course to the first deputy, not the additional help or deputy. In column two, page 3171, sec. 11811, R. S. Mo. 1929, there are two provisos, and I am not sure whether the second one is a limitation of the first only, or on the matter preceding the first proviso. "

The population of Carter County with reference to the amount to be allowed the County Clerk as fees should be estimated upon the election of 1932. Insofar as the increase in population would affect the fees which he would be entitled to receive, it would become operative on the first day of January, 1933.

In the case of State ex rel Harvey v. Linville, 300 S.W. 366, the court says:

> "The increase of salary which a statute permits after an election showing an increase in population is not in violation of the constitution in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixed a salary to be estimated at periods as changed by increase in the population."

The constitutional provision refered to in this opinion, Section 8, Article XIV, does not place an inhibition upon a decrease in salary or fees during term of office. The court in further considering a statutory provision in the Linville case, supra, pertaining to annual salary says:

> " Annual salary as used in said Section 10938 means salary for each year of his incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual' as applied to salaries means not the calendar years but the years of the incumbent's term, which in case of relator begins on the first day of April each year."

The term of the officer of which you inquire begins on the first of the year following his election, and the first year of his service would end on December 31st.

The second subdivi ion of your inquiry has to do with the right to employ a deputy or assistent clerk. Section 11811, R. S. 1929, among other things provides that in counties containing fifteen thousand inhabitants or less, the clerks shall be permitted to retain $1250.00 for themselves, and be allowed to pay for deputies or assistants not exceeding $600.00; provided that the county court in all counties of this state having a population of seven thousand and less than forty thousand may allow the county clerk and circuit clerk of such counties, or either of them, to retain in addition to the amount now allowed them for deputy or assistant hire, a further sum not to exceed five hundred dollars per annum to be determined by the county court of such county; provided that the county court shall determine that the work required to be done by

such clerk or clerks demand or require such extra remuneration, and that the fees collected and taken in by such clerk are sufficient to pay the same, but in no event shall such allowance be made by the county court where the fees collected by such clerk or clerks are not absolutely sufficient to meet such demand.

Under our interpretation of this statute, the county clerk is entitled to the first deputy referred to as a matter of right, and the county court would be without authority to restrict him with reference to such deputy. The second provision, however, is a matter to be determined wholly by the county court and unless in the judgment of the court the duties of his office would require an additional assistant, the clerk would be without authority to employ such assistant and pay for his services out of county funds.

Very truly yours,

Carl C. Abington,
Assistant Attorney-General

CCA/N

Constable Holding office until successor is elected and qualified Sec 11748 Constitution of Missouri Sec 5 Art XIV

A/p-7/11 R

February 7th, 1933

FILED
92

Hon. C. P. Turley,
Prosecuting Attorney,
Van Buren, Missouri.

Dear Sir:

Your letter of January 28th in which you request the opinion of the legal department, has been handed to the undersigned for attention. In your inquiry you state the following facts:

> " Section 11748, R. S. Mo. 1929, provides that constable who is elected shall serve until his successor is elected and qualified.
>
> And the section further provides that in case of vacancy the court may appoint a constable who shall hold office until the next general election for constables. Does that imply that such appointed constable shall hold after the election until his successor is qualified? The practice here has always been for him to do so. I do not think that practice is correct."

Section 11748, R. S. Mo. 1929, provides for the election of constables and the tenure of their offices. This section particularly provides that in the election to be held in the year 1920 and each general election every two years thereafter, the qualified voters of each township in every county of this state shall elect a constable who shall be a resident of the township of the township for which heis elected, and who shall hold such office for two years, and until his successor be elected and qualified.

Section 11749, R. S . Mo. 1929, provides for the bond of such township constables.

Section 5, Article XIV of the Missouri Constitution provides that,in the absence of any contrary provisions, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.

In reference to an officer holding over until his successor has been elected and qualified, we find from Mechen on public Office and Officers, the following in Section 397 of said authority.

> "It is usually provided by law that officers elected or appointed for a fixed time shall hold not only for that time but until his successor is elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term, if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it is beyond the term fixed by law."

In the case of State ex rel v. Seay, 64 Mo. 89, the court writing the opinion states:

> "The law abhors vacancies in public office and great precautions are taken to guard against their occurence. The policy of the law is to have someone always in place to discharge the duties of public offices, and in a doubtful case the construction of the law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a casus omissus resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence."

In 22 R. C.L. Section 258, in commenting upon the purpose and effect of authorization to hold over, we find this language:

> "The purpose of constitutional or statutory provisions authorizing public officers to hold over is to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office. Where a constitutional or statutory provision exists permitting or commanding an incumbent of an office to continue in the discharge of his duties until his successor is qualified, the expiration of the official term not only does not create a vacancy, but the period between the expiration of his term and the qualification of his successor

> is as much a part of the incumbent's term of office as the fixed statutory period. This is true even where a person is elected his own successor. * * * *. The practical effect of a constitutional provision directing that public officers should hold over until their successors are qualified is that a public office does not actually become vacant in the sense that there is no incumbent to fill it except in the case of death. Nevertheless it has been said that when the legal term expires, the office becomes vacant in one sense, and the incumbent is authorized to continue in the discharge of his functions until the appointment and qualification of his successor by sufferance rather than from any intrinsic title to the office (Citing State v. Williams 222 Mo. 268.)"

In view of the above authorites, we are of the opinion that the constable is authorized by the provisions of the statute to hold office until his successor has qualified as provided by the sections hereinabove referred to, and this is ture although the period for which the incumbent was elected has expired. The above cases and principles of law declared therefrom appear to be based upon the reasoning that under the imperative demand of necessity, the public, for whose benefit the office has been created, should at all times have an incumbent to discharge the duties incident to such office so that the public interest may not suffer from a neglect which would of neccessity occur in t e event of a vacancy.

Very truly yours,

Carl C. Abington
Assistant Attorney-General

CCA/N

Sec. 46, Art. IV, Mo. Constitution of 1875 forbids payment by General Assembly of counsel fee of contestor or contestee in contest for seat in lower House of Mo. General Assembly.

April 21, 1933.

FILED
92

Hon. Richard R. Nacy,
State Treasurer,
Jefferson City, Missouri.

Dear Sir:

Your letter reads as follows:

"I am enclosing herewith House committee report of election contest recommending a $250.00 fee to be paid N.J. Craig, attorney for R.P. Weeks, contestee.

First, does this recommendation give the State Treasurer authority to pay this bill when certified by the State Auditor without a special appropriation for that purpose? Second, will this recommendation authorize the State Treasurer to pay this account when certified by the State Auditor, when an appropriation has been made for that purpose?"

The Constitution of Missouri of 1875, Article X, Sec. 19 thereof provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. ***"

In my opinion the General Assembly should make an appropriation to pay this counsel fee and expense of Two hundred and fifty dollars, if it is paid.

Article VIII, Chapter 61, R.S. of Mo. of 1929 provides for candidate contesting election of any person to the Senate or House of Representatives, but I have been unable to find in Article VIII, Chapter 61, or elsewhere in the Missouri Statutes any provision authorizing the General Assembly of Missouri to appropriate money to pay the counsel fees in such a contest of either contestor or contestee. If a statute exists authorizing payment of counsel fees in a legislative contest in Missouri, I have overlooked it.

If such a statute existed, I am of the opinion that it would not be valid because of the provisions of Sec. 46, Article IV of the Missouri Constitution, which provides:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever ***"

The General Assembly is a trustee for the citizens, clothed as trustee with certain powers and wherever the Constitution limits the power of the General Assembly to appropriate public funds, such such limitation bars legislative appropriation for any of prohibited uses. The payment of counsel fees of either contestor or contestee for a seat in the Missouri General Assembly would be a grant of public money to contestor or contestee for his or their private benefit, in my opinion.

A grant of public money to pay counsel employed by an individual or individuals to establish a right to a seat in Senate or House of Missouri General Assembly would be a grant to such individual and would be within the prohibition of the following decisions of our Supreme Court, in my opinion:

> Hitchcock v. City of St. Louis, 49 Mo. 485
> State v. Parker Distilling Co., 237 Mo. 103
> Kavanaugh v. Gordon, 244 Mo., l.c. pp. 720-21-22
> State ex rel v. Kimmel, 256 Mo. 611

It is true in State ex rel Crow v. City of St. Louis, 174 Mo. 125, the court held the city had a right to appropriate money to reimburse an officer who in an effort to kill a mad steer on a crowded street shot a child, whose next friend recovered damages against him, which he paid; but the right to make the appropriation on the ground the officer was in the discharge of his duty as such officer in removing a nuisance from the highway, which the law expressly required him to do and which the city was under obligations to its citizens to do in the discharge of its police power and its health and safety duty. But in case of counsel rendering service for the contestants for a legislative seat, the services are for the individual profit

which would arise from the emoluments of the office to the successful contestor or contestee.

If the election committee investigating the question of which of the two candidates was elected expended money in such investigation, the General Assembly could by a specific appropriation therefor pay such expense. I do not think recommendation of the committee would justify you in paying the warrant for $250. In my opinion, if this $250 can be legally paid under our Constitution and statutes, it can only be done by a specific appropriation naming the particular purpose for which the appropriation is made.

I return you herewith the report of committee you enclosed.

Very respectfully yours,

EDWARD C. CROW.

APPROVED:

_____
Attorney General

ECC:AH

INSURANCE COMPANY AGREEING TO ACCEPT ASSIGNMENT OF UNEARNED PREMIUM DUE FROM SOLVENT COMPANY CONSTITUTES DISCRIMINATION AND REBATING.

May 4, 1933

FILED
92

Insurance Department
Jefferson City, Missouri

Gentlemen:

This Department acknowledges receipt of your letter dated May 1, 1933, as follows:

"Enclosed is an advertisement which appeared in one of the St. Louis daily papers. You will note that the H. W. Eddy Insurance Agency is offering to accept as part payment for the premium on a policy which they might sell, claims for unearned premiums on policies originally issued by the Independence Indemnity Company and the International Reinsurance Corporation. This situation is caused from the failure of the Independence Indemnity Company and the International Reinsurance Corporation.

In view of the apparent discrimination between insurants, we would like your opinion as to whether or not this practice would constitute rebating under the provisions of Section 5868 R. S. Missouri, 1929. We offer only as a suggestion that the claim for unearned premium against the insolvent corporation, and which is accepted as part payment of a new policy, cannot in any sense of the word be considered as being worth one hundred cents on the dollar. In other words, these two corporations were dissolved because of their insolvency, and their inability to pay their claims in full. Therefore, it is a certainty that the claims if, as and when paid will not be paid in full".

379.315

Section 5860 Revised Statutes of Missouri, 1929, requires every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm to maintain a public rating record - that is a public record of its rates in force for such insurance - from which record the rate or premium applicable to each risk in the state, that has been or may be written, may be ascertained and in advance of the writing of such insurance.

Section 5866 of such Statutes provides that no fire insurance company or other insurer, nor any rating bureau shall fix and charge any rate for fire insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire.

Section 5868 provides as follows:

379.350

> "No company or other insurer or agency shall directly or indirectly, by any special rate, tariff, drawback, rebate, concession, device or subterfuge, charge, demand, collect or receive from any person, persons or corporation any compensation and premium different from the rate or premium properly applicable to the property so rated, as indicated by its public rating record, and no company or other insurer shall discriminate unfairly between risks of essentially the same hazard and substantially the same degree of protection."

Sections 7 and 9 of the rating act, Laws 1915, page 314, are the same as sections 5866 and 5868, Revised Statutes Missouri, 1929, respectively.

As to the two last named sections, as well as Section 5860 of the rating act, the Supreme Court of this state in State ex rel v. Clark, 204 S. W. 1090, 1092, said:

> "These records are to be kept open to the public, in order that the proposed insurer may readily ascertain in advance the rate to be charged him, and the components of charge and credit which go to make up that rate. Section 1, p. 314, Laws 1915. Upon the issuance of any policy the assured

> shall be furnished a schedule, or analysis, which shows the basis rate and the items of charge and credit which enter into and determine the whole rate charged. Section 7 of said Rating Act forbids any company or any rating bureau from fixing any rate which discriminates unfairly between risks by reason of the application of like charges and credits, or which discriminates unfairly between risks which have substantially the same hazards and the same protection against fire. Section 9 forbids the giving of any rebate by which the discrimination forbidden in section 7 of the act may be brought about by evasion or subterfuge. Its effect is in all respects similar to that of Section 7, supra."

The advertisement attached to your letter states in part that,

> "We will accept assignment of your Independence Indemnity Company policies in part payment for new policies".

You state in your letter that the latter company is insolvent and I take it is in course of liquidation and if the same result occurs, as usually does in similar liquidations, little or nothing will be paid on account of the unearned premiums on policies originally issued by the Independence Indemnity Company.

We think the spirit of the rating act is that risks of essentially the same hazards and having substantially the same degree of protection against fire, are entitled to pay the same rate for insurance protection. The intent of the Act evidently was to prevent discrimination, favoritism, gratuities or abatements in whatever form it might appear, as among the same class receiving the same prospective benefits. If the ultimate effect of the acceptance of the offer contained in the attached advertisement would be that one class of policy holder would pay a greater sum for a like protection than other policy holders, then such transaction would come within the condemnation of Section 5868 Revised Statutes Missouri, 1929. What we have said is upon the theory that the amount deducted from the premium of the

insured, who holds a policy in the insolvent company, on account of the unearned premium due from the Independence Indemnity Company, will not be collected from the latter company, and upon the further theory that the rates required to be kept of record will be paid in cash or its equivalent. Upon that assumption the advertised plan, having for its purpose and results discrimination as to rates among policy holders, the matter submitted to you would be in violation of Section 5868 above referred to.

It is true that under the ruling in Rogers v. Ramey, 248 S. W. 254, it is held that the fact that an agent who insures his own property and receives a commission on the premium paid is not rebating, but his commission represents the value of his services rendered to the company. The same rule is declared in Insurance Commissioner v. Guarantee Life Insurance Company,159 Ala. 533.

Some of the rules with reference to rebating, when prohibited by statute, are mentioned in 32 C. J. 1194, as follows:

> "Within the meaning of such prohibitory statutes rebating may consist in accepting as full payment of premiums sums less than the amounts stipulated in the policies or contracts of insurance, applying the whole or part of an agent's commissions to payment of premiums due from insured, dividing agent's commissions with insured, paying premiums for insured, or offering any special favor as to payment of premiums by insured, in order to induce insured to enter into a contract of insurance.".

We think the rule just quoted abundantly supports our conclusion as above expressed.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

_____
Attorney General.

FEDERAL AID - Authority to issue bonds for municipal improvements.

September 16, 1933.

FILED 94

Hon. H. A. Von Rump,
Mayor,
Rogersville, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of September 6th, 1933, couched in the following terms:

> "We, the City of Rogersville, population 408, anticipate the receipt of Federal aid in order to install City Water Works under the Federal Aid program.
>
> With this in mind and under these conditions will you kindly advise us if we, the city, have authority under the state law to issue municipal bonds to cover this cost. We are incorporated as a 'town or village under class four'."

The Constitution of Missouri, Article X, Section 12 (a) provides as follows:

> "Any city in this State, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds (2/3) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in section 12 of article 10 of the Constitution of this State, not exceeding an additional ten (10) per centum on the value of the taxable property therein, for the purpose of purchasing or constructing waterworks, * * * to be owned exclusively by the city so purchasing or constructing the same".

Revised Statutes of Missouri 1929, Sections 7029 and 7030, governing cities of the fourth class also provide for the borrowing of money up to the constitutional limit to cover the construction of waterworks and the issuance of municipal bonds to cover their cost, such statutes imposing no further restrictions material to your inquiry on cities of the fourth class. Thus, unless the issuance of such bonds would cause the municipal debt of the City of Rogersville to be in excess of the amount allowed by Section 12 of Article X of the Constitution of Missouri, which restricts the municipal debt of a city of the fourth class to five percent of the value of the taxable property therein and by Section 12 (a) of Article X of the Constitution of Missouri above quoted, which total maximum would be anything over fifteen per cent of the value of all of the taxable property in the City

of Rogersville, no objection would exist under the laws of Missouri to the issuance of municipal bonds for the construction of such waterworks.

As to whether or not the fact that the City of Rogersville would receive funds from the United States to cover part of the construction of the waterworks would have any effect on the right to issue the bonds in question, it is provided in Section 6946 of the Revised Statutes of Missouri 1929 that:

> "any city of the fourth class in this state * * * may receive bequests, gifts and donations of all kinds of property",

and it is further provided in Section 7029 of such statutes that the Board of Aldermen of a city of the fourth class

> "shall have the right * * * to acquire by * * * donation * * *suitable grounds within or without the city, upon which to erect said works (i. e. waterworks) and the right-of-way to and from said works, and also the right-of-way for laying water pipes * * *."

Thus, by Section 6946, since no restriction is placed upon cities of the fourth class as to what persons may be the donors of gifts to such cities, no objection would exist to the receipt by the City of Rogersville from the United States as a gift of part or all of the funds for the construction of waterworks, and as to borrowing such money from the United States, the Constitution and Statutes of Missouri above quoted and cited place no restrictions on the persons or entities from which funds can be borrowed.

Under the Act of the Seventy-third Congress, approved June 16, 1933, H. R. 5755, commonly known as the "National Recovery Act", it is provided in Section 203 (d) that:

> "The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality, notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness."

The validity of this section of the National Recovery Act has not yet been settled by the courts, and if it should be upheld by the Supreme Court of the United States it would make any inquiry into the law of Missouri regarding the power of the City of Rogersville to borrow such money immaterial, but, as above stated, it is my opinion for the reasons set out above, that no objection exists under the law of Missouri to the issuance of the bonds which are the subject of your inquiry, unless the issuance of such bonds should bring the indebtedness of the City of Rogersville above the amount allowed by the Constitution of this state, and as to this latter question I am unable to

express an opinion as no figures were furnished in your inquiry concerning the present indebtedness of the city or the amount to be incurred under the contemplated bond issue.

Very truly yours,

ASSISTANT ATTORNEY GENERAL

Approved:

ATTORNEY GENERAL

NEPOTISM:

The fact that teacher not related to director at time of appointment afterwards becomes related within the fourth degree, will not work a forfeiture of office.

October 5, 1933.

10-7

FILED 94

Mr. G.W. VanNess,
District Clerk,
Jonesburg, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "I am writing you for a decision on a condition that exists in our Public School. Sometime after we had hired our teachers for 1933-34 one of the teachers married a half - sister to one of the school directors of our district. We at once wrote to State Superintendent Lee for a decision, which you will find enclosed. Since then the Editor of our home paper who is not on friendly terms with some of the directors, has published statements, seemingly with the intention of placing us in a bad light before the public. Now, of course, we want to comply with the law in every way, and will appreciate a letter from you that we may know where we stand."

Section 13, Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above section of the constitution, if any public officer names or appoints anyone within the fourth degree, either by consanguinity or affinity, he shall forfeit his office. The constitution means that the right to name or appoint shall not be exercised in favor of any person who is related to a director at the time of the naming or appointing. As we construe the constitution, the test as to whether or not a director shall forfeit his office depends on whether

or not the director and the appointed teacher are related within the prohibited degree at the time he exercises the right to name or appoint such teacher.

The proper construction of the constitution, in our opinion, is that the officer may, by his own wrongful act, forfeit his office. We do not understand that it was intended a director should be made to forfeit his office by acts or circumstances for which he was not liable and which were not under his control. To hold that a director could be made to forfeit his office because the appointed teacher, after her appointment, married someone related within the fourth degree to a member of the board, would put it within the power of such teacher to cause a forfeiture of the director's office when the director himself had done nothing to violate the constitution. Such is not within the letter or the spirit of the constitution. It is no violation of the constitution for the director to appoint or name a person who is not related within the fourth degree. If, after a bona fide and legal appointment of a teacher, she afterwards becomes related to a member of the board through the ordinary vicissitudes of life, such act upon her part should not and will not work a forfeiture of the director's office.

It is therefore the opinion of this Department that the test under the constitution is whether or not at the time of the naming or appointing the teacher is related within the fourth degree to a director who votes for her appointment. If such teacher was not related within the fourth degree at the time of her naming or appointment, then the fact that she may afterwards become related to a member of the board will not cause the forfeiture of that director's office.

Very truly yours,

Frank W. Haynes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

ELECTIONS: City of St. Louis
"Qualified electors"under Weeks Bill defined.
Who eligible to vote.

July 22, 1933. 7-22

FILED
95

Hon. James A. Waechter, Chairman,
Board of Election Commissioners
for the City of St. Louis,
208 South Twelfth Boulevard,
St. Louis, Missouri

Dear Mr. Waechter:

This is to acknowledge your letter of July 18th, 1933, which is as follows:

"Under Section 14 of House Bill 514 (the Weeks Bill) it is provided:

'No person shall be eligible to membership in any convention held under authority of this act, who is not a qualified elector of this State **'.

The question has arisen here as to what constitutes a 'qualified elector'. Does this mean that only such persons who are duly registered voters, in accordance with the election laws of the State and the City of St. Louis, shall be eligible to membership in any convention?

This Board would also like to have your opinion as to whether or not a person must be a registered voter in accordance with the laws of the State of Missouri and this City before he or she is permitted to vote in the coming special election.

Kindly let us have your answer to these questions as promptly as possible and thereby greatly oblige,"

Section 14, Laws of Missouri, 1933, page 237, provides in part as follows:

> "No person shall be eligible to membership in any convention held under authority of this act, who is not a qualified elector of this State, etc. "

Section 4, Laws of Missouri, 1933, page 235, provides in part as follows:

> "* * * Said mass conventions shall meet at places in such precinct or voting districts as shall be designated by the county court or board of election commissioners of such counties or cities, and elect 4 delegates, qualified electors of such precinct or voting district, etc."

As you well know, meetings are held in precincts and then in Senatorial districts and the membership of the delegates chosen in these meetings must be made up of qualified electors.

Words & Phrases, Vol. 6, third series, page 469, reads as follows:

> "A 'qualified elector' is a citizen of the state, male or female, 21 years of age or more, possessing qualifications required by Constitution, duly registered, and not under disability; while a 'qualified voter' is a person who is not only a qualified registered elector, but who has met the additional requirement, imposed by Constition and statute law, of payment of all taxes assessed against him and collectible during the previous year. Watson v. Spartanburg County Board of Education, 139 S. E. 775, 776, 141 S. C. 347."

It is our opinion that the words "qualified elector" mean such persons that are duly registered voters and possessing other qualifications required by the statutes and the Constitution.

Section 2, Laws of Missouri, 1933, page 234, provides in part the following:

> "In all other respects, such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, inso far as such laws will apply and etc."

Section 10582, R. S. 1929, which is found in Article XVII, Chapter 61, which article and chapter pertains to registration and conducting elections in cities of this State now having, or which may hereafter have, 100,000 inhabitants or over, provides in part the following:

> "Every citizen of the United States and * * *, who is over the age of twenty-one years, who has resided in the state one year next preceding the election at which he offers to vote, and during the last sixty days of the time shall have resided in the city where such election is held, * * *, shall be entitled to vote at such election, for all officers, state or municipal, made elective by the people, or at other elections held in pursuance of the laws of the state, but shall not vote elsewhere than in the precinct where his name is registered, and whereof he is registered as a resident."

We are not going to go into the matter of the judges of election, their powers and duties, other than to remind you that the judges of election are in complete power and control over matters coming up during an election and it is up to them to determine whether one is entitled to vote. However, so that no fraud may be perpetrated, and in order to be on the safe side, we are of the opinion that a person in order to vote should be a registered voter and vote where registered. If only those persons who are registered are permitted to vote, then, only registered voters will decide the issue and no question may ever be raised that persons not entitled to vote

had a hand or a part in something that it was the duty of the voters to decide. In other words, the result will reflect the will of the registered voters.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

ELECTION: Weeks Bill.

August 3, 1933. 8-4

FILED
95

Hon. James A. Waechter
Chairman
Board of Election Commissioners
208 South Twelfth Boulevard
St. Louis, Missouri

Dear Sir:

This is to acknowledge your letter of July 31st, 1933, which reads as follows:

> "Your Mr. HornBostel, under date of July 22, 1933, in answer to an inquiry from this Board, advised it as follows: (last paragraph, page 3)
>
> '**However, so that no fraud may be perpetrated, and in order to be on the safe side, we are of the opinion that a person, in order to vote, should be a registered voter and vote where registered. If only those persons who are registered are permitted to vote, then, only registered voters will decide the issue and no question may ever be raised that persons not entitled to vote had a hand or a part in something that it was the duty of the voters to decide. In other words, the result will reflect the will of the registered voters.'
>
> In your letter, dated July 26, to the Kansas City Election Board, the opinion seems to conflict as regards who may be eligible to vote, with the opinion given this Board as quoted above.
>
> What this Board desires to know now is just which of your opinions it is to follow.

For your information, we might say that the practice here, since 1916, has been to permit registered voters to be transferred from one precinct to another, or from one ward to another, at any time prior to ten days before the date of any special election. This course we propose to continue to follow, inasmuch as it is based on the opinion of Judge Cave of the Circuit Court in the case of State ex rel Thomas F. Keane vs. Board of Election Commissioners, and we feel that if we deny any voter the privilege of transferring, we would be compelled to permit such voter to do so upon his taking proper action in the Circuit Court.

Inasmuch as this Board has a limited time within which to prepare and print instructions for the Judges and Clerks, for their guidance on election day, we would appreciate an answer to this letter by return mail."

You state in your letter of July 31st, that there is an apparent conflict in the opinion rendered by this Department on July 22nd, to you, and one rendered to the Chairman of the Board of Election Commissioners of Kansas City, July 26th, and you desire to know which to follow.

We can readily understand that you might come to the conclusion there is a conflict in the two opinions but a close comparison of them will actually reveal none. In the paragraph to which you refer it would appear that only registered voters are entitled to vote and we apparently made no specific provision for the voters who are unregistered, who might be permitted by the Constitution to vote, or having changed their place of residence would not be entitled to vote, because of not being registered. With the exception of this portion we think that our opinion to you is identical in its findings with the one rendered to Kansas City. At this time we shall supplement our opinion to you and enlarge and clarify it to the end there will be no doubt on the subject.

The first question that presents itself is, just what will the people vote upon or for and is this a "special election" or an "election"? The Weeks Bill terms it as "special election" and uses such words ("special election") several times in the act. But the people in the state will not vote to repeal the Eighteenth Amendment. They will only vote for delegates who favor or oppose the Amendment which repeals the Eighteenth Amendment. After the delegates have been elected they will convene in Convention and vote the way they are pledged and their vote will carry out the wishes of the majority

of the people who nominated (or elected) them; the way a delegate will cast his vote will be known to the people in advance.

The "special election", so termed, is only a method to amend the Federal Constitution. In the case of Hawke v. Smith, 253 U. S. 221, Mr. Justice Day in delivering the opinion of the Court said the following:

> "This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people. Etc. "

In the present instance Congress has stated the method of ratification; that method being by convention and not by legislative ratification. This is the first time Congress has provided for amending the Constitution by convention; we quote from the case, supra:

> "All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted."

The Ohio Supreme Court in State ex rel. Thomas J. Donnelly v. Goerge S. Meyers, cited July 12th, 1933, and being yet unprinted, No. 24269, said the following:

> "In our opinion action in calling of such a convention is but a step necessary and incidental to the final action of the convention in registering the voice of the state upon the amendment proposed by the Congress. The action of the legislature in performing this function rests upon the authority of Article V of the Constitution of the United States. It is a Federal function, which in the absence of action by the Congress, the state legislature is authorized to perform. (Leser v. Garnett,

> 258 U. S. 137; Smiley v. Holme, 265 U. S. 335). The mode of assembling the convention set up in Amended Senate Bill No. 204 provides for a vote by all the electors of the state upon the selection of all the delegates. The views of the candidates for election as delegates to the convention will be known in advance, so that the final action of the convention should be truly representative of the will of the people upon the one special question involved. The intent of Article V of the Constitution of the United States will therefore be effectuated by this action of the state legislature."

Thus, when considered in the light that this is not an "election" but is simply a step necessary and incidental to the final action of the convention composed of delegates, then the procedure for electing delegates is the only problem that confronts us.

The Weeks Bill provides,

> "In all other respects, such special election in every precinct in this state shall be conducted under the provisions of the election laws of this state insofar as such laws will apply, etc."

It is necessary that this provision be kept in mind. The act (Weeks Bill) does not provide or say what the qualifications of a voter shall be and in order to determine same we must look to the statutes and Constitution to ascertain their qualifications.

Section 10582, R. S. 1929, (quoted from in opinion to you) provides who shall be entitled to vote. Under our general election laws for cities a citizen, having all the necessary qualifications, will not be permitted to vote in an election unless he registers. The duty of registration (in St. Louis City) is placed upon the eligible voters and is a prerequisite to vote. However, by being registered does not mean a voter is eligible to vote, his right may be challenged, and if the judges find he is disqualified such voter would be precluded therefrom even though his name appears on the registration books. You are familiar with the qualifications of a voter and we will not again state them. If one does not possess the necessary qualifications he would not be entitled to vote, neither would he be permitted to register. Thus, the voter's qualifications and registration are independent and separate of each other but both must be present in order for him to vote in an

election in a city. In many counties registration is not necessary in order for one to vote. In the City of St. Louis it is. Thus in some instances registration is prerequisite in order for one to vote, and in other instances not. The statutes clearly state that in St. Louis the vote of no one shall be received by said judges whose name does not appear on said register as a qualified voter (Section 10612). However, in the present instance the election shall be conducted under the provisions of the election laws of this State insofar as such laws will apply. We do not believe the Legislature intended to (or could) disenfranchise voters in the coming election (if they possess the necessary qualifications) solely because they are not registered. The primary purpose of registration in a city is two-fold: first, to determine a voter's qualifications, and, second, place him in a ward where he may cast his vote.

If a voter is on the registration books in a ward and he still resides therein, such person should be permitted to vote in that ward and not be permitted to vote in some other ward in which he does not reside. You readily understand that this is not in a strict sense an election, yet the election laws govern so far as practicable; it of necessity means the relaxing of part of the laws to meet the conditions and exigencies without abrogating them entirely. We are speaking of procedure and our opinions deal with same in that they are not to be applied literally and strictly in the casting of one's vote, it being our opinion that all persons eligible to vote have the right to express their choice for the delegates. If a person is on the registration books and he goes to his precinct and asks for a ballot, he should be given one, unless challenged, and if a person desires to vote and is not on the registration books the judges have the right of inquiry as to whether he possesses the qualifications of a voter, to-wit, age, residence and citizenship, and if a voter has such he should be entitled to vote. You now see that the election laws apply insofar as practicable. If one's name appears on the registration books the presumption is that he is eligible to vote. However, it does not follow that all persons eligible to vote in this election are on the registration books. If the judges be satisfied that a person whose name does not appear on the registration books is entitled and qualified to vote, they should not bar him from so voting.

We quote from our previous opinion:

> "The judges of election are in complete power and control over matters coming up during an election and it is up to them to determine whether one is entitled to vote."

As to your statement that registered voters will be permitted to be transferred upon the registration books from one ward to another, which you propose to continue, is your prerogative.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:EG

IN RE: Remitting Merchants Tax by collector - Duty of

FILED
96

March 16, 1933.

Hon.Ray E. Watson,
Prosecuting Attorney,
Jasper County,
Webb City, Missouri.

Dear Sir:

You ask me the following questions:

"Is the County Collector required to remit payment in full for all merchants' tax charged against him on his books as of November 1st, 1932, irrespective of whether such tax has been paid, or is he required to remit only for those taxes which have been paid to him?

When do Merchants' Tax become delinquent, and does it draw interest at the rate of 1% per month the same as other delinquent taxes?"

The provisions of the statutes, Secs. 10075 to 10102, inclusive, R.S. Mo. 1929 have been on the statute books in substantially the same form for many years. These statutes constitute the Missouri code of laws for taxation of merchants, together with applicable sections in general revenue laws.

Section 10076 prohibits dealing as a merchant without a license and attaches heavy penalty for violation of sections' provisions.

Section 10084 directs the County Clerk to issue as many blank licenses for merchants as the County Court shall order and provides the form therefor.

Section 10085 provides the County Clerk shall deliver to the County Collector all the licenses so issued and charge him therewith in a book kept for that purpose.

Section 10078 is as follows:

"BOND TO BE GIVEN--Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to

> the state, with good and sufficient surety, conditioned that he will, on or before the first day of November next following, pay to the collector of the proper county the tax due upon such license; which bond shall be approved by the collector, and his approval indorsed thereon."

It will be observed bond must have the approval of the Collector and same must be endorsed on the bond. The Collector cannot be compelled to endorse his approval unless the bond legally furnishes complete indemnity against default of merchant in payment of the tax. This places the matter of protection of the Collector in his own hands. The statute provides the form of the bond.

The tax is ad valorem and levied on highest value of stock in possession whether owned or consigned between first Mondays in March and June of each year.

Section 10079 makes it an offense for Collector to fail to require merchant to file a bond.

Section 10081 makes it duty of merchant to file on June 1 statement showing greatest amount of goods on hand between first Mondays in March and June, and the statement must be verified.

Section 10087 provides every person filing a correct statement and failing to pay the tax shall be deemed to have forfeited the bond given and judgment shall be rendered for plaintiff in damages for double the amount of revenue and costs.

Section 10088 provides every person failing to file a statement shall forfeit his bond and is mulcted three times the amount of revenue due and costs.

Section 10089 imposes penalty of four times amount of revenue for the year and costs for filing a false statement.

Section 10090 makes it duty of Collector on bond forfeiture for any of the causes named to employ an attorney and institute suit upon the bond, and provides reasonable counsel fees shall be taxed as costs to pay Collector's attorneys. These provisions are rigorous, direct and enforcement thereof left wholly in hands of the Collector and it should here be borne in mind these suits are not for the taxes, but for damages for breach of the bond.

State ex rel v. Land Co., 161 Mo., 664

Section 10093 provides as follows:

> "Each Collector at each regular term of the County Court shall return on oath: first, all blank licenses not granted by him; second, a list of all licenses granted by him and not before accounted for, showing the name of to whom granted, the amount of tax collected,on each and the commencement and termination

> of each license granted by him; third statements of the bonds taken by him as required by this chapter, and the penalty, date and obligors in each bond."

These reports are evidently required with a view to keeping a close watch on the administration of the Merchants Tax Law to protect the state, city, school, and county, and to protect Collector's bondsman and the bondsman of the merchant and the intent of the law evidently is as rapidly as these merchants' taxes are collected, same shall reach the proper official treasury.

Section 10094 reads:

> "The county court at each regular term thereof shall settle and adjust the accounts of the Collector for licenses delivered to him, giving him credit for all blank licenses returned, and charging him for all licenses not returned, according to the statement required to be filed by the person having license and the statement of the bonds required to be returned."

We see here the statement filed each term of County Court by the Collector is checked against the statements required to be filed by the person having the license and the statement of the bonds required to be returned.

Section 10095 provides:

> "If the Collector shall fail to return a number of such statements of the bonds corresponding with the number of the licenses not returned the court shall for each license not returned above the number of such statements returned charge him, in such settlement, a sum of not less than two hundred dollars nor more than five hundred dollars. "

You will observe the statute says these quarterly reports to and adjustments with the County Court are settlements. So the Collector is making practically a quarterly settlement on these merchants' licenses as to number outstanding and as to number of bonds given and number of licenses he has issued and number returned.

Section 10096 provides that at each term of court the County Court shall cause the County Clerk to certify to the amount so charged against the Collector as account of licenses not returned.

The operation of this system is in practical effect that the state through its local governmental agencies, the County Clerk and the County Court, delivers these licenses to the Collector, a bonded agent of the state and county, and tells him, "You are going to be held responsible for the amount due on every license you issue and to protect you we empower you to require a bond which you yourself alone shall approve and be the sole judge of the sufficiency thereof before you issue a license to any one, as a merchant, which bond shall

bind the signers thereof to pay you the full amount of Merchants Tax due under the license so issued by you; and in case default is made, we empower you to select your own attorney and sue on this bond at once, and you are also authorized to recover from two to four times the amount of the penalty for any failure to comply with the condition of the bond, and also to have judgment for your counsel fees and have same taxed as costs. " These duties and obligations are imposed on any one who seeks, secures and takes the oath of office and qualifies as County Collector.

Section 9927 R.S.of Mo. 1929 provides:

> "Every county collector and ex officio county collector, except in the City of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

Section 9928 provides if collectors fail to pay collections into state and county treasuries, they shall be penalized 10% of amount withheld by them, and within thirty days prosecuting attorney shall proceed to collect on official bond of defaulting collector the taxes so unpaid into state and county treasuries.

Section 9929 provides a penalty of two hundred dollars for each withholding of taxes collected by collectors to be recovered by suit on collector's bond and State Auditor shall direct prosecution thereof immediately in addition to issuing a distress warrant.

Section 9932 provides upon payment by Collector after settlement according to law the County Court shall grant him a full quietus under the seal of the court. It is true where a statute creates new rights and remedies the statutory remedy is ordinarily exclusive.

> City of Clintonto use of Thornton vs.
> Henry Co., 115 Mo., 557

While many new rights and remedies are created by the Merchants Tax Code, yet there are many provisions of the General Revenue law applicable to administration and enforcement of rights and remedies in instances not provided for in Article XVII, Chapter 69, R.S. of Mo. 1929.

If there are any Missouri decisions bearing directly on the question of whether or not Collector is required to remit in full

for all merchants licenses with which he is charged under Section 10094-10095 and 10096, R.S. of Mo. 1929. I have been unable to find same. Neither have I been able to find decisions on this exact question in courts outside of our state.

But considering all the various provisions of the Merchants License Tax Code in Article XVII, Chapter 59, and considering other provisions of our general revenue laws all as one related code on taxation, I am of opinion that the Collector must remit in full all licenses not returned and charged to him under Article XVII, Chapter 59, and for each license not returned above the number of such statements returned as shown by the records of the County Court, County Clerk and State Auditor on November 1 of each year of his incumbency in the office of County Collector, and this includes November 1, 1932.

From my interpretation of the statute, there are no delinquent merchant ad valorem taxes.

I call your attention to the fact that long continued interpretation of a statute by public officers charged with its execution should be considered in construing a statute.

State ex rel Barrett vs. First Nat'l. Bank, 297 Mo., 397

The state executive officials administering this merchants tax law have given the statute same construction I do. In my construction of the statute there are no delinquent taxes and hence no one per cent per month penalty.

Yours very truly,

EDWARD C. CROW

APPROVED:

ATTORNEY GENERAL

ECC:AH

SCHOOLS - City, Town and consolidated school districts must advertise and secure depositaries for their funds under Section 9362 and take bond to secure same as provided for under Section 12187.

May 18, 1933.

FILED
96
22

Hon. Ray E. Watson
Prosecuting Attorney
Jasper County
Webb City, Missouri

Dear Mr. Watson:

Your letter of May 3, 1933, received, in which you asked,

"The question which I desire to ask is this:

Does the law authorize the Board of Education of a city or town school district to award moneys of such district to a bank that is the successful bidder for depositary and deposit such moneys in such bank without first requiring such bank to give security to the school district in accordance with Section 12187, and if the provisions of said Section 12187 are not binding upon such Board of Education, then what security, if any, is such Board required to take from the bank that is to become such depositary?"

In reply to your question will state that Section 9362 R. S. 1929, says,

"The board of education of city, town and consolidated school in this state shall select depositories for the funds of such school district IN THE SAME MANNER as is provided by law for the selection of COUNTY DEPOSITORIES; *"

Now turning to Section 12184, R. S. 1929, it is provided that,

"* * * proposals from banking corporations, associations or individual bankers in such county as may be desired to be selected as the depositaries of the funds of said county * * * * * * * * (may) divide said funds into not less than two nor more than ten equal parts,

and the bids herein provided for may be for one or more of such parts. * * * * * * * *"

Then the law provides for advertising for these bids to secure bidders who will give the largest amount for the use of the funds or for their being deposited with the bank.

Section 12186, R. S. 1929, provides for the manner of opening the bids etc.

Section 12187, R. S. 1929, provides that,

"Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond * * * * * * * * *, with not less than five solvent sureties, who shall own unencumbered real estate in this state as of as great value as the amount of said bond, OR with a surety or trust company authorized by the laws of this state to execute bonds as surety: * * * * * * * * *"

Then follows the manner of preparing and executing the bonds. Henry Co. v. Salmon 201 Mo 136 L.C. 165-

With the statutes in mind (extracts of which are above quoted), it is our opinion that the city or town school district may award the deposits of such district to a bank that is the successful bidder for depositary, but that the money of such school district must not be deposited in such depositary bank without FIRST requiring such bank to give security to the school district in accordance with the provisions of Section 12187, R. S. 1929, and the board must comply with the provisions of the law above referred to before making such deposits. As the law is plain and unequivocal that bond is required, it must be taken before the deposits are made with the depositary.

Very respectfully,

Geo. B. Strother

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

GBS:EG

State lien for taxes attached to Insurance only when liability on the company: Tax lien taxes to Insurance money payable as damages to the particular tract against which the taxes are assessed.

June 12, 1933

FILED
96

Mr. Gordon Weir,
Prosecuting Attorney
Greenfield, Mo.

Dear Mr. Weir:

We received your letter of June 8, 1933 requesting an opinion on the following state of facts:

> "Where a person owns two separate tracts of land and both are insured in the same company but under the separte policies and there is a loss by fire on one of the places, does the new law mean to say that the taxes are paid on both tracts of land or only on the place where the loss occurred."

Section 9746 R.S. Mo. 1929, provides that the owner of property on June 1st, of each year shall be liable for the taxes thereof. The state is given a lien for the taxes on each tract of realestate. Section 9747 R.S. Mo. 1929. Each tract of land must be separately assessed, Section 9772 R.S. Mo. 1929, and each tract of land under Section 9793 R.S. Mo. 1929 is chargeable with its own taxes.

The recent law passed by the Legislaute is found in Mo. St. Ann. Section 9963b. This law extends the state lien to certain insurance moeny. It is the opioion of this office that before a lien provided for in Section 9963b. Mo. St. Ann. attaches that the following conditions precedent must exist: (1) The improvement of buildings destroyed or damaged must have been on said land at the time of the assessment and levy of the taxes, which are unpaid; (2) The loss of damage to said building or improvement must be by fire, windstorm or tornado; (3) The destroyed or damaged property was insured and that there is some liability under the contract of insurance for all or any part of said loss or damage.

When the above three conditions exists, then the statute provides that the insurance company shall,

> "Pay to the county collector from said

 State lien for taxes attached to Insurance money only when liability on the company: Tax lien taxes to insurance money payable as damages to the particular tract against which the taxes are assessed.

> insurance money, and limited to the extent thereof, all taxes, interest and const then due, levied and assessed against the identical land or lot upon which were situated the building and * * are improvements destroyed".

The term "identical", means land or a lot which is assessed separately, and which is chargeable with its own taxes, on which taxes constitute a lien against that particular piece of property a specifically provided in the above statutes. It is therefore, the opinion of this office that the tax lien under the above statute attaches only to that particular and separate tract upon which the damage or destroyed buildings are located and not to other separate individual tracts of land which may be owned by the same party.

It is now well settled that policies of insurance issued subsequent to the passage of a statute, are issued subject to its terms and the statute becomes a part of the insurance contract and in some instances controls provisions of the policy. State ex rel Business Men Assurance Company v. Allen 259 S.W. 77. Ampleman v. Citizens Insurance Company 35 Mo.A.Field 308. Wilson v. Illinois Insurance Company 300 S. S. 550.

Even though the above statutes become a part of the Insurance contract, it does not place upon the insurance company any new or additional burden, in the sense that the standard mortgage clause does. The requirement that the insurance company shall pay the taxes, "from said insurance money" means the money which the insurance company under the contract is obligated to pay to the owner or other persons interested in the damaged or destroyed property. In this sense the liability of the insurance company is a condition precedent to the right of the state to have the tax lien attached to said insurance money.

Yours very truly,

APPROVED:

FRANKLIN E. REAGAN
Assistant Attorney General.

ROY MCKITTRICK
Attorney General.

FER;lm

PROSECUTING ATTORNEY: Cannot recover a refund of salary overpaid to him since January 1, 1931.

11-13

November 4, 1933.

FILED
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57

Honorable Gordon Weir,
Prosecuting Attorney,
Dade County,
Greenfield, Missouri.

Dear Sir:

In your letter of October 5 addressed to General McKittrick you make the following inquiry and request an opinion regarding the same:

> "I have been advised that at the meeting of the county clerks, a few days ago, they were informed that in the matter of their salaries, they shouldn't go back of 1932, and as our county clerk understood this, it applied to all county officers. If this is the case, would it not also apply to the office of Prosecuting Attorney?
>
> At the time when this was in question, and as soon as the opinion of Judge White was delivered, I paid back $900.00 of the 1931 salary and am the only one to pay back anything except for the county school superintendent, who made a settlement with the county court on a 50% basis. In equity and good conscience, if they don't recover from the others should I not have my $900.00 on the year 1931?"

In 1933 the Legislature passed laws fixing the salaries of circuit clerks and county clerks. Under Sec. 11811, p. 370, Laws of Mo. 1933, the following provision appears at the close of the section:

> "Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law, provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."

We are enclosing an opinion rendered by this office on January 26, 1933 to Hon. Lewis B. Hoff, Prosecuting Attorney of Cedar County, wherein the question of the salary of county clerk is determined by Sec. 11811, R.S. Mo. 1929.

A portion of the amended section, quoted supra, permits the salary to remain unchanged until the present term of office of the county clerk expires, and Sec. 11811 has never been declared unconstitutional. The method of arriving at the population since 1930 differs from the method used in the case of a prosecuting attorney.

I.

Prosecuting Attorney cannot recover a refund of salary overpaid by him since January 1, 1931.

The salary of a prosecuting attorney is governed by Sec. 11314, R.S. Mo. 1929. This section was amended by the Legislature in 1933 (Session Acts, 1933, p. 178). However, it contains the following proviso:

> "Provided, that until the expiration of the present term of office, the persons holding the office of prosecuting attorney shall receive the same compensation now provided by law.***"

In view of this provision, we must rely upon the interpretation of the original section, 11314, R.S. Mo. 1929.

A leading case upon an interpretation of this section is the case of State ex rel. O'Connor v. Riedel, et al, 329 Mo. 616; l.c. 629, Judge Ragland, in passing upon the constitutionality of the law in fixing the salaries of prosecuting attorneys, said:

> "'The closing sentence of the section provides for but two things in express terms: the multiplying of the whole number of votes cast at the last preceding presidential election by five as a method of ascertaining population, and the termination of the use of that method upon the occurrence of a designated event. The event has occurred, the method just mentioned can no longer be employed. How are the populations of the counties to be now ascertained? There is no express language requiring a resort to the 'next' or any other decennial census of the United States. But the implication is clear that after the occurrence of the event which puts an end to further use of the presidential-vote method the populations shall be ascertained

> from the official census of the United States. But which census? One which is obsolete for all except historical or statistical purposes? Manifestly the one at the time in current use for every other practical purpose--the last one. That which is implied in a statute is as much a part of it as what is expressed. (2 Sutherland on Stat. Const. (2 Ed.) sec. 500, and cases cited). The contention of the amici curiae cannot be sustained.
>
> In accordance with the foregoing we hold that said Section 11314, in its entirety is valid in all the respects as to which its constitutionality is challenged. Under its plain terms the prosecuting attorney of Marion County is entitled to a salary of $2,500 and no more.'"

It appears that after the above decision you made the refund of $900.00, the same being excess salary that you had drawn from January 1, 1931 until the rendering of the decision in February, 1932. You now desire that this amount be returned to you for the reason that the other county officers have not made any refund of their salaries.

In the case of O'Connor v. Riedel, supra, Judge Ragland, on p. 625 thereof, does not place the county clerks and circuit clerks in the same position as the prosecuting attorneys. The prosecuting attorneys receive their salaries according to actual census of the county, while the county clerks receive their salaries based on a population by multiplying the last presidential vote by 3½. The pertinent part of the opinion is as follows:

> "'The primary purpose of the section undoubtedly is to secure uniformity in the operation of laws fixing the compensation of county officers: the classifying of the counties by population is incidental--collateral. It is merely a method by which the required uniformity may be realized. If some other method (of classification or otherwise) will produce that result, the essential objection of the section will be just as surely attained. The form of the language employed clearly indicates that the classifying of counties by population was intended as a permissible but not as an exclusive method of securing the prescribed uniformity: 'and for this purpose may (not shall) classify the counties by population'. But it is argued that, if the clause does nothing more
>
> Mandatory or Permissive

> than confer the power to classify the counties by population, it serves no purpose whatever, because the Legislature has always possessed, and now possesses, that power independently of the purported grant. It should be considered, however, that there has been in some of its aspects a very great development of constitutional law since the adoption of our present Constitution in 1875. Since that time tomes have been written on the subject of classification of persons and things for the purpose of legislation, in determining whether innumerable statutes and ordinances fell within the condemnation of the 14th Amendment of the Constitution of the United States or the due-process clauses and the provisions relating to the enactment of local or special laws of our own and other state constitutions. While there have been classifications for legislative purposes since the earliest times, the principles determining their validity under American constitutions are of comparatively recent development. Had they been as familiar in 1875 as they now are, it is probable that the last clause of said Section 12 would have been omitted. But be that as it may, if the words used be given their usual and ordinary meaning, the clause permits, but does not command, the classification of counties by population for the purpose of bringing about uniformity of operation. That was the construction put upon it by this Court en Banc in Greene County v. Lydy, 263 Mo. 77, 172 S.W. 376, and in State ex rel. v. Grinstead, 314 Mo. 55, 282 S.W. 705. We still think that construction sound.'"

Having established in the above quotations from Judge Ragland's opinion that since January 1, 1931, same being the last decennial census, the prosecuting attorneys have received their salaries according to the actual decennial census, and you, having paid back to the county the overpayment in your salary, can you now demand that the same be refunded to you? A leading case on the question is the case of State v. Dearing, 274 S.W. 477, wherein the Court said:

> "A mistake of law will not excuse a public officer from paying out public funds when he is dealing with other public officers. When a public official wrongfully receives funds, although paid to him under an honest mistake of law, he must restore such funds, and this has been the rule in Missouri especially since the case of Lamar Township v. City of Lamar, 261 Mo. 171."

The decision in the Lamar Case, 261 Mo., l.c. 186, relating to this question, is as follows:

> "The serious question and the one as to which appellant most earnestly and strenuously contends, is whether the rule that money paid without protest or duress, under a mistake of law, cannot be recovered, applies as between officers of municipal corporations dealing with the money and the property of the public. That individuals may not recover money so paid, absent fraud, protest or duress, is too well settled for argument. (Needles v. Burk, 81 Mo. 569; Savings Institution v. Enslin, 46 Mo. 200; Campbell v. Clark, 44 Mo. App. 249). Likewise, in other jurisdictions this rule so far as it applies to individuals, sui juris, dealing with their own property, is well nigh without exception. (30 Cyc. 1313, and cases cited). The reason for the rule as between individuals (which while sometimes provocative of great miscarriages of justice, and while largely predicated upon expediency) is yet bottomed upon some considerations which are logical and well settled. Among these (but when wrong is being done, clearly not chief among these) is the maxim ignorantia legis neminen excusat. Likewise the rule touches nearly upon the doctrines of accord and satisfaction, and of estoppel; as also upon the rule forbidding the unsettling of things settled and thereby disturbing repose by clamorous litigation. Other maxims, e.g. volenti non fit injuria, have likewise been invoked; but confessedly even among individuals, unless the peculiar facts of the case also warrants the application of the rule ex aequo et bona, there is little logic and less of honesty in putting it upon such an excuse. The best that may be said of the rule even as applied to individuals, is that it is a handy rule to apply in those rare cases where the application of it prevents gross injustice. (See, arguendo, Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264)
>
> Certainly in a case like this of dealings between public officers with the public's money, no excuse for invoking this rule can be found in logic, nor in our opinion can such excuse be found in the decided cases. The rule in such case is thus stated in 30 Cyc. 1315: 'Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, especially when

made to another officer, may be recovered back.'"

CONCLUSION

Under the law, the county could have maintained an action against you for the recovery of the amount you were overpaid. Therefore, in view of the foregoing decisions and the distinction, as to salaries of the respective officers, it is the opinion of this department that you cannot recover the excess salary which was paid you and which you returned to the county; and the fact that other county officers failed to return any excess salaries which might have been paid them, would have no bearing or probative force involving the return of such payment to you as Prosecuting Attorney.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

CLERKS OF COURTS OF RECORD: (1) Power of Circuit Clerk to appoint deputy;
(2) Sec. 11812, Laws of 1933, p. 371 governs appointment of deputy since July 24, 1933.

October 17, 1933.

10-23

FILED

52

Honorable Stanley Wells,
County Clerk - Johnson Co.,
Warrensburg, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 5, 1933 in which was contained a request for an opinion as follows:

> "I am under this cover mailing you a certified copy of a Circuit Court Record, and asking you to give me your opinion in this matter as to the validity of this order.
>
> This order commences with the expiration of a prior order made for a six months period, and if you will note it was made prior to the Laws passed by the fifty-seventh General Assembly, which go into effect July 24th, 1933."

The appointment and order was evidently made under Sec. 11812, R.S. Mo. 1929, which is as follows:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the circuit court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The circuit court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, and shall designate the period of time such deputy or assistant may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may, at any time, discharge any deputy or assistant, and may regulate the time

> of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

The Legislature in 1933 repealed the above section and passed a new section in lieu thereof, same being Sec. 11812, Laws of Missouri, 1933, p. 371, which is as follows:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

But there remains another section which deals with the appointment of Circuit Clerks. This section is found under "Clerks of Courts of Record", being Sec. 11680, R.S. Mo. 1929, and provides as follows:

> "Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

I.

Does Sec. 11812, Laws of Mo. 1933 take precedence over Sec. 11680, R.S. Mo. 1929?

When the court approved the appointment, and the attached order was made, the same was, in our opinion, legal. The statute was in full force and effect until superseded by the new statute on the 24th day of July, 1933. In an early case of Kean v. Cushing, 15 Mo. App. 96, it was said by the Court:

> "Until the date on which an Act takes effect, the Act has no force or validity for any purpose, not even of imparting notice of its existence."

But the question arises as to which statute is now in effect, Sec. 11680 or the new section 11812, both quoted supra, and which one should be followed in the appointment of a deputy circuit clerk. As stated before, Sec. 11680, supra, covers all classes of clerks - the new section, 11812, supra, applies only to circuit clerks. Can it then be said that the new section is in conflict with the old section?

In the case of State ex inf. Barrett, Att'y. Gen., v. Imhoff, 238 S.W. 122, l.c. 125, the Court, in passing on a special statute in its relation to a general statute, said:

> "That the two statutes are in conflict it is evident. We have said, not once, but a number of times, that where there are two acts, and the provisions of one have special application to a particular subject and the other is general in its terms, and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter. This, of course, on the assumption that the general act is in other respects valid, and would, but for the exception, suffice to prescribe thereafter the county court's course of procedure."

And again, this rule is followed in the case of Hurlburt v. Bush, 284 Mo. 397, l.c. 405, wherein the Court said:

> '"Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act

> must be taken as constituting an exception to the latter or general act, and not a repeal of the former, and especially is this true when such general and special acts are contemporaneous.***** The provisions of the general statute are not in conflict with those of the special one. As persuasive evidence that the enactment of the latter was not intended to amend or repeal the former, there is an absence from the general statute of the usual provision that 'all acts and parts of acts in conflict herewith are hereby repealed.'"

Therefore, under these decisions the new statute which deals with only the procedure in the appointment of the deputy circuit clerk does not in any wise repeal the old section, i.e., 11680, supra, but is one out of a general class, and it is the opinion of this department that the new section, 11812, Laws of Mo. 1933, p. 371, should be the guide in the future as to the appointment of deputy circuit clerks.

II.

Is the County Court bound by the order made on July 23, 1933?

Having held in the prior question that the new section controls the appointment of deputy circuit clerks, we are confronted with the question as to whether or not the order made on July 23, 1933 and attached hereto, wherein an appointment of deputy circuit clerk was made for a period of seven months from said date, would be effective for that length of time irrespective of the new statute. Under the new statute the circuit clerk has the power to appoint the deputy, and may at any time discharge him and may regulate the time of his employment, but the County Court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation. So, in the last analysis, the controlling power is within the County Court.

Referring to the length of time a deputy clerk may be appointed, the Supreme Court has decided the matter in the case of Horstman v. Adamson, 101 Mo. App. 119, l.c. 124, as follows:

> "The question thus presented is whether a contract is valid, and for breach of which the law will afford redress in damages, entered into between a clerk of a county court and a deputy appointed by him by the terms of which the latter was to continue as deputy at a stipulated salary for the whole period that the county clerk should remain in office under his commission,

> especially when the breach of such contract by the removal of the deputy prior to the expiration of the full term was without cause and impelled by willful and malicious motives. Any such contract was in the judgment of the writer, illegal, void and incapable of enforcement as opposed to public policy for several reasons. The appointment of plaintiff as such deputy by defendant as county clerk of Lawrence County was made under the provisions of the law, by which every clerk is authorized to appoint one or more deputies who are required to be at least seventeen years of age, and possess all other qualifications of their principals; the appointments are required to be approved by the court of which the clerk is an official, and the deputies when so appointed and qualified by taking the same oath as the clerk, are authorized in his name to perform his duties, and the clerk is made accountable on his official bond for the action of his deputies. R.S. 1899, sec. 527. The statute and the appointment of plaintiff in conformity to it, alike fail to define the period for which the deputyship shall continue. The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own."

Likewise, in the case of State ex inf. Barrett, Attorney General, v. Hedrick, 294 Mo. 21, l.c. 64, the Court said:

> "'If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or the assignment of reasons. (Throop on Public Officers, sec. 354; Mechem's Public Officers, sec. 445)

> The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his own'; i.e., he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this State. In State ex rel. Campbell v. Police Commissioners, 14 Mo. App. l.c. 302, it was said: 'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.' This decision was fully approved by this court on appeal.'"

Under the above decisions, it is the opinion of this department that the County Court of your county has the power, and has had the power, since the 24th day of July, 1933 to approve or disapprove the appointment of a deputy circuit clerk, and to fix the compensation and period of employment thereof, irrespective of any prior orders referring to the same subject.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

PROSECUTING ATTORNEYS)
) Special prosecuting attorneys may be appointed by court.
BONDS OR RECOGNIZANCES)
FORFEITURE)

11-23

November 21, 1933

FILED
7

Hon. Warren L. White,
Judge Division Two,
Circuit Court,
Springfield, Missouri.

Dear Judge White:

This is to acknowledge your letter of November 14th, 1933, requesting an opinion on the following facts:

> "Ed Alexander was convicted of murder in this court in 1932, sentenced to ten years in the penitentiary, appealed, and gave bond. After the lapse of one year his appeal was dismissed in the Supreme Court on your motion, for his failure to perfect and prosecute his appeal with dilligence.
>
> Alexander has never been apprehended, but is a fugitive from justice, and so far as I know, nothing has been done toward collecting the bond. The present prosecuting attorney of this County, Nat Benton, was an attorney for the defendant, and has asked to be relieved of any duty he may have in reference to the forfeiture proceedings.
>
> I would like to ask your opinion on these questions?
>
> Whose duty is it to prosecute the forfeiture? The prosecuting attorney's or the attorney general's?
>
> What steps should first be taken and in what court?

If the duty devolves upon the prosecuting attorney, can I appoint a special prosecutor under the circumstances above detailed, and if so, can he receive any compensation and how?"

I.

FORFEITURE - WHERE TAKEN.

Section 3747, R. S. Mo. 1929, provides:

"CONDITION OF RECOGNIZANCE.--The recognizance shall, in case of felonies not excepted in the last preceding section, be conditioned that the defendant shall appear in the supreme court at the next term thereof, to receive judgment on the appeal or writ of error, and in the court in which the trial or indictment shall have been had, if the supreme court shall so order, and at such time and place as such court shall direct, and that he will render himself in execution, and obey every order and judgment which shall be made in the premises."

Section 3749, R. S. 1929, provides:

"WHEN SUPREME COURT SHALL ORDER SENTENCE EXECUTED.--In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the supreme court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the supreme court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary."

Section 3759, R. S. 1929, provides:

"FORFEITURE, WHERE CERTIFIED.--If the forfeiture of the recognizance is taken in the supreme court, the same shall be certified back to the court in which the judgment was rendered; and the supreme court, in such case, and in case the defendant breaks jail, shall proceed to determine the cause, and issue a capias if necessary."

See also Section 3763, R. S. 1929.

We assume that the recognizance complies with the requirements of the statute. As stated in your letter the party convicted never perfected his appeal, same being dismissed by the Supreme Court on motion of the Attorney-General. Thus, the Supreme Court did not affirm or reverse the judgment of the Circuit Court. Consequently, it was not its (Supreme Court's) duty to direct the sentence pronounced to be executed. The forfeiture then in this case should be taken in the Circuit Court of Greene County.

Section 3584 R. S. 1929, provides:

> "RECOGNIZANCE, WHEN AND HOW FORFEITED.--If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

See Section 3585 R. S. 1929.

> "The writ of scire facias is not an original writ by which litigation can be initiated; it only marks a stage in litigation already commenced. It is founded on the record of the court that issues it, and must rely on the record of that court for its support."--
>
> State v. Kelly, 2 S. W. (2d) 750, l. c. 752.

Thus, the matter is in the nature of a civil action and not criminal.

Section 11316 R. S. 1929, provides in part the following:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in

> their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county."

It is our opinion that the forfeiture should be taken in the circuit court of Greene County, Missouri; and that a scire facias issue; and it is the duty of the prosecuting attorney to prosecute such unless he be ineligible.

II.

INELIGIBILITY OF PROSECUTING ATTORNEY.

Section 11322 R. S. 1929, reads as follows:

> "INTERESTED IN CASE, COURT TO APPOINT.--If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

The disqualification of the prosecuting attorney goes to him personally and does not attach to any of his assistants. Note wording of the above statute, "If the prosecuting attorney and the assistant prosecuting attorney etc." Under this section the court has power to appoint a special prosecuting attorney. We quote from State v. Jones, 306 Mo. 437, l. c. 445:

> "On account of his personal interest in the matter he was disqualified to act as prosecuting attorney or to prefer a charge based on the alleged criminal conduct of the defendant. (Sec. 11322) The trial court had inherent power, independent of the statute, to appoint a special prosecuting attorney for the State when the prosecu-

ting attorney, for any reason, was disqualified."

For limitations on inherent power of court, see State ex rel. Jones v. Wierdeman, Judge, 274 S. W. 407.

It is our opinion that the court has the power to appoint a special prosecuting attorney if Mr. Benton or his assistants are ineligible to act in this matter.

III.

COMPENSATION OF SPECIAL PROSECUTING ATTORNEY.

Section 11324 R. S. 1929, provides:

"POWER OF APPOINTEE.--The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

The above statute originated at a time when the prosecuting attorney received as compensation certain "fees" for his services. Since that time legislation has placed the prosecuting attorney upon a salary basis. Now, it is the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month pay over to the county treasurer all moneys collected by him as fees. Section 11315 R. S. 1929.

Section 11783 R. S. 1929, provides in part:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: for collections or recognizances given to the state in criminal cases and which are or may become forfeited, ten per cent. on all sums collected, if not more than five hundred dollars, and five per cent. on all sums over five hundred dollars, to be paid out of the amount collected."

Section 11317 R. S. 1929, provides:

> "PENALTY.--Any prosecuting attorney of any county who shall fail or neglect to comply with any provision of section 11315 shall forfeit his salary for that quarter of the year and shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined in the sum of not less than fifty dollars ($50.00), nor more than five hundred dollars ($500.00), for each offense, and if he shall continue in default for three months, his office shall be deemed vacant and shall be filled as provided by law for filling vacancies therein."

Thus the prosecuting attorneys must charge "upon behalf of the county every fee that accrues in his office and to receive the same", but are not allowed to retain them.

In State ex rel. v. Patterson et al, 152 Mo. App. 264, l. c. 267, 268, the court said:

> "The thing that embarasses relator in maintaining his demand is that he performed his services in a county where the prosecuting attorney receives no other compensation than a fixed salary of five thousand dollars per annum and is compelled by law to account for and pay to the county treasurer all the fees collected by his office.
>
> The statutes grade the compensation of prosecuting attorneys according to the population of the respective counties. In nearly all counties, a salary ranging from three hundred to one thousand dollars per annum is paid, and in addition thereto, the attorney is allowed to 'receive for his services in the circuit court such fees as are allowed by law.' * * * Had relator rendered his services in one of such counties he would have been entitled to receive all the fees his services brought to the office but there is no warrant in the provisions of section 1014, for saying that he would have been entitled in such case to receive any part of the prosecuting attoryes's fixed salary."

The facts in the above case were that a grand jury was summoned to investigate violations of particular laws in Jackson County and the prosecuting attorney refused to recognize it, whereupon the Circuit Court appointed a special prosecuting attorney. The Prosecuting Attorney of Jackson County was paid a salary and all fees collected by him were turned over to the county treasurer. The special prosecuting attorney, being denied compensation upon completion of his duties, instituted an action to compel payment under the provisions of Section 1014 R. S. Mo. 1909, which provided:

> "The person thus appointed shall possess the same power and receive the same fees as a proper officer would if he were present."

The case was defended on the theory that the Prosecuting Attorney of Jackson County did not receive any fees and since therewas no provision in the statute for the special prosecuting attorney, he was not entitled to any compensation. The court sustained this defense.

We, therefore, hold that the prosecuting attorney receives no fees as compensation for his services, and it is clear that a special prosecuting attorney can receive none, since it is a positive mandate of the statute that all fees must be paid into the public treasury and in the absence of express statutory warrant, they cannot be diverted to any other use or purpose. In this connection, however, it may be urged that the term "fees" includes the term "salary". We quote from State v. Riedel, 46 S. W. (2d) 131, l. c. 133:

> "The word 'fees,' if used in its narrow distinctive sense, signifies the compensation for particular acts or services rendered by county officers in the line of their duties, to be paid by the individuals obtaining the benefit of the acts, or receiving the services, or at whose instance they were performed. But a glance at the statutes in force at the time (Wagner's Statutes 1872), will show that in the main only state officers then received salaries within the strict meaning of that term. Practically all county officers (with whom alone the constitutional provision was dealing) were compensated by fees, but, when a limit was placed on the amount of fees an officer might retain, that maximum

> was regarded as his salary, and therefore, in a generic sense, the word 'fees' implied compensation or salary since it was the source of these."

In this connection it must be borne in mind that constitutional terms are to be liberally construed, gathering the intent of the framers thereof from the four corners of the instrument, while statutory terms with reference to compensation are to be strictly construed as was found in the Patterson case, supra, l. c. 268:

> "The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be strictly construed."

Observe the language of the court in King v. Riverland Levee District (Mo. App.), 279 S. W. 195, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office (Cases cited.) Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

Therefore, the court has the right to appoint a special prosecuting attorney and when such is appointed he becomes an officer of the court, and no provision in the statute existing for compensation he would be deemed to have performed same gratuitously. It is analogous to the same case when the court appoints

an attorney to represent a defendant. The attorney thus appointed receives no compensation.

IV.

ATTORNEY-GENERAL.

The procedure for obtaining the assistance of this office is found in Section 11273, R. S. 1929:

> "When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney."

V.

In conclusion we inquire why the matter may not be handled by an assistant prosecuting attorney, or as the money goes into the county school fund (Article 11, Sec. 8, Constitution of Missouri) why the county court could not employ counsel, who then could be appointed special prosecuting attorney, in order to protect that fund? However, we are not called upon for an opinion as to these questions and we express none.

Respectfully submitted,

James L. HornBostel
Assistant Attorney-General.

Approved:

ROY McKITTRICK
Attorney-General.

JLH:RG

MOTOR VEHICLES: Who required to register as reig registered operators.

March 9, 1933

FILED
98

Miss Agnes Mae Wilson
Prosecuting Attorney
Trenton, Missouri

Dear Miss Wilson:

We acknowledge receipt of your letter dated March 4, 1933, in which you state in part and inquire as follows:

> "I am writing you for some assistance in another matter. I should like to have your opinion as to what is meant by the word 'regularly', as employed in the definition of Registered Operator in Sec. 7759 R. S. Mo. 1929, as follows: "Registered Operator." "An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operation of such motor vehicle".
>
> "Should a farm laborer who operates a motor truck of another person, his employer, as a part of his employment, but as a small part of his employment, be required to obtain a Registered Operator's license? In this instance, the laborer operates a truck for hauling purposes about the farm and to and from market. The truck is operated at irregular intervals, part of the time every week or two; at other times remaining in the garage for as long as a month."

You have correctly set out in the letter above quoted, the definition of a "Registered Operator", as found in Section 7759 Revised Statutes Missouri 1929.

We think the words "in the course of" and "as an incident to" are used interchangeably and to be treated as substantially synonymus phrases.

We find the word "Indidental" or the phrase "as an incident to" as applied to services rendered in connection with certain employment and as the same is used in Section 7759 to be defined in the case of The Robin Goodfellow, 20 Fed. (2nd) 924,925, as follows:

> "Incidental", obviously, means depending upon or appertaining to something else as primary. "Burrill's Law Dictionary defines 'incident' as 'belonging or appertaining to; following; depending upon another thing as more worthy.* * * A thing may be necessarily or inseparably incident to another, or usually so'. Webster defines it thus: 'Something necessarily appertaining to or depending on another, which is termed the principal'. Thomas v. Harmon, 46 Hun. (N. Y.) 75,77". 4 Words and Phrases, First Series, p. 3494.
>
> Lord Dunevin, in Trustee of Harbor of Dundee v. Nicol, (1915) H. L. A. C. 550, said: "Incidental, in my view, means incident to the main purpose of the main business".

Section 7766 Revised Statutes 1929, makes provision for the registration of registered operators requiring that the person desiring to be so registered should file in the office of the Commissioner of Motor Vehicles of the state a statement containing his name, age and address and the trade name and motive power of the motor vehicle he is competent to operate and which statement should be endorsed by two citizens of this state who are registered motor vehicle owners and who shall certify to the correctness of the facts stated in such application and the good character of the applicant. Whereupon, upon the payment of the fee of $3.00 the applicant shall be granted a certificate of registration and assigned a number as a registered operator.

Subdivision F of Section 7783, Revised Statutes 1929, requires every person operating or driving a motor vehicle on the highways of this state, knowing that an injury has been caused to a person or damage to property, due to the culpability of said operator or driver or due to accident, shall not leave the place of said injury, damage or accident without stopping, giving his name, residence, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or other persons specified.

Section 7783, Subdivision A, requires registered operators to at all times carry subject to inspection the registration certificate furnished by the Commissioner.

We have no way of knowing what was in the minds of the legislators with reference to what persons the defined words "registered operator" was intended to apply, except as we may ascertain that intention from what the legislature said by way of definition. We are unable to find any construction or interpretation of the term "registered operator" by any court or in any text book.

We assume that the legislators had in mind that in addition to the protection afforded by "licensing chauffeurs" who could only be licensed when they possessed the requisite qualifications that it further intended to throw about the traveling public some additional protection by requiring other persons not the owner of cars and while operating a car on the public highways of the state, but only as an incident to the main business of the employer, to likewise register, not only for identification purposes but so that only those persons who possessed the qualifications described in Section 7766 and who could obtain the endorsements therein required would operate motor vehicles on the public highway.

The word regularly, as used in Section 7759 with reference to registered operators, means in accordance with some consistent or periodical rule or practice.

Green v. Benedict, 128 A. 20, 21; 102 Conn. 1.

We therefore are of the opinion that, on your statement, the person referred to in your letter, is engaged in regularly operating the motor vehicle of his employer and that such operation is in the course of and as an incident to his employment, as those terms are above defined and is required to register as an operator of motor vehicles under said Section 7766.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

_____
Attorney General.

GL:LC

CONFEDERATE HOME: ✓

ELEEMOSYNARY INSTITUTIONS: ✓

Receipts of sale of products from farm operated by home not to be transmitted to state treasurer.

July 7, 1933

FILED
98

Judge Roy D. Williams
Moonville, Missouri

Dear Judge Williams:

This Department acknowledges receipt of your letter of June 17, 1933, as follows:

"The Confederate Home Board has asked that I write you for an official opinion upon the following state of facts:

From year to year the Confederate Home has earned certain amounts upon its farm. There is now an accumulation of several thousand dollars in this fund. An Act was passed at the last Legislature which seems to require that this fund be turned over to the State Treasurer.

We are not sure, however, whether this fund should be turned over now to the Treasurer, or whether what remains of the fund should be given over at the end of the first biennial.

Our appropriation is so meager that we are very desirous of having this fund with which to run the farm and turn in what is left of the fund in December, 1934.

If you will write me or the Superintendent of the Home, Mr. Stone, the Board would greatly appreciate it."

Section 13932 Revised Statutes of Missouri 1929, provides:

> "All money received by the treasurer, or by any financial officer of said institution from whatever source, except such as may arise from the sale or exchange of the products of the home by order of the executive committee, shall be immediately transmitted by such financial officer to the state treasury, and the state treasurer, on receipt of such moneys, shall receipt the same into the confederate home fund which is hereby created and established".

From the operation of the above section with reference to the transmission of moneys received by the treasurer of the home is specifically exempted such money as may arise from the sale or exchange of the products of the home. In the word home we think is included the farm operated by the board of trustees in connection with and for the uses of the home.

Section 11478 Revised Statutes Missouri 1929 makes provision for the state auditor inspecting, visiting, examining and auditing the accounts of the various state institutions of Missouri, including the Confederate Soldiers' Home. Section 13929 requires the board of trustees of the home to furnish the general assembly each two years a detailed report of its work accompanied by a statement under oath of the treasurer of the board as to the financial transactions in connection with the home for the two preceding years, giving a detailed statement of all moneys and property received on account of such home and an itemized account of the disbursements of such money and property. So that, by each of the above sections an audit and check is provided and public information given thereof as to all the moneys received and disbursed by the home.

Senate Bill Number 124 to which your letter doubtless refers, is as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the

state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly

to the Governor and biennially to the General Assembly".

Section 13932 provides for the transmission to the State Treasurer of certain moneys received by the treasurer of the board, just as Senate Bill No. 124 provides for such transmission of certain moneys. But Section 13932 exempts the receipts from the sale or exchange of the products of the farm operated by the board of trustees of the home and there is nothing in Senate Bill No. 124 that suggests an intention to repeal Section 13932. Furthermore, the impracticability of transmitting the receipts from the sale or exchange of the products of the farm to the State Treasurer and the consequent necessity of a subsequent appropriation for the needs of the home and the operation of the farm, repels the thought that by the enactment of Senate Bill No. 124, there was any intention to repeal Section 13932.

Other reasons might be suggested why Senate Bill No. 124 does not affect the sale or exchange of the products of the farm under consideration but in view of the conclusion we have reached, that is not necessary.

We are of the opinion that the moneys received by the treasurer of the Confederate Soldiers' Home from the sale or exchange of the products of the farm operated by the managers or trustees of the home, are not required to be transmitted to the State Treasurer.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

NEPOTISM:

Where Board votes unanimously in favor of teacher, director who is first cousin of teacher violates Section 13 of Article XIV of the Constitution of Missouri.

October 12, 1933.

10-14

FILED 98

Mr. B. C. Wilde,
Argyle, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "At the last school meeting I was elected school director for three years. Later we organized and employed the following teachers, Josepha Schrader, Ida Brunnert and Alice Hartman.
>
> Since the last Supreme Court opinion it was brought out that Miss Ida Brunnert, who has been teaching in this district for the last twelve years, is a first cousin to my wife.
>
> At the employment of teachers there was no deciding vote cast, nor was there any agreement or collusion before the meeting, in fact there was no votes cast, only all directors agreed to hire Miss Brunnert for another year. Relationship was to my knowledge not even thought of.
>
> According to my understanding of the opinion I think I am entirely within the law as we all acted in good faith and relationship was not considered, all three directors being satisfied, as Miss Brunnert has given good service for twelve years or more.
>
> Kindly let me know by return mail, whether you think that I am right in holding the directorship as I think I am. Many thanks."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

You state that at the last meeting of your Board of three members that it was agreed among the directors to hire Miss Brunnert for another year, and that Miss Brunnert is a first cousin to your wife.

In 2 C. J. 378, it is said, in discussing affinity:

> "The connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same reciprocal connection with the relations of the husband."

The degree of relationship under Section 13 of Article XIV we believe is to be determined by the application of the civil rule. In 12 C. J. 511, the civil rule is announced as follows:

> "By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

Under the application of the civil rule, your wife is related to her first cousin by consanguinity within the fourth degree, as prohibited by the Constitution. Such being true, by application of the rule announced above as to "affinity," you are related by affinity to your wife's first cousin in the same degree as she is related to her by consanguinity, and such relationship would be within the fourth degree, as prohibited by the Constitution.

You state that there was no deciding vote cast and that the directors unanimously agreed to elect Miss Brunnert. When the three members of the Board, by their unanimous action, elected this teacher, each of them exercised his right to "name or appoint" in favor of that teacher. The Supreme Court in the case of State ex rel. v. Whittle (not yet reported), in which they ousted a director for voting in favor of a related teacher, said:

> "Respondent also argues that the amendment is only directed against officials who have all the right (power) to appoint. We do not think so. The question must be determined upon the construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) the right to name or appoint a person to office. Of course, a Board acts through its official members, or a majority thereof. If, at the time of the selection, a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative

within the prohibited degree, he violates the amendment."

The Supreme Court says that if the director who has the right, either by casting a deciding vote or otherwise, to name or appoint a person to office and exercises that right in favor of a relative, he violates the amendment. When the three members, who make up the entire Board, vote or consent to the election of a teacher, each member of the Board has exercised the right he had to "name or appoint" in favor of the relative. We believe that the Supreme Court meant that whenever a director votes in favor of a relative within the prohibited degree and such relative is elected to office, he violates the constitutional provision.

We believe that there is a great misunderstanding among the directors as to what is meant by a deciding vote or otherwise. Take for example, a Board consists of three members and two are necessary to elect. Assume that director No. 1 is related to the teacher and that directors Nos. 2 and 3 are not. Assume that director No. 2 votes first for the teacher and director No. 3 votes against her. Then, if director No. 1 votes for the related teacher such director certainly has cast a deciding vote for her election and has violated the constitution. However, assume that the order of voting was such that director No. 1 voted first and voted in favor of his relative; that director No. 2 voted against the relative and that director No. 3, who voted last, voted with director No. 1, thereby electing the teacher to office. In both instances director No. 1 exercised all the right he had to name or appoint in favor of the relative. If it be said that in the first instance director No. 1 violated the Constitution because he voted last and in the second example did not violate the Constitution because he voted first, then whether or not the Constitution was violated would depend upon the order in which the directors voted. We do not believe that the constitutional provision is to be nullified by the directors adopting any particular method of or order voting, or by juggling their votes. We believe the Constitution means, as interpreted by the Supreme Court, that whenever any director exercises his right to name or appoint a teacher in favor of a relative within the prohibited degree, he has violated the constitutional amendment.

According to the facts stated in your letter, the Board unanimously, without a dissenting vote, selected the related teacher. It is not necessary to a violation of this amendment that a formal vote, either orally or written, be taken. When the Board unanimously consented to her selection, the Board unanimously voted in her favor. Every member of the Board, under such circumstances, must legally be deemed to have cast his vote in favor of the teacher and to have exercised his right to "name or appoint" in favor of the teacher so selected. The question of good faith does not enter into this proposition. The test is not whether the director voted for the relative with any particular intention; the test is whether or not he exercised his right to "name or appoint"

in favor of the teacher. When a director does exercise his right to "name or appoint," or votes in favor of a related teacher and such teacher is elected, then we believe that he has violated Section 13 of Article XIV.

It may be, in the inforcement of this provision of the Constitution, that teachers who heretofore have rendered service loyally and efficiently may be prohibited from continuing to teach in schools where their relatives are on the Board. Its inforcement may also result in the removal or retirement from the Board of members who have rendered long and efficient service. It is out duty, however, to construe this amendment as interpreted by the Court and according to the spirit and intention of the people when they adopted it. The intention of the people was that directors of Boards should not exercise their right to vote in favor of a relative. When a director does so exercise his right to vote in favor of the related teacher and she is elected thereby, regardless of the good faith of either party the director has violated the constitutional provision.

It is therefore the opinion of this department that when you, as a member of this School Board, consented and voted in favor of this related teacher, you violated Section 13 of Article XIV of the Constitution and thereby made yourself liable to forfeiture of your office.

Very truly yours,

Frank W. Haynes

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

ROADS & BRIDGES: Special tax on distributable property of utility companies apportioned to districts wherein property located.

12-11

November 25, 1933.

FILED 62

Hon. Andy W. Wilcox
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Wilcox:

This is to acknowledge your letter which reads as follows:

> "What is the legal method of computing and apportioning or distributing the special road and bridge tax on the distributable property of utility companies to special road districts and common road districts?"

In approaching this subject we feel somewhat as the court did in Carthage Special Road District of Jasper County v. Ross, 270 Mo. 76, l. c. 80, to-wit:

> "Our road laws remind us of the famous comment of Peter on the epistles of his Beloved Brother Paul: 'In which are some things hard to be understood.' We have been compelled to approach them frequently during the last few years, and do so with the feeling that we are taking up a bundle of plugs, whittled to suit well enough the local uses that suggested them, but far too small for the apertures into which we are called upon to fit them. In the attempt to do so it will be of service to consider the broad foundation upon which they rest. The entire highway system is a unit. The legislative problem is to provide money to construct, improve and maintain

> these facilities in such a way as to distribute the burden approximately in proportion to the benefit received by each locality, as well as by each taxpayer. It is evident that this problem is not well solved by a system of little units like our road districts, for it is frequently the case that the most expensive roads must lie over the roughest, most unproductive and least valuable lands."

I.

Section 7868, R. S. Mo. 1929, provides:

> "The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

The above statute makes it mandatory that the county court divide the county into road districts. Thus, the county is divided into road districts, which for convenience we designate "common road districts."

Section 8024, R. S. Mo. 1929, provides:

> "Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district: Provided, however, the provisions of this section shall not apply to counties under township organization, and shall not apply to all counties in this state now containing or which may hereafter contain 50,000 inhabitants or more and lying adjoining any city of this state containing 300,000 inhabitants or more."

It is thus seen that a county likewise may have "special road districts" as well as "common road districts."

II.

The rate of tax levy in "common road districts" and "special road districts" is found in Sections 7890 and 7891 respectively.

Section 7890, R. S. Mo. 1929, provides:

> "The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

We quote Section 7891 R. S. Mo. 1929, and divide same to emphasize it:

> "In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county:"

This part of said section is unambiguous and entails no difficulty in ascertaining what the Legislature meant. Note underscored words.

And further,

> "Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be:"

It will be noted that this portion of said statute provides, (1) that the tax collected in all road districts (general or special) shall be paid into the county treasury, and (2) "placed to the credit of the special road district, or other road district, from which it arose." The question to be determined is what is meant by "other road district" or does "common road districts" fall within the meaning of the words "other road districts"? Note underscored words.

And further,

> "Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village: etc."

III.

COMMON ROAD DISTRICTS.

Above we have shown that the tax levies for road purposes consist of (1) for general county road purposes (7890) and (2) for special road and bridge tax (7891).

Section 7867 R. S. Mo. 1929, provides:

> "All taxes derived from the levy authorized by section 7890, R. S. 1929, are hereby appropriated to the use of the county court in each county where levied, to be used at the discretion of said court for the construction and maintenance of roads and bridges located within the confines of the county highway system here provided for as well as all other roads and bridges in such county."

Thus, as far as the "common road districts" are concerned, moneys derived by section 7890 may be expended within the confines of the county highway system. This is not true of the special tax authorized by section 7891. We call your attention to this priviso therein found:

> "Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be:"

IV.

SPECIAL ROAD DISTRICTS.

Taxes levied in a "special road district," whether under Sections 7890 or 7891, are entitled to be spent within its boundaries. Observe part of Section 8042, R. S. Mo. 1929:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by

> virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, * * * * * * shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, * * * * *; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, etc."

Thus "special road districts" are entitled to all moneys collected on taxes for road purposes (Secs. 7890 and 7891) in that district. Such was the holding of the Supreme Court in State ex rel. Special Road District v. Barry County, 302 Mo., l. c. 291:

> "The three sections (10682, 10683 and 10818) as they now stand do not indicate any change of the legislative purpose with respect to the distribution of road and bridge taxes collected upon property within special road districts.
>
> Section 10683 (7891 R. S. Mo. 1929) provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within any road district shall when paid into the county treasury be placed to the credit of the district from which it arose.
>
> Section 10782 (7890 R. S. Mo. 1929) which directs the levy of a road and bridge tax in connection with the general levy for county purposes makes no provision for its distribution.
> But
>
> Section 10818 (8042 R. S. Mo. 1929), <u>voicing the legislative purpose with respect to special road districts,</u> provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of any . . . . . law,' upon property within a

> special road district, shall be set aside to the credit of such special road district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable. * * * * * *."

V.

We have hereinbefore concluded that taxes collected in a "special road district" for road and bridge purposes, both special and general, are to be expended in that district. And we have likewise concluded that taxes collected by virtue of Section 7890 in "common road districts" arenot confined to be expended in the district whence derived.

Your inquiry concerns the special discretionary tax (Sec. 7891) levied on distributable property of public utilities in both "common" and "special road districts." Utility companies' distributable property is assessed the same as railroad property by the Tax Commission. After its assessment it is apportioned according to the provisions of Section 10022 R. S. Mo. 1929. Observe this section:

> "Said board shall apportion the aggregate value of all property hereinbefore specified belonging to or under the control of each railroad company, to each county, municipal township, city or incorporated town in which such road is located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town shall bear to the whole length of such road in this state: Provided, that in any case where a company whose line of road is liable to taxation shall have been or may become consolidated into another corporation, entitled by its charter or otherwise to exemption from county or other taxation, that portion of the road which is liable to taxation, as aforesaid, shall be assessed separately, and the value thereof apportioned to the counties, municipal townships, cities or incorporated towns in which it is located."

In conclusion it is our opinion that distributable property of public utilities located in a "special road district" (in counties not under township organization) should be apportioned to that district. As to "common road districts" (in counties not under township organization) distributable property should be apportioned insofar as the special road and bridge tax is concerned, to the district in which it is located. In other words, property of public utilities located in a road district (special or common), as concerns the special road and bridge tax (Sec. 7891) is apportioned to the district wherein located according to the rule prescribed in Section 10022. As per your oral request we have not included in this opinion the questions inquired about as pertaining to counties under township organization.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

ROADS AND BRIDGES:-Refund for bridges of Missouri River to be made under Section 8129, R. S. Mo. 1929. Refund received, if in cash, should be paid to county, city or road district which advanced funds in the first instance.

12-27

FILED
98
64

November 28, 1933.

Mayor R. L. Willeford,
Hardin, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "May I ask of you in behalf and for the Hardin Special Road District, and the City of Hardin, of Ray County, to or for what purpose, the refund on the Lafayette-Ray County bridge to be used. And the necessary procedure for our district to get their proportionate part of this fund. Our road district and city are in need of any fund that may belong to them, as I suppose are most municipalities.
>
> To date we have been unable to get a distribution from our County Court in our community, although some districts in our County have received their apportionment. Any information your office may give us will be grate-fully received by our community."

Section 8129, R. S. Mo. 1929, which provides for refunds where any bridge has been constructed or purchased, is as follows:

> "Whenever a county, city or other civil subdivision shall have constructed or purchased out of public funds any bridge across any navigable stream entirely within the state of Missouri, that forms a segment or part of the state road system or any easement thereon, then the state highway commission may, at such time or times as the road funds will justify without interfering with other state road construction or maintenance, construct and build such roads in such county, city or other civil subdivision as the county court of such county or in which such city or other civil subdivision is situate may direct; the cost of which roads shall be equal to the value to the state of such bridge at the time taken over, not exceeding in any case the amount expended by such county, city

> or other civil subdivision in the acquisition of such bridge; provided, however, that any county, city or other civil subdivision may elect to receive such reimbursement from the state highway commission in cash."

The above section provides for a refund to the county, city or other civil subdivision having constructed or purchased out of public funds any bridge across any navigable stream entirely within the state whenever the highway commission believes that such refund may be made without interfering with any road contract or maintenance. The section provides that the highway commission may construct and build roads in such county, city or other civil subdivision as the county court of the county in which the city or other subdivision is situated may direct. The proviso provides that any county, city or other civil subdivision may elect to receive such reimbursement from the highway commission in cash.

It is apparent from your letter that the county has elected to receive this refund in cash and that portions of the fund due to other districts and cities have been paid to them by the county. This money does not belong to the county, but belongs to the city or road district which contributed the funds in the first instance. The county has recognized this by making refunds to some districts in your county, but for some reason has failed to pay to the city of Hardin that portion due it. If the county refuses to make this distribution, then it will be necessary for the city and the district to bring suit against the county to recover the portion due them.

You next inquire what the funds arising from this refund may be used for. Section 20 of Article X of the Constitution of Missouri provides as follows:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or the repayment of such debt or liability, and not otherwise."

If the money which was used in the construction of the Lafayette-Ray County bridge arose from a bond issue, then under the foregoing constitutional provision, such money shall first be applied to the retirement of the bonds and not otherwise. If there is a surplus of funds remaining after the retirement of the bonds, or if the money did not arise in the first instance from the sale of bonds, then we believe that the funds should be returned to the treasury of the city or district and allotted to the funds from which they were originally withdrawn. Section 8127, dealing with refunds for roads, expressly exempts "bridges over the Mississippi, Missouri and the navigable portions of the Osage and Gasconade rivers." That Section, therefore, does not apply to the refund arising from the Lafayette-Ray

County bridge and the refund for this bridge is made under Section 8129 which does not provide how such funds shall be used after they have been paid back to the county, city or other civil subdivision. There being no restriction in said section as to how refunds shall be used, we are of the opinion that the money should be returned to the treasury of the city or district and should be credited to the fund from which it was drawn and may be used for the same purposes which the funds in the first instance might have been used for.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

APPROVED:

_____

Attorney General.

FWH:S

TAXATION: Grain stored in elevator subject to taxation.

12-20

December 16, 1933.

FILED
98

Mr. Andy W. Wilcox, Chairman,
State Tax Commission,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "This Department is asking your opinion on the following:
>
> I. Is grain held in storage in an elevator in Missouri assessable as personal property to such elevator company as of June 1st?
>
> II. Is grain purchased and owned by an elevator company assessable to such company as personal property?
>
> III. Is grain stored in an elevator, title to which is in some resident of Missouri, assessable to such elevator company or to the owner?
>
> IV. Is grain temporarily held in an elevator but destined for reshipment out of the State assessable to the elevator company holding same on June 1st?
>
> V. Would an elevator company be classed as a merchant, and would its stock of grain owned and held under consignment or on storage be liable to assessment for merchants ad valorem tax?"

The constitutional provisions involved in your inquiry are as follows:

Section 6 of Article X of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to

the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 7 of Article X of the Constitution of Missouri provides as follows:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

In support of the above constitutional provisions the Legislature has enacted the following general statutes which are pertinent to your inquiry.

Section 9742, R. S. Mo. 1929, provides as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743, R. S. Mo. 1929, provides as follows:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, all lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this State; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

Section 9746, R. S. Mo. 1929, provides as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Under Section 6 of Article X of the Constitution the people of the State have determined what property shall be exempt from taxation. Under Section 7 above, they have provided that none other than enumerated in Section 6 shall be exempt. The Legislature in Section 9743 has declared the exemptions under the foregoing constitutional provisions. It does not appear that either the constitution or the laws of the state exempt from taxation grain held in storage by an elevator company, as distinguished from any personal property subject to taxation.

In Mullins v. Cemetery Association, 239 Mo. 681, 689, the Supreme Court says:

"It is settled law that statutes creating exemptions from taxes, whether general or special, are strictly construed, and the right of exemption exists only when expressed in explicit terms and must be established beyond a reasonable doubt."

In view of the foregoing, therefore, it is our opinion that grain stored in a elevator within the State of Missouri has not been exempted from taxation.

Section 9746, quoted above, provides that every person "owning" or "holding" property on the first day of June, including property purchased on that day, shall be liable for taxation.

In State ex rel. v. Haphe, 31 S. W. (2d) 788, 791, the Supreme Court says:

"Both the person "owning" and the person "holding" personal property are liable for taxes thereon, and such taxes may be assessed against either or both. But with respect to each they do not become a debt unless and until they are duly assessed against him in the manner prescribed by law."

We therefore answer your inquiries as follows:

I.

We are of the opinion that grain held in storage in an elevator in Missouri is assessable as personal property to such elevator as of June 1st.

II.

We are of the opinion that grain purchased and owned

by the elevator company is assessable to such company as assessable property.

III.

We are of the opinion that grain stored in an elevator, the title of which is in a resident of Missouri, is assessable to either the elevator company or to the owner. If the owner lives in the county wherein the grain is stored, then it should be assessed against the owner in such county. If the owner does not reside in the county wherein the grain is stored, then under Section 9745, R. S. Mo. 1929, the grain should be assessed to him in the county where the owner resides.

IV.

We are of the opinion that grain held by an elevator company on the first day of June is assessable even though it is contemplated that such grain later may be shipped out of the State.

V.

Section 10075, R. S. Mo. 1929, which declares who is a merchant, provides as follows:

> "Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

We do not believe that an elevator company conducts its business in such a way as would make it a merchant under the above section. However, whether or not it is a merchant is a mixed question of fact and law, and if they are engaged to a considerable extent in the business of selling, then they may be merchants within the above definition. We, however, conclude, with a showing to the contrary, that the ordinary elevator company is not engaged in the business of a merchant so as to make them subject to the merchant's ad valorem tax.

Very truly yours,

Frank W. Sayers

Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S

SCHOOL FUND:)
)
COUNTY OFFICERS:)

Money in county school fund or township fund withdrawn from treasury by warrant or order by board of directors or treasurer.

December 30, 1933. 1-5-34

FILED
65

Hon. Dockery Wilson
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This is to acknowledge your letter which reads as follows:

> "The Treasurer of Harrison County has asked me to get an opinion from you on the following proposition: The County Court has failed so far to issue warrants for payment of County and Township Interest on School Funds. The County Clerk furnished the Treasurer with the 1933 apportionment sheet and asked the Treasurer to make disbursements according to the apportionment sheet without warrants being issued for the same.
>
> Question No. 1- Has the Treasurer the right to make disbursement from the apportionment sheet without any warrants being issued?
>
> Question No. 2- If the County Court should make an order of record directing the Treasurer to make disbursements according to apportionment sheet, would that authorize the Treasurer to issue checks for disbursement?
>
> Please let me have an answer as soon as possible. The school districts are in need of this money."

Article 2, Chapter 57, R. S. Mo. 1929, is styled "Laws Applicable to all Classes of Schools", and Section 9243 of said article and chapter provides as follows:

> "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Section 9247 provides as follows:

> "The proceeds of the sixteenth section, or other lands selected in lieu thereof, the interest of such proceeds, the rents and profits of such lands, and all the public school moneys which shall be apportioned to any unorganized township, arising from dividends, proceeds and profits of the public school fund, shall constitute a township school fund."

You state: "The County Court has failed so far to issue warrants for payment of County and Township Interest on School Funds." We assume you mean by this statement, funds obtained by virtue of Sections 9243 and 9247, supra, and our opinion is written on this assumption.

Note these statutes relating to county school funds (Section 9243) and township funds (Section 9247).

Section 9245 provides as follows:

> "Whenever any county in this state may have, separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds--the proceeds of said funds to be collected annually and distributed as provided in section 9257."

Section 9248 provides as follows:

> "The county courts, respectively, shall have the care and management of the school funds of the several townships within their respective jurisdictions, and shall cause accounts thereof to be stated and kept so as to exhibit the funds of each township separately, and the disposition thereof."

The above statutes show the sources of these funds and management of same. Your attention is directed to the underscored portion of Section 9245, supra.

Section 9246 in part provides:

> "The county treasurer shall collect, or cause to be collected, all school moneys mentioned in section 9243, and all other moneys for school purposes in his county, etc."

It is thus seen by Section 9246 that the county treasurer collects all school moneys and Section 9245 provides, "any public school fund arising from any source whatsoever-----the proceeds of said funds to be collected annually and distributed as provided in section 9257."

Section 9257 provides for the "Apportionment of public school fund" and in part provides as follows:

> "The state superintendent of public schools shall, annually, before August 15th, apportion the public school fund applied for the benefit of the public schools among the different counties. This apportionment shall be made as follows: etc."

And further,

> "and in making such distribution, each county clerk shall apportion all moneys collected on tax duplicate of any district, for the use of schools to such district, all moneys received from the state treasurer, and all moneys on account of interest of the funds accruing from the sale of section sixteen or other lands in lieu thereof to the district schools in the congressional townships, and parts of congressional townships to which said land belonged, and all other moneys, for the use of schools in the county, and not otherwise apportioned by law, to the proper district: etc."

Section 9261 pertains to the "Duties of county clerk--assessment of estimates."

Section 9263 provides as follows:

> "The clerk of each and every county court shall, on or before the thirty-first day of July, annually, make out and transmit to the state superintendent of public schools, at Jefferson City, an abstract of all the returns of school districts, cities or towns in his county made to him according to the form that may be prescribed by the state superintendent; also, the amount of income of the school funds of said county, and amount realized from taxes collected therein."

Section 9264 provides in part as follows:

> "It shall be the duty of the county clerk to take a receipt from the county collector for the school taxes by him placed on the general tax books; and the collector shall proceed to collect the same in like manner as the state and county taxes are or may be collected, etc."

Section 9266 provides in part as follows:

> "The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, etc."

Above we have shown that the statutes provide that county school fund and township fund are under the management of the county court. The interest arising from these funds is apportioned to the school districts as provided for in Section 9257. All school moneys arising from any source (Section 9266) are in the custody of the county treasurer and such custody divested from him "until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district." We have thus seen that it is not necessary for the county court to make any order or draw any warrant for the school districts to receive this money. The only thing necessary is a warrant or order from the board of directors.

In answer to your question No. 1, it is our opinion that the treasurer has no right to make disbursement from the apportionment sheet without any warrants being issued. The warrants or order, however issued (Section 9266), come from the board of directors, treasurer or et cetera of the school or school district. Thus, our answer to your question No. 2 will be in the negative.

A word might at this time be appropriate as to the nature and object of this fund. A reading of Corpus Juris, Vol. 56,

page 179 et seq., under the title of "School Lands and School Funds" gives a fair epitome of this subject. Page 562 of the same volume of Corpus Juris, relating to the power and duty to issue warrants in general, has this to say:

> "The power and duty of ordering, drawing, signing, or paying school warrants or orders is usually vested by statute in certain specified boards or officers, under which statutes it is held to be the imperative duty of the proper officer to draw or sign warrants when properly requested or presented; and if he improperly refuses to do so a writ of mandamus will lie at the instance of one showing himself entitled to such warrant or order, to compel its issuance. Warrants drawn by de facto officers charged with that duty are valid. On the other hand, warrants drawn by the officers of a school district organized contrary to law so that it has no de facto existence are invalid. Where the power to draw such warrants or orders is vested in a particular board, it is a personal trust which cannot be delegated by such board to one of their number, but must be executed in person by each and all; and so, following the general rule that boards must act as a body and not as individuals in the making of contracts, a warrant issued by an officer pursuant to an agreement entered into by the members of the board as individuals is invalid."

Trusting the above answers your inquiry, we are

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General.

JLH:FG

POLICE OFFICER - Special motorcycle police in Carterville

September 15, 1933

9-20

FILED
99
44

Mr. A. W. Wolfenbarger,
Webb City, Missouri

Dear Sir:

This department acknowledges your letter as follows:

"I am writing you for an opinion relative to the legality of the office of Special Motorcycle Police Officer in the city of Carterville, Carterville, Missouri.

Here are the facts. The mayor appointed two members of the council, himself the chairman, as the special police committee. This committee forthwith employed one John Gabriel as Special Motor-cycle Policeman, subject to the approval of the council at the next regular meeting.

They didn't employ him on a fixed salary. They agreed to fixed fine of $5.75, the police judge receiving $2.50, the policeman receiving $2.50 and the city the remainder, 75¢.

At the first regular meeting, myself and one other man who conducts a small business here, in behalf of the business men of the town offered, what we thought some worthwhile objections to the appointment in this manner, of this man as a special police officer. One member moved to table the appointment and was seconded and the motion carried.

At the next regular meeting we presented a petition signed by all business men but three, requesting the council to remove this officer. The petition was read by the secretary. One of the members moved to table the petition for

further consideration. It carried. The next week, in secret session, called by the mayor, this man was appointed.

We have a business here that depends largely on tourist traffic. With this man confining his arrests largely to people from other states we are certain to loose a portion of this business.

This is a town of about 1200 people and we don't see the need of an officer of this type. If there is any way of getting him removed we would like to know just what course to pursue. I believe I am safe in saying that 90% of the people here are opposed to having this office. It is quite evident that he has been employed in order that he can pay some outstanding bills.

It is the opinion of most of the representative citizens of Carterville and Webb City that this job was created not as a safety measure but as legal graft. An early reply will be appreciated."

Section 6960, Revised Statutes of Missouri, 1933 provide as follows:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner."

Section 7016, Revised Statutes of Missouri, 1933, provide the style of ordinances, how passed and how revived.

In the case of Dearmont v. Mound City, 278 S. W. 802, the Kansas City Court of Appeals said:

"It is claimed that a motion or resolution was adopted on June 7, 1920, by the board of alder-

men of defendant city employing Mr. O'Fallon to assist the city in defending the injunction suit. No ordinance was passed employing Mr. O'Fallon and City clerk failed to record the resolution, if there was one adopted by the board of aldermen, so on February 4, 1921, the board passed a resolution ordering the City clerk to amend his minutes to show such employment, which was accordingly done. O'Fallon assisted in the defense of the injunction suit and the evidence shows his services were of the reasonable value of $1,000. No ordinance was passed employing Mr. O'Fallon or anyone else to assist the city in the matter of the injunct on suit and his employment could not have been effected through a resolution. 19 R. C. L. page 895, 28 Cyc. 379 and Sections 8415 and 8467 R. S. 1919." (Now 6960 and 7016).

And in the same case they further said:

There was more than a mere defective exercise of the power by the city, as the power to employ special counsel under the circumstances could only be exercised by the mayor and board of aldermen enacting an ordinance on the subject. Instead of there being a defective or irregular exercise of power there was no exercise of the power."

I have interpreted your letter to the effect that no ordinance appointing the Special Police officer was passed by the board of aldermen. If this is true then we rule that said Special Police officer is not in fact an officer of the city of Carterville.

Yours very truly,

S. W. Davies
Assistant Attorney General.

APPROVED

Attorney General.

TAXATION -SALES TAX)
) House Bill No. 5 Pending before the 57th
CONSTITUTION.) General Assembly is unconstitutional.
)

12-9

December 8, 1953

FILED
99
63

Senator Carroll Wisdom
Chairman Ways and Means Committee
and members thereof.

Dear Mr. Chairman and members of the Committee:

Receipt of your request for an opinion from this Department as to the constitutionality of House Bill No. 5, pending before the 57th General Assembly, in extra session, is acknowledged.

In complying with your request, we do not overlook the importance of the matter involved nor the responsibility that lies before us. Your question is to be answered, however, only by an application to the bill of the Federal and our State Constitutions.

Reaching our conclusions herein, we have kept in mind the well established rule of statutory construction that all doubts as to the constitutionality of a law shall be resolved in favor of its legality.

I.

HOUSE BILL NO. 5 IS AN EXCISE TAX IN THE NATURE OF AN OCCUPATION TAX.

(a). In determining the constitutionality of House Bill No. 5 the first premise to be considered is the character of tax sought to be imposed by the bill.

Section 2 of the bill provides:

"A tax is hereby imposed upon all persons engaged in the business of selling tangible personal property at retail in this state

> at the rate of 1% of the gross receipts from such sales as herein provided, after the taking effect of this act and prior to January 1, 1936; provided, however, that such tax is not imposed upon the privilege of engaging in any business in Interstate Commerce or otherwise, which business may not under the Constitution and Statutes of the United States of America be made the subject of taxation in this state. * * * "

By the above section the tax is attempted to be imposed upon all persons engaged in the business of selling tangible personal property at retail in this state at the rate of one per cent of the gross receipts from such sales, as is in the bill provided.

Section 23 provides in part:

> "If any person after the effective date of this act shall engage or continue in any business for which a privilege tax is imposed by this act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the Auditor, upon the payment of the sum of One Dollar ($1.00), a license to engage in and to conduct such business for the current tax year, upon the condition that he shall pay the emergency tax accruing to the State of Missouri under the provisions of this Act; and he shall thereby be duly licensed to engage in and conduct such business. * * * "

Section 2 having provided that the tax therein provided for is not to be imposed upon the privilege of engaging in business in Interstate Commerce indicates that the writer of the bill had in mind that the tax sought to be levied thereby is a privilege tax.

Section 4 of the bill refers to the tax provided for in the Act as a privilege tax. Likewise Section 23 of

the bill refers to the tax proposed to be imposed by the Act as a privilege tax. We understand the words "privilege tax" may be synonymous with occupation tax and both to be distinguished from a tax on property.

The case of Viquesney v. Kansas City 306 Mo. 488, involved the validity of an ordinance passed by the legislative authority of Kansas City which imposed a tax of one cent a gallon on gasoline sold by the dealer. With reference to the character of that tax the Supreme Court of this state, at page 495 of the opinion said:

> "The first question for determination is whether the tax of one cent a gallon on the gasoline sold by the dealer is a property tax or an excise or occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by a taxpayer, irrespective of the value of his assets, it is an excise tax. * * * * * *
>
> Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is occupation tax - one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. (In re Opinion of the Justices, 121 Atl. (Me.) 902; State v. Hart 217 Pac. (Wash.) 45; Altitude Oil Co. v. People, 202 Pac. (Colo.) 180.) In case of Bowman v. Continental Oil Co., 256 U. S. 642, it was held by the Federal Supreme Court that such a tax was consistent with the due-process and equal-protection clauses of the Fourteenth Amendment of the Federal Constitution."

On the same subject the Supreme Court of Illinois in Winter v. Barrett 352 Ill. page 441, having under consideration the question of the validity of a sales tax law, much like that embodied in House Bill No. 5, at page 457 said:

> "We hold that the tax is not a property tax and is not a tax on purchasers of property, but is a tax on persons engaged in the business of selling tangible personal property at retail - - an occupation tax."

But one conclusion can be reached, therefore, and that is that the tax sought to be imposed by House Bill No. 5 is an excise tax in the nature of an occupation tax, which, as our Supreme Court said in the Viquesney case is,

> "* * * * One form of excise tax* * * ."

HOUSE BILL NO. 5 BEING A REVENUE MEASURE MUST CONFORM TO SECTION 3 ARTICLE X OF THE CONSTITUTION OF MISSOURI.

(b). Section 3 of Article X of the Constitution of the State of Missouri provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

Logically, the next question for determination is whether or not the kind and character of tax attempted to be dealt with in House Bill No. 5 comes within the limitation and restriction of Section 3 of Article X of the Constitution above set out. That question has been determined by the Supreme Court of this state in Viquesney v. Kansas City, where the court at page 498 of the opinion said:

> "The present tax being a revenue measure it must conform to Section 3, Article X, of the Constitution, providing that the

> tax must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

The act being clearly a revenue measure, it is to be construed according to the provision of the constitution above set out.

II.

TAX IS IMPOSED ON THE RETAILER AND HE CANNOT BE DELEGATED TO COLLECT A PRIVILEGE TAX AS SUCH, FROM BUYERS.

(a). As heretofore stated, Section 2 of the Act imposes whatever tax is levied by the Act upon all persons engaged in the business of selling tangible personal property at retail. In Section 1 of the Act "sale at retail," is defined as any transfer of the ownership of or title to tangible personal property to the purchaser at retail for use or consumption, and not for resale as tangible personal property for a valuable consideration. "Selling price" and "gross receipts" are defined in said Section 1 to be:

> " 'Selling price' or the 'amount of a sale' means the consideration for a sale valued in money, whether received in money or otherwise, including cash, credits, services and property of every kind or nature and shall be determined, without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost, or any other expense whatsoever. 'Gross receipts' from the sales of tangible personal property at retail means the total selling price or the amount of such sales. In the case of charge and time sales the amount thereof shall be included only as and when payments are received by the seller."

Section 2 of the Bill, in part, provides:

> "The vendor shall keep a record of daily sales and a record of the amounts collected from purchasers as the tax, as herein provided, and shall pay over all such sums collected as tax at the time of making the

> return required by Section 3 hereof and the vendor shall be allowed to credit against the amount returned under Section 3 subdivision (j) all such amounts so collected and paid over to this state under the provisions of this Section."

Thus the retailer is required to keep a record of daily sales as well as a record of the amounts collected from purchasers as the tax (meaning the tax imposed by the first part of Section 2) and the retailer shall pay over all such sums collected as tax at the time of making the return required by Section 3 of the Bill, and the retailer is allowed credit on the tax due on the amount of gross receipts returned or reported under Subdivision (j) of Section 3 of the Bill, in the amount and to the extent of the sums collected by him as tax. The sums collected as tax mean the sums collected by the retailer from his customers at the time of the sale as the tax due on the amount of the sale.

The first paragraph of Section 3 and Subdivision (j) of such section read as follows:

> "On or before the fifteenth day of the month after this Act becomes effective and on or before the fifteenth day of each calendar month thereafter, until, but not including February, 1936, every person engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month shall make a return to the Auditor, stating ;
>
> (j) The total amount of taxes due the state from such retailer for the preceding calendar month."

Section 11a of the Act provides:

> "It shall be unlawful for any person, foreign or domestic, resident or non-resident, to circulate or have circulated in this state, or to assert in any advertisement, published or circulated

> in this state, that the tax or any part thereof imposed by this act will be assumed or absorbed or paid by such person, or that it will not be added to the selling price of the property sold, or if added, that it or any part thereof will be refunded, or that the tax may be avoided by making the sale or purchase in another state for the purpose of encouraging the purchasers in this state to evade the tax herein imposed. Any person violating any of the provisions of this section shall be guilty of a misdemeanor."

By Section 11a it is made unlawful for the retailer to circulate, publish or advertise that the tax imposed by Section 2, or any part thereof, will be assumed or absorbed by the retailer, and it is made unlawful for the retailer to circulate, publish or advertise that the tax so imposed will not be added to the selling price of the property sold by the retailer and it is further made unlawful for the retailer, if he adds the tax to the selling price, to circulate, advertise or publish that he will refund any such tax paid by his customers.

Nowhere in the Act is the retailer prohibited from raising his prices on account of the tax being imposed against him, but he is authorized to collect the tax imposed against himself from his customers. The right to collect the tax, as a tax, from the buyers is sought to be delegated to the retailer. Bear in mind that the tax is imposed against retailers engaged in the business of selling tangible personal property and we have had no difficulty in reaching the conclusion that the tax so imposed against such retailers is an occupation tax.

The case of Winter v. Barrett, supra, involved the construction of a sales tax law passed by the Legislature of Illinois, and which law as set out at page 445 of the opinion of the Supreme Court of Illinois contains Section 2, as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent of the gross cash receipts from such sales in this State of tangible personal property made in the course of such business on and after the first day of the next calendar month after the taking effect of this act and

> prior to July 1, 1935. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State."

One of the questions presented in the case was as to the nature and character of the tax imposed and against whom. The Illinois sales tax act did not contain a provision similar to the latter part of Section 2 last above set out. The court at page 455 of the opinion said:

> "From these provisions it appears that the tax is imposed upon persons engaged in the business mentioned. They are the persons who are required to pay the tax. They are not made the agents of the State or of the Department of Finance to collect the tax from purchasers and pay it over to the department, but the tax is imposed on them and they are the ones who are required to pay it. By the provisions of the act they are neither required to take nor prohibited from taking into consideration the amount of tax to be paid by them in fixing the selling price of articles sold. They must pay the tax. If prior to April 1,1933, the selling price of an article was one dollar, and thereafter the seller,taking into consideration the tax in fixing the price of the article, charges one dollar and three cents for the same article, he cannot report that the cash received from the sale of the article was one dollar and that the three cents was collected as tax, but in reporting his receipts he must report the total amount received - that is,one dollar and three cents - and pay as tax three per cent of that amount. So it appears that the tax is on the seller.* * * *"

We are of the opinion that in so far as the act undertakes to authorize the retailer to collect the sales tax from the consumers, as a tax on the privilege of buying, then that far the last quoted portion of Section 2 of the Bill is void because the tax sought to be imposed by Section 2 is levied against the person engaged in the business of selling tangible personal property at retail.

(b). Section 1 of the act does not clearly define what is a "sale at retail." In effect, the definition given is that a "sale at retail" is a "sale at retail".

At this juncture, we desire to call your attention to the possible inequalities that may arise in an attempted application of the act as well as the result that may follow by way of exempting from tax payments the retail dealers in tangible personal property in large quantities. We can best instance this by quoting from Kentucky Consumers' Oil Co. v. Commonwealth 233 S.W. 892. The court said:

> "There is a well-defined and clearly understood distinction between the words 'retail' and 'wholesale'; they are used in opposition one to the other, one being a sale in large quantities, the other in small quantities. Whether the sale is one by retail or wholesale will depend upon the facts of the particular transaction. We experience no difficulty in deciding that the sale of oil in quantities of not less than 500 gallons at a time to one customer is not a sale at retail.

III.

HOUSE BILL NO. 5 IS RETROACTIVE IN OPERATION AND UNCONSTITUTIONAL.

Section 3, Sub-section (d) of House Bill No. 5 provides as follows:

> "Section 3. On or before the fifteenth day of the month after this Act becomes effective and on or before the fifteenth day of each calendar month thereafter, until, but not including February, 1936, every person engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month shall make a return to the Auditor, stating:
>
> (d) Total amount received during the preceding calendar month on charge and time sales of tangible personal property made by him prior to the month for which

the return is made;"

Section 19, Article XII, of the Constitution of the State of Missouri, provides as follows:

> "The General Assembly shall pass no law for the benefit of a railroad or other corporations, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the State a new liability in respect to transactions or considerations already past."

It is a well recognized fact that property sold on charge and time sales in many instances is not paid for until some months after the actual sale is made. Under the operation of this section the receipts from a sale of property made in 1933 but paid for in 1934, would have to be included by the vendor in his return as provided by Section 3 and a tax of one per cent imposed thereon.

Accordingly, Section 3, Sub-section (d), is retroactive in operation and is unconstitutional as in violation of Section 19, Article XII, of the Constitution of the State of Missouri, for it necessarily "imposes on the people * * * a new liability in respect to transactions already past."

This rule of law is forcibly stated in the case of Smith v. Direkx 283 Mo. l. c. 197, wherein the court said:

> "Section 15 of Article 2 of our Constitution provides: 'That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation,or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly.'
>
> It will thus be seen that our Constitution contains an express inhibition against the passage of a 'law retrospective in its operation.'
>
> In the case of Reed. v. Swan 133 Mo. 100,l.c. 108, Gantt, P. J., speaking for the court quoted with approval Mr. Justice Story's

> definition of a retrospective law as follows: 'Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'
>
> To the same effect are the following decisions: Leete v. State Bank, 115 Mo. 184, l. c. 198; Bartlett v. Ball, 142 Mo. 28, l. c. 36; Bartlett v. Tinsley 175 Mo. 319, l. c. 332; Ruecking Const. Co. v. Withnell,269 Mo. 546, l. c. 558.
>
> Applying the above definition to so much of the amendment of 1919 as undertook to assess an additional one per cent upon that portion of the net income for the calendar year of 1919, which was received by appellant prior to the going into effect of said amendment we are clearly of the opinion that it 'did create a new obligation or impose a new duty' in regard thereto and that the amendment does to that extent operate retrospectively and is in violation of the above mentioned constitutional inhibition against retrospective laws. It would be difficult to reach any other conclusion while looking the constitution squarely in the face."

Section 3 of the Bill requires the retailer to make a return of gross receipts on or before the 15th day of each month after the Act becomes effective and until January 1936. This return shall show the gross receipts of the preceding month, so that so much of the preceding month as had elapsed and gross receipts received prior to the effective date of the Bill, would be required to be reported in and covered by the return and would relate to transactions occurring, prior to the taking effect of the Act and therefore the Act is retroactive in its effect.

IV.

HOUSE BILL NO.5 VIOLATES SECTION 44a OF ARTICLE IV OF THE CONSTITUTION OF THE STATE OF MISSOURI.

We feel it our duty to direct your attention to another matter in connection with the bill under consideration.

As appears from Section 2, heretofore quoted, and as before stated, the tax is levied against the persons engaged in the business of selling tangible personal property. The selling of motor vehicle fuels is the selling of tangible personal property. Section 44a of Article IV of the Constitution of Missouri provides,

> "For a period of ten years after adoption hereof the General Assembly shall have no power to levy and collect * * * state tax on the sale of motor vehicle fuels in excess of the rates fixed by law at the time this amendment is adopted* * * *."

The amendment was adopted November 6, 1928. That the Act in question seeks to impose a tax on the sale of motor vehicle fuels is beyond question and thereby violates the provisions of our Constitution last above quoted.

While the matter is left somewhat dark as to meaning, it is assumed that this situation is undertaken to be satisfied by that part of Section 6 of the Act, which reads as follows:

> "* * *and there shall be allowed as a deduction from the amount returned under subdivision (h) of Section 3 the amount of sales of articles on which a specific tax is paid to this State by the vendor under any other law of this State which requires the vendor to pay a gross amount or percentage of the selling price of any commodity for the privilege of selling same in this State."

The amount to be returned under subdivision (h), Section 3 is,

"(h) Gross receipts during the preceding calendar month from sales of tangible personal property made by him in the course of such business, upon the basis of which the tax is imposed."

But the right of reduction accorded the retailer does not change the fact that a tax is, by the bill, levied against the sale of motor vehicle fuels which the Constitution says cannot be done.

The Act attempts to authorize the retailer to collect the tax imposed from the customer. It might happen, whether the retailer had the right or not, that he would collect the tax from the consumer to whom such retailer sells motor fuel, then the retailer take credit in his return for the gross receipts, on account of sales of motor fuels and have the tax collected from the consumer in his pocket. The door to fraud is left wide-open. We know, what everyone else knows, that sales taxes are ordinarily passed on to the consumer.

V.

HOUSE BILL NO. 5 VIOLATES SECTION 5 ARTICLE X OF THE CONSTITUTION OF MISSOURI.

Section 1 of House Bill No. 5 provides in part as follows:

"For the purposes of this Act: 'Sale at retail' means any transfer of the ownership of or title to, tangible personal property to the purchaser at retail for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the vendor retains the title as security for payment of the selling price shall be deemed to be sales."

Section 1 further provides:

> "The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail or sale by actual producer does not constitute engaging in such business."

The question here presented is whether or not the above provisions constitute such arbitrary classifications as to violate the Federal Constitutional guaranty of equal protection of the laws and our own constitutional provision of uniform taxation.

The framers of House Bill No. 5 evidently had before them the sales tax law enacted by the Legislature of the State of Illinois. This Act, passed in March, 1933, was held unconstitutional by the Supreme Court of Illinois in the case of Winter v. Barrett 352 Ill. 441. One of the reasons given by the court for so holding was the provision in the Act excluding farm products or farm produce sold by the producer from the tax. This section of the Illinois Act is as follows:

> " 'Tangible personal property' does not mean or include farm products or farm produce sold by the producer thereof or motor fuel as defined in the Motor Fuel Tax Law approved March 25, 1929, as amended."

We quote at length from the opinion of the Illinois Supreme Court in construing this section:

> "The language quoted does not and cannot mean that farm products or farm produce or motor fuel are not, in fact, tangible property, for it is a universally known fact that they are such. It is equally well known and universally recognized that the business of selling those commodities at retail to the consumer is the business of selling tangible personal property at retail. The legislature has no power to, by legislative enactment, declare that not to be a fact which every one known is a fact, though it may be an otherwise valid enactment declare that for the purposes of the application of the act that which is recognized as a fact may be excluded from

such application. The purpose of such provision in this act is, therefore, clearly to exempt from the application thereof those engaged in the business of selling farm products or farm produce or motor fuel to the consumer at retail. Appellee therefore contends that such provision and purpose deny to those engaged in the business of selling tangible personal property at retail equal protection of the laws and renders the act void, as in violation of the provisions of Section 1 of Article 9 requiring that taxes levied on occupations shall be by general law and uniform as to the class upon which it operates.

* * * * *

The tax levied by the act must be uniform on all of the class upon which it operates. The question,therefore, arises whether there is any basis for taking those engaged in the business of selling farm products or farm produce or motor fuels at retail from this class. But for the exemptions sought to be made by the act, those engaged in the business of selling farm products or produce or motor fuels at retail come within the terms of the act for they are selling tangible personal property at retail. Uniformity of taxation and equal protection of the laws require that they, too, pay this tax unless there be a valid basis for discrimination in their favor or for considering them a different class or vocation from that into which they naturally fall.

It is argued as to the seller of farm products or produce,that his sales at retail of such property are not a part of the business in which he is engaged, but are an incident thereto,merely;that his business is producing, and that he does not conduct a business of selling 'to the consumer for use and not for the purposes of resale in any form,' as sales at retail are defined in the act; that this

> places him in a different class from the grocer or clothier, whose business is to sell to the consumer, and he may be exempted from the class to which the act applies, and that such exemption is founded on fact, and therefore has a reasonable basis. It will be observed that the exemption of farm products or farm produce, when sold by the producer from the category of tangible personal property exempts those selling those commodities from the operation of the act whether sales at retail by them are but an incident to their business of producing or a part of the business of selling such property at retail in which they may be engaged.
>
> * * * * *
>
> He is in the business of selling tangible personal property at retail in addition to the business of producing, and exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as a druggist who compounds and produces the proprietary remedies which he sells at retail is in that class, and so far as the act attempts to exclude him from its provisions it is not uniform in its application to the class on which it operates and cannot be sustained. "

This opinion is illuminating when considered with reference to House Bill No. 5.

Section 3, Article X of the Constitution of the State of Missouri provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes

shall be levied and collected by general laws."

Section 1 of the 14th Amendment to the Federal Constitution provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of City of Aurora v. McGannon 138 Mo. 38, l. c. 49, the Supreme Court, in construing certain ordinances with reference to Sec. 3, Article X of the Missouri Constitution, said:

"In this last case it was said: 'The only prohibition of the section being discussed is that which forbids inequality, favoritism, to be exercised in imposing taxes upon the same class of subjects. So long as this is not done, the constitution is not infringed, nor the rules of uniformity and equality violated. Cooley on Tax. (2d Ed.) 170 and 171, and notes.' * * * * That 'the requirement of equality and uniformity does not preclude the division of things taxable into classes, and the imposition of taxes, which while bearing equally upon the different members of each class, bear unequally upon the classes in the aggregate,' and that 'a legislative division of this sort can not be interfered with by the courts,' are general rules recognized everywhere. 25 Am. and Eng. Ency. of Law, p. 62, and cases cited in notes 1 and 2.

'To fix arbitrarily a specific tax for all licenses would be grossly unequal and far from uniform**** The requisites of the

> constitution may be carried out by a uniform tax on licenses to persons following the same pursuit, under the same conditions and circumstances; a difference therein will justify a discrimination in the tax.' Slaughter's case, 13 Grat.loc. cit.776. 'A license tax ought to be proportioned as nearly as practicable to the value of the privilege.' Ould & Carrington v. City of Richmond 23 Grat. 472."

In the case of Smith v. Calhoon 283 U. S. 553, 75 L. Ed. 1264, the Supreme Court of the United States recently had before it a case involving the following statute:

> "****Sec.1.(h). The term 'auto transportation company' when used in this act means every corporation or person,their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this state between fixed termini or over a regular route; Provided, That the term 'auto transportation company' as used in this act shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy, or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city."

The Supreme Court held:

> "****But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary."

* * * * * *

> But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' * * * * "

House Bill No. 5 purports to levy a tax "upon all persons engaged in the business of selling tangible personal property at retail in this state* * * *". However, under Section 1, persons actually selling tangible personal property at retail, not for use or consumption, but for resale are exempt from the provisions of the act. This exception prevents the tax from being uniform in its application and is therefore unconstitutional. A "sale at retail" is a sale at retail in all instances and the Legislature has no power to declare by legislative fiat that not to be a fact which is universally known to be a fact.

> "The legislature has no power to, by legislative enactment, declare that not to be a fact which every one knows is a fact, though it may be an otherwise valid enactment declare that for the purposes of the application of the act that which is recognized as a fact may be excluded from such application."
>
> (Winter v. Barrett, supra)

Section 1 of House Bill No. 5 further provides:

> "The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail or sale by actual producer

does not constitute engaging in such business."

Webster defines a producer as:

"One who produces, brings forth, or generates. One who grows agricultural products, or manufactures crude materials into articles for use."

For further definitions, see:

Wilson v. Israel, 125 N. E. 819;
Foss-Hughes Co. v. Federer, 287 F. 150;
Klepper v. Carter, 286 F. 370.

By this section the actual producer, though his sales be in fact sales of tangible personal property at retail, is not subject to the tax imposed on other retailers. According to Section 1, though a producer actually and in fact be "engaged in the business of selling tangible personal property at retail," that producer is not "engaging in such business" so as to be subject to the tax imposed by House Bill No. 5.

This discrimination and lack of uniformity was flatly held unconstitutional by the Supreme Court of Illinois in the case of Winter v. Barrett, supra. While it is true that the Illinois law only attempted to exempt producers of farm products, nevertheless, the reasoning of the Court would have been the same if the Act had exempted all producers, for the conclusion of the Court was reached, not because there was lack of uniformity with respect to producers, but because there was lack of uniformity in that a producer might be and in many instances was a person actually engaged in the business of selling tangible personal property at retail.

"He is in the business of selling tangible personal property at retail in addition to the business of producing, and exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as a druggist who compounds and produces the proprietary remedies which

> he sells at retail is in that class, and so far as the act attempts to exclude him from its provisions, it is not uniform in its application to the class on which it operates and cannot be sustained."
>
> (Winter v. Barrett, supra)

In order to fully understand the effect of the above exception, let us consider the following hypothetical case: An oil company owning its own oil wells, produces oil and refines it in its own refineries. The gasoline produced is then sold from filling stations owned and operated by the oil company. Under House Bill No. 5, there could be no sales tax imposed on the oil company, it being the actual producer of the gasoline. However, an independent filling station, selling the same gasoline, would be subject to the sales tax because it did not in fact produce the gasoline. The effect, of course, is to penalize those who are unable to produce and also sell.

VI.

HOUSE BILL NO. 5 MUST BE HELD VOID IN ITS ENTIRETY.

If the provisions of an act are so mutually "connected with and dependent on each other, as condititions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." 1 Cooley's Const. Lim. (8th Ed.) pp.362, 363.

The effect of our conclusion in Section IV of this opinion is to hold unconstitutional Section 2 of House Bill No. 5 for the reason that the section attempts to levy a tax not uniform in its operation. If, therefore, Section 2 be held unconstitutional, the tax itself would be eliminated and there would be nothing remaining except regulations respecting a void tax. This question was before the court in the case of Winter v. Barrett, supra,. The court after referring to the void provisions of the

act, including the exemption of farm produce, said:

> "Resolving all doubts in favor of the validity of the act in question, yet, with the eliminations stated, it is not the act the General Assembly passed or intended to pass, and hence the act under review, whole and entire, is void."

Respectfully submitted,

GILBERT LAMB
Assistant Attorney General,

JOHN N. HOFFMAN, Jr.
Assistant Attorney General,

HARRY G. WALTNER, Jr.
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

SALARY OF DEPUTY CIRCUIT CLERKS: 1. County Court has right to fix salary of deputy circuit clerks immediately on the becoming effective of section 11812, Laws 1933, page 371, without regard to present deputy clerks assumed fixed term of office.

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Mr. O. O. Wyrick,
Clerk of Circuit Court,
Tuscumbia, Missouri.

Dear Mr. Wyrick:-

We have your letter of October 12, 1933, in which was contained a request for an opinion as follows:

> "Under section 11812 of the Session Acts for 1933 the County Court is given the right to determine what the salary of the deputy of the Clerk of the Circuit Court shall be. I would like to have your opinion as to whether this applies to the present term or should it only apply beginning the next term?"

From a subsequent letter written by you, we judge the words "present term" in the letter above quoted to refer to the assumed present fixed term of office of the deputy clerk in question. We use the words "assumed present fixed term" since an examination of the pertinent law convinces us that the deputy circuit clerk has within the strict meaning of the word, no definite fixed "term" of office.

Section 11812, Revised Statutes of Missouri, 1929, under authority of which the deputy circuit clerk in question was appointed provides as follows:

> "Sec. 11812. DEPUTIES AND ASSISTANTS, HOW APPOINTED-COMPENSATION. Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the circuit court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The circuit court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, and shall designate the period of time such deputy or assistant may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may, at any time, discharge any deputy or assistant

and may regulate the time of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

Section 11812, Revised Statutes of Missouri, 1929, as re-enacted Laws 1933, page 371, provides as follows:

"Sec. 11812. DEPUTY AND ASSISTANT CIRCUIT CLERKS-COMPENSATION. Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it.

It will be noticed that while both sections provide that the true appointing power shall designate the period of time that such deputy may be employed, there is a further provision that said deputy may be removed from office at any time by said appointing power. On these provisions do we base our opinion that such an office holder has no fixed term of office in the legal sense.

On this point the courts of Missouri have taken an identical stand in many cases but we deem it necessary to refer merely to one.

The case we refer to is the case of State ex rel. Rumbold vs. Gordon, 238 Mo. 168, decided by the Supreme Court of Missouri sitting in Banc , the opinion being written by Judge Lamm. In that case the court, all the judges concurring, held that an Adjutant-General appointed by and holding office under the Governor "during the term of the Governor and removable by him at pleasure" did not

have a fixed "term of office" in the constitutional sense that increasing his salary during said term was in violation of Article XIV, Section 8 of the Constitution of Missouri. Judge Lamm in his opinion stated, at page 178, as follows:

> "But the matter need not rest on mere parity of reasoning. Says a sound author (Mecham's Public Offices and Officers, sec. 385): 'The word "term", when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power.'
>
> "In accord therewith in another standard work (Throop on Public Officers, sec. 303): 'The word "term" is uniformly used to designate a fixed and definite period of time. * * *And an officer who holds his office at the pleasure of another officer * * *has no official term, within the meaning of a constitutional or statutory provision relating to such term.' Again (Sec. 304): 'Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time." (Italics ours).

Judge Lamm then proceeds to review the decisions of the appellate courts of other states to the same effect, and then writes at page 179:

> "In full accord with the general doctrine of the cited cases are our own appellate courts." Citing State ex rel vs. Alt, 26 Mo. App. l.c. 675-6; State ex rel. vs. Stonestreet, 99 Mo. l.c. 371 et seq.; State ex rel. vs. Johnson, 123 Mo. 43, and quoting from the latter.

In addition to the above authority, a note in 37 L.R.A. (n.s.) 388, reviews a list of cases to the same effect.

In discussing the above angle of this matter, our intention is to show that the following provision of our Missouri Constitution does not apply to our case:

> "Article IV, Section 8, Constitution of Missouri; Compensation of officers, not to be increased nor term extended:-- The compensation or fees of no state, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

There is obviously nothing in this provision of the Constitution which prevents a decrease in the salary of an officer during his term (Lycette vs. Wolff, 45 Mo. App. 489), hence, we need not take the time to show that.

Having now shown that the Constitution does not prohibit a fixing of salary, whether by decrease or increase, in our present case, we proceed to a construction of the legislative power and the effect to be given thereto.

Section 11812, Revised Statutes of Missouri, 1929, above quoted, delegates to the circuit court the supervisory powers over deputy circuit clerks. The office of deputy circuit clerk is not created by the constitution but is merely an office created by statute. The legislature has, therefore, the power at any time to regulate such office as it deems best. The shifting therefore by the legislature of the above mentioned supervisory powers from the circuit court to the county court (Section 11812, Laws 1933, p. 371, above quoted), was clearly within its powers, and the provisions of the new statute should be given effect, as provided by our Constitution, Article IV, Section 36, ninety days after the adjournment of the session at which it was enacted. Said adjournment date in this case was April 25, 1933.

The law is well settled in this and other states on the above legislative power, hence, we deem it necessary to quote from only one leading case.

In State ex rel.vs. Hedrick, 241 S. W. 402, decided by the Supreme Court of Missouri, sitting in Banc, James T. Blair, Chief Justice, in a separate concurring opinion in which four other judges concur, passes on this question. In this case, Judge Blair, at page 419, quotes with approval from the case of Graham vs. Roberts, 200 Mass. 152, as follows:

> "Where an office is created by law and one not contemplated, nor its tenure declared by the Constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged, or terminated by law, as the public exigency or policy may require."

When, therefore, our legislature at the 1933 legislative session transferred from the circuit court to the county court the power to fix the salaries of deputy circuit clerks, said power belonged to the county court as soon as the law became constitutionally operative, without regard to any assumed fixed term of office which any deputy circuit clerk then held or now holds.

Very truly yours,

CHARLES M. HOWELL, Jr.
Assistant Attorney-General.

APPROVED:_____
Attorney-General